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CORRIGENDA.

[1941] Vol. 3, pp. 493, 494. *Re* CAIDAN, OFFICIAL RECEIVER *v.* REGIS PROPERTY CO., LTD. The last line on p. 493 should be transposed so as to read immediately after the second line on p. 494.

P. 96. THE ALRESFORD. At l. F 6. For "they got payment" read "except on the terms that freight was not to be payable for the period in question."

P. 323. R. *v.* WEYMOUTH JJ., *Ex p.* SLEEP. The first word in the line at D should be "no," and the phrase should read "no express reference to discretion." In the same case at p. 325, the line above G should read: "they could have proceeded under rr. 44 and 45."

P.326. GOLD *v.* ESSEX COUNTY COUNCIL. The junior counsel for the plaintiffs was *W. Gumbel.*

P.416. INCOME TAX COMRS. *v.* GIBBS. *J. S. Scrimgeour* also appeared as counsel on behalf of the appellants.

P.447. STEEL *v.* GEORGE & CO. Counsel stated to have appeared for the appellants were for the respondents and *vice versa.*

P. 515. *Re* WARD, HAMMOND & SON *v.* OFFICIAL RECEIVER. The solicitors acting for the applicant were *Haslewood Hare & Co.*, agents for *Bosley Legg & Co.*, Brighton.

P. 609. MCMILLAN *v.* GUEST. Fourth line from bottom of page; for "with Sched. E" read "within Sched. E."

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THE

ALL ENGLAND
LAW REPORTS
ANNOTATED

SMART BROTHERS, LTD. *v.* ROSS.

[COURT OF APPEAL (Lord Greene, M.R., and MacKinnon and Clauson, L.JJ.), **December 12, 1941.**]

Emergency Legislation—Hire-purchase—Determination of agreement by hirer—No pressure by owner—Real bargain—"Remedy"—Courts (Emergency Powers) Act, 1939 (*c.* 67), *s.* 1 (2) (*a*) (ii)—*Liabilities* (*War-Time Adjustment*) *Act,* 1941 (*c.* 24), *s.* 26 (2).

A hirer under a hire-purchase agreement was unable to continue her payments, and concluded an agreement with the owners whereby she determined the hire-purchase agreement upon the terms that, upon the return of the goods subject to the agreement, she was to be under no further liability for arrears of hire and was to receive £10 in part return of instalments paid by her. It was admitted that this was a *bona fide* agreement, made at the instance of the hirer and without pressure by the owners. The point in issue was whether leave had to be obtained under the Courts (Emergency Powers) Act, 1939, s. 1 (2) (*a*) (ii), before the owners could retake possession under the new agreement :—

HELD (LORD GREENE, M.R., dissenting) : leave of the court was necessary, because by taking the goods the owners would be exercising a remedy given to them by the terms of the hire-purchase agreement and arising upon the default of the hirer under that agreement.

Decision of UTHWATT, J. ([1941] 3 All E.R. 326) *reversed.*

Bowmaker, Ltd. v. *Tabor* (1) *applied.*

[**EDITORIAL NOTE.** A hire-purchase agreement in the usual form contains separate and distinct clauses by which it may be determined by either party. The Emergency Legislation only restricts the right of the owner to determine the agreement, but it is possible for the owner by coercive measures to force the hirer to determine the agreement, and it has been held that any such attempt is an infringement of the provisions of the Courts (Emergency Powers) Act, 1939. If it were otherwise, the position would be, in the words of MACKINNON, L.J., in *Bowmaker, Ltd.* v. *Tabor* (1), "that protection ceases for a humble and submissive debtor, and avails only one who is astute and assertive of the benefit given him by this Act." In the present case the hire-purchase agreement contained a clause enabling the hirer to terminate the hiring by returning the goods and another enabling the owners to seize the goods in case of a breach of any term of the agreement. It is perhaps a little unfortunate that neither party proceeded under these clauses. In fact, they made a new agreement, supported by a proper consideration, whereby the hire-purchase agreement was terminated and the obligations thereunder ceased. LORD GREENE, M.R., in a closely reasoned and full judgment, has taken the view that, the hire-purchase agreement being thus terminated, the full ownership of the goods was revested in the owners and they were entitled to possession of the goods. This is substantially the same view as UTHWATT, J., took in the court of first instance. The other members of the Court of Appeal, however, have taken different views of the case, and, as they both reach the conclusion that leave to proceed under the Courts (Emergency Powers) Acts was necessary, the decision below is now reversed. MACKINNON, L.J., appears to have based his decision on the fact that the owners were enforcing a remedy given them by the hire-purchase agreement itself. This view is difficult to support unless it is found as a fact that the transaction by which the hire-purchase agreement was determined was a colourable one and a mere subterfuge. Both UTHWATT, J., and LORD GREENE, M.R., are clearly of the opinion that there was no evidence to support such a view of the facts, and MACKINNON, L.J., does not appear to contest that view of the facts. CLAUSON, L.J., clearly takes the view that the court is being asked to enforce a remedy arising, not out of the hire-purchase agreement, but out of the agreement to determine that agreement. LORD GREENE, M.R., answers this contention by saying that, if it be right, a tenant could not, without leave of the court, take possession of a house which was let to him. Indeed, it could be equally well contended that a purchaser could not take possession of goods sold to him without first obtaining the leave of the court. It would seem, therefore, that this friendly litigation, undertaken at some expense to obtain a clarification of the issues involved, has only produced a number of conflicting views as to the legal principles involved. It is, however, clear that traders who enter into hire-purchase agreements must now obtain the leave of the court before they retake possession of the goods.

For the Courts (Emergency Powers) Act, 1939, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 32, p. 946, and BUTTERWORTH'S EMERGENCY LEGISLATION, Statutes Volume, p. 206.]

Cases referred to:

(1) *Bowmaker, Ltd.* v. *Tabor*, [1941] 2 K.B. 1; [1941] 2 All E.R. 72; Digest Supp.
(2) *Soho Square Syndicate, Ltd.* v. *Pollard & Co., Ltd.*, [1940] Ch. 638; [1940] 2 All E.R. 601; Digest Supp.; 109 L.J.Ch. 266; 162 L.T. 372.

Appeal by the defendant from an order of Uthwatt, J., dated Oct. 30, 1941, and reported [1941] 3 All E.R. 326, where the facts are fully set out.

A. C. Longland for the appellant.

A. A. Pereira for the respondents.

Longland: The hirer is in default, and the owners, if they please, can exercise their remedy of taking possession of the goods. The agreement to determine the hiring was signed by the hirer at the instance of the owners to the extent that the instrument was prepared by the owners. There is a substantial consideration. That, however, is not relevant. There is an assent to the instrument, as it was signed by the hirer. That being so, it is idle for the owners to say that the instrument is in fact a new contract and not the exercise of a remedy by way of retaking possession. The result of the arrangement is that the hirer becomes dispossessed of the goods and the owners again become possessed of them. In the present case, the result is the same as that which followed in *Bowmaker, Ltd.* v. *Tabor* (1), although it has followed along a different channel. If the Courts (Emergency Powers) Act, 1939, is designed to protect persons who need protection against themselves, the decison in the present case would still leave the loophole open. It is intended that persons shall put the whole of the facts before the court. If the decision in the present case stands, instead of saying that there was a consent under an existing agreement, it would be possible to say that a new agreement had been made. In the present case, there has been a default. The arrangement made effects the same result as the exercise of a remedy by the owners. The owners seek to say that they are absolved because the Act speaks of a remedy, and not of a new contract. [Counsel referred to *Soho Square Syndicate, Ltd.* v. *Pollard & Co., Ltd.* (2).]

Pereira: The whole of the transaction between the parties appears in the correspondence. Therefore, the court is able to judge whether the transaction is a *bona fide* transaction or a colourable arrangement intended to cover up some other transaction. It is clear that at no stage did the owners claim to retake the goods. There is no suggestion that they wished to have the goods back. The suggestion that the ownership of the goods should be transferred came from the hirer. The hirer knew what she was doing, and it is obvious that she wanted to do that which she finally did. Therefore, it cannot be said, on the form of the document, that the owners were exercising a remedy They were accepting an offer which had been made quite freely by the hirer. If the word " remedy " means, not redress, but a right to take possession of property under an agreement, the words in the Courts (Emergency Powers) Act, 1939, will need to be varied to read " any remedy or right or power which is available to him." *Bowmaker, Ltd.* v. *Tabor* (1) was decided upon the ground that the transaction was a waiver by the hirer of the rights given to him by the Courts (Emergency Powers) Act, 1939, upon the exercise of a remedy by the owner. Where the parties have agreed upon the cancellation of a hire-purchase agreement without any pressure being put by one upon the other, it cannot be said that, by acting upon that agreement to cancel, the owners are exercising the remedy of retaking possession of the property.

Longland, in reply: The present case differs from a contract relating to a new matter. In the present case, there was a pre-existing contract.

Lord Greene, M.R.: This appeal raises a question which is obviously of great importance to both parties to hire-purchase agreements. It is raised by means of a friendly originating summons taken out for the purpose of ascertaining the true construction of certain words in the Courts (Emergency Powers) Act, 1939, in their application to the facts of the case. The parties are represented by the same solicitors, but the matter has been fully argued by counsel on each side and quite clearly this friendly litigation is not in any sense being conducted in a half-hearted way. It is a perfectly *bona fide* attempt, by proper means, and supported by the vigorous argument of counsel, to ascertain the true legal position. The facts are very fully set out in the judgment of UTHWATT, J., and I do not propose to repeat them.

The substance of the matter arises in this way. The hirer (the present appellant, Miss Ross) was in default in her payments under a hire-purchase agreement for the purchase of furniture amounting in value to some £52. The property, at her request, had been taken by the respondents, who had supplied it in the first instance, as bailees, in order to store it for her, as she had moved to another part of England. That being the situation, and the appellant being in arrear with her payments, the right given to the respondents to retake possession of the goods under the hire-purchase agreement had arisen. Moreover, as is customary in these documents, there was a right given to the hirer herself to terminate the hiring by returning the goods to the owners on certain terms specified in the agreement.

It is perfectly clear, on the facts of this case, that the arrangement ultimately made between the parties was a perfectly *bona fide* one. The respondents had not threatened to exercise their right to seize the furniture, and, so far as the evidence goes, they had neither the intention nor the wish to do so. Miss Ross, on the other hand, was anxious to put an end to the whole transaction, for reasons which are abundantly clear on the face of the correspondence, and it was from her that the suggestion came that the respondents should take back the goods and make her a payment. In those circumstances, the respondents prepared and sent to her a document which she signed, in the following terms:

> I have received your letter of the 3rd inst., and I confirm that it is my desire to determine my hire-purchase agreement dated Sept. 3, 1938, with you, which I hereby do, pursuant to my right to do so under the Hire-Purchase Act, 1938. It is clearly understood between us that upon my returning the goods as agreed to you, that I shall be under no further liability to you for arrears of hire, and that you will return to me £10, being part of the sum I have paid on account of instalments under the agreement.

There is one matter on that letter which calls for comment. It was drafted, obviously, with the idea that the hire-purchase contract in question was one to which the Hire-Purchase Act, 1938, applied, so far as the relevant provisions of that Act are concerned. That was a mistake, and, therefore, looking at this document literally, I think that by it Miss Ross is apparently purporting to exercise a right under statute which she did not in fact possess. However, no point has been made upon that, and the document has been treated by counsel on each side as being a contract under which, in consideration of the release of liability for arrears and the payment of £10, she gave up her interest in the goods to the respondents. I therefore ignore that error in the document and treat it, as it was treated, as a contract to the effect which I have mentioned.

That being the transaction between the parties, the respondents were anxious to know whether they could safely proceed according to its terms and keep the furniture as their own without first obtaining the leave of the court under the Courts (Emergency Powers) Act, 1939. At the time they were in possession as bailees, but, if they acted upon the agreement contained in that letter, they would be changing the character of their possession, in that they would thenceforward possess, not as bailees, but as owners. The relevant words of the Act are contained in sect. 1 (2), which provides as follows:

> Subject to the provisions of this section, a person shall not be entitled, except with the leave of the appropriate court:—(*a*) to proceed to exercise any remedy which is available to him by way of . . . (ii) the taking of possession of any property . . .

It is now asked whether, if and when the respondents take possession of this furniture, in the sense of changing the character of their possession in the way I have mentioned, they will be proceeding to exercise a remedy available to them by way of the taking of possession of the furniture. UTHWATT, J., answered that question in the negative, and I find myself in complete agreement with the conclusion at which he arrived and with the reasoning by means of which he arrived at it.

The crucial word which requires construction here is the word "remedy." It is perfectly clear that, if the respondents had retaken possession of this furniture pursuant to the right to do so contained in the hire-purchase agreement —which, in my opinion, they clearly did not—that would have been the exercise of a "remedy" available to them, being the means by which they were entitled to remedy the breach of agreement which had led to their taking possession. That is perfectly clear. It is also, to my mind, perfectly clear, and is stated in *Bowmaker, Ltd.* v. *Tabor* (1)—and I agree, if I may say so, with the observations to that effect contained in that case—that, if Miss Ross had exercised the right which the hire-purchase agreement conferred on her to terminate the contract and return the goods, the respondents could have accepted the goods without any need to apply to the court for leave to do so. The reason is that in such a case, in accepting the goods, or, indeed, in taking possession of them, if, at the time when she exercised her right to return them, they had been, let me say, in the hands of a third party, the respondents would not have been exercising any remedy available to them by way of the taking possession of any property. In order to explain a little more clearly what I mean, supposing that the goods at the time had been in the hands of a warehouseman, and that Miss Ross had been minded to exercise her right under the contract to terminate the hiring and had said to the owners: "I exercise my right, and the goods are there. Will you take them?" In that case, if the owners had agreed to go and fetch the goods, they would have agreed to take possession. To my mind, however, that would not have been the exercise of a remedy available to them under the hire-purchase contract at all. It would have been the taking possession of the goods in consequence of the exercise of a right by the hirer. The owners' title to take possession would have been derived from the exercise by the hirer of her right, and would not have arisen from any remedy to which they were entitled within the meaning of the section.

Thirdly, it is also clear, to my mind, that, if, on the facts of any particular case, it appears that the owners of the goods are really exercising a right, conferred upon them by the hire-purchase contract, to retake goods on breach of the agreement by the hirer, the Act applies even though the transaction has been given some colourable appearance of a different character. Whether or not a particular transaction falls within that description is, in my judgment, a matter of fact, to be decided upon the facts of each individual case. In whatever form of words the matter is wrapped, whatever colourable contractual documents may have been signed, if the court comes to the conclusion that what is being done is the exercising of a right to seize on breach by the hirer, the Act will apply. It is said, however, that, no matter how genuine and *bona fide* a transaction may be by virtue of which the title of the owners to get possession of the goods arises under a separate contract altogether, they must be treated as exercising the right to seize contained in the hire-purchase agreement, and so the leave of the court is required. In my opinion, on the facts of the present case, when the respondents take possession of these goods, they will not be exercising a remedy under the hire-purchase agreement at all. They will be taking possession of goods of which they have obtained a right to take possession, not by virtue of anything in the hire-purchase agreement, but under a different and perfectly *bona fide* contract, a right for all relevant purposes similar in character to the right to take possession which any purchaser of goods gets when he contracts to buy them and the property vests in him. It is then said, alternatively, that the respondents would be exercising a remedy given to them by the agreement contained in the letter written by the appellant. If this argument is a sound one, it merely means that the word "remedy" includes any right to take possession. When the matters with which the subsection is specifically dealing are examined, it seems to me that they all have one character. They are, all of them, what I may call remedies for default of some kind. The levying of distress is a remedy for default in payment of rent. The appointment of a receiver of any property is a remedy for default in payment of interest or something of that kind. Re-entry upon any land is a remedy for default or breach of covenant. The realisation of any security or forfeiture of any deposit is a remedy for default in paying the debt in respect of which the security was given or discharging the obligation in respect of which the deposit was made.

That being the type of transaction in respect of which the word "remedy" is used, I ask myself whether it is possible to extend the construction of that word so as to cover a case of a totally different character—namely, a case where the right to take goods is one which arises under contract, not because the contract has been broken and for the purpose of remedying that breach, but because the contract between the parties is nothing more than that the ownership (if it be ownership) which includes the right to possession, or the right to possession alone, is to pass to the other party. It seems to me that, if that suggested construction is adopted, every tenant who takes a lease of a house, which gives him the right to go into possession of the house which he has taken, must be said to be exercising a "remedy" available to him by way of taking possession of the property. I venture to think that the word "remedy" in such a context as this is quite unsuitable to meet that class of case.

It was admitted by counsel for the appellant that he could not really press a construction which would have results of that kind, and he therefore limited the word "remedy" to cases where taking possession in fact follows a default. In every case, he says, where there is a clause in a contract under which, on default, one party is entitled to take possession, if one finds that in such a case the party does take possession, one must refer that taking of possession to the enforcement of the clause. In my opinion, that is quite inadmissible. The question whether the arrangement for taking possession follows a default in respect of which default rights could be used seems to me to have no bearing on the matter, save in so far as it is relevant to the question which I mentioned before—namely, the question of fact whether the taking of possession which is effected is indeed done in execution of the default clause. If it is, then the Act applies. If it is not, then the Act does not apply, and the mere consequence of the one following the other in time appears to me to throw no light on the character of the second transaction, and is quite incapable of turning that second transaction, and the right which it confers, into something different from that which in truth it is.

One further argument was suggested, and I can mention it without any appearance of discourtesy to MacKinnon, L.J., who suggested it to counsel for the appellant, who, as I understood him, accepted it as his own. The suggestion was to the effect that, in a case where there was a *bona fide* contract such as that in the present case, the court would have no difficulty in granting leave. That was put, as I understand it, as an argument in favour of construing the word "remedy" in the wide sense suggested. With the greatest possible respect, I cannot accept that argument. It seems to me that one cannot answer the question of what cases require the leave of the court, which is a question of construction, by saying that this is a case where leave would be given, and is one, therefore, where, on the true construction of the Act, leave is required. What we have to decide is what the Act means and whether or not this case falls within its terms.

There are two authorities on this matter which were referred to in the judgment of Uthwatt, J., and I must confess that, so far as I am concerned, they cause me no difficulty at all, any more than they did Uthwatt, J. The first case was *Soho Square Syndicate, Ltd.* v. *Pollard & Co., Ltd.* (2), a decision of Farwell, J. That was a case where a mortgagee had, under the mortgage, the right to appoint a receiver. He was, therefore, in such a position that he was precluded by the subsection from exercising that remedy of appointing a receiver without the leave of the court. That being the position, he went to the mortgagor and said: "Will you give me your agreement to my appointing a receiver?" This the mortgagor did, and the receiver was appointed. What happened? By appointing the receiver, the mortgagee was exercising the remedy mentioned in the subsection. He was not exercising something else. It was the remedy given by the mortgage, and his only ground for saying that the leave of the court was not required was the fact that consent had been given by the mortgagor. The sole question in that case was whether the mortgagor could give consent to the exercise of a remedy so as to make it unnecessary for the person entitled to the remedy to come to the court, and the answer was that he could not, because the protection which the subsection gives cannot be waived in that way.

The next case was a case in this court, *Bowmaker, Ltd.* v. *Tabor* (1). That was a hire-purchase case, and, in the agreement in that case as in most hire-purchase agreements, and as in the one we have before us, there were two clauses in the agreement relating to the determination of the contract. The subject-matter was a motor car, and the hirer was entitled to determine the agreement by returning the vehicle in good condition and repair, together with the registration book, licence and insurance certificate. That was the hirer's right of determination and return. A right to seize the car if the hirer was in arrear with his payments was also given to the owners. That being the state of affairs, and the hirer being in arrears, the representative of the owners suggested that the hirer had better return the car, and produced a typewritten form in the following terms :

> I hereby declare that it is my desire voluntarily to terminate the hiring under the above hire-purchase agreement, and to surrender the vehicle concerned.

The hirer signed it and the plaintiffs retook possession of the car. They subsequently sued the hirer for arrears, but he counterclaimed for damages, on the ground that they had retaken the car without obtaining the leave of the court. It is obvious at the outset that the first question which the court had to decide in that case was whether the retaking of possession of the car was in pursuance of the exercise by the hirer of his right to determine the contract or whether it was in exercise of the right conferred by the contract on the owners to seize the car. That was the first question, and it is the matter which is first dealt with in the judgment of GODDARD and SCOTT, L.JJ. That question was answered quite clearly by saying that this was a seizure of possession under the power to seize given to the owners, and not a determination of the contract and delivery of the motor car by the hirer under his option. The judgments make it perfectly clear that, had it been the latter, the case would have fallen outside the subsection altogether. Having answered that question of fact in that way, the court then had to consider the case on the footing that all that had happened was that the hirer had consented to the exercise by the owner of the owner's right to seizure under the hire-purchase agreement itself, and the only matter which fell for consideration then was whether or not—and it is with this that the bulk of the judgment is concerned—the view which FARWELL, J., had taken that the protection afforded in cases to which the Act applies cannot be waived was correct. They agreed that it was correct, and that, in cases where the Act applied, it was not possible to get out of it either by merely waiving the necessity for obtaining the leave of the court or by agreeing, even for consideration, that the leave of the court should be unnecessary. I call attention to the difference between " waive," which implies waiver without consideration, and " contracting out of the Act," which means contracting that, in a case to which *ex hypothesi* the Act applies, the person who wishes to take possession shall be entitled to proceed without obtaining the leave of the court, and, being an agreement, of course, it would have to be for consideration. This explains the references in that judgment to contracting out of the Act.

There are one or two passages which I would like to read, to show that the view which I take of that judgment is the correct one. At the very outset of his judgment, GODDARD, L.J., refers to the first point taken by the plaintiffs—namely, that the goods were returned under an exercise by the hirer of his right to terminate the contract. That was negatived, and then he said, at p. 4 ([1941] 2 All E.R. at p. 75) :

> It may be true that in one sense the car was given up voluntarily, but what it really amounts to is that the defendant assented to the owners exercising their right to retake it.

That is all there was to say on that branch of the case, because he then goes on to discuss the question as to whether or not such a waiver is effective. He proceeds, at pp. 4, 5 ([1941] 2 All E.R. at p. 75) :

> The question then arises whether, if the parties so agree, they can dispense with the necessity of the owners obtaining the leave of the court to the retaking of the property in question.

Then he goes on to deal with it on the basis that it was a case of an exercise of the remedy conferred by the hire-purchase contract itself, when a breach had taken place, and the whole of the rest of the judgment, as I have said, is based on that view.

The next passage in his judgment to which I wish to refer is at the end, because there is no necessity for me to examine that part of the judgment which deals with the question whether a party can waive the protection conferred by the subsection or can contract out of it. That is now settled law, and no question upon it arises in this case. At the end of his judgment, GODDARD, L.J., said, at p. 9 ([1941] 2 All E.R. at p. 78) :

> We want to add one further word. We do not desire that it should be thought that, in cases where a hire-purchase agreement contains such a clause as 3 (*b*) in the present case [which gave the hirer the right to determine the contract and return the motor car], the owners can avoid the necessity of going to the court by putting pressure on the hirer to act ostensibly under that clause, when in fact all that they are doing is getting a consent to seize.

Pausing there for a moment, I think that that brings out the distinction to which I referred at the beginning of this judgment. Is it a mere consent to seize or is it something different ? That is a question in the answering of which the court will not be misled by any amount of ostensible or colourable matter. Then GODDARD, L.J., continued as follows, at pp. 9, 10 ([1941] 2 All E.R. at p. 78) :

> Where a hirer has paid a substantial sum by way of instalments the number of cases in which, owing to temporary embarrassment caused by war conditions, he would really be willing to forgo the benefit of all that he had paid must, we think, be very small. If such a case came before a court, we think it would be the duty of the court to ascertain whether the return of the chattel was really and truly the *bona fide* exercise of the option given by the clause, or whether, in truth, it was no more than a submission by the hirer to the owner exercising his right to seize.

Speaking with great respect, I venture to think that nothing could be explained with greater lucidity. It is perfectly clear that, in the minds of GODDARD and SCOTT, L.JJ., if the case was one where the goods were returned by the hirer under a clause in the contract, it would not fall within the subsection. I cannot myself see how, if that be right, and if the goods are returned under a perfectly *bona fide* contract to that effect made later, it should any the more fall within the subsection. The truth is that that case is not in any sense an authority which obliges us to decide the present appeal in favour of the appellant. The real transaction which was being carried out there was the exercise of the right to seize conferred by the contract, and, once that was established, there was an end of the matter, so far as anything related to this case is concerned. MACKINNON, L.J., agreed with the judgment prepared by GODDARD, L.J., in its entirety, but he added certain words. He pointed out the object of the Act, and he said, at p. 10 ([1941] 2 All E.R. at p. 79) :

> The protection given by the Act against coercion will disappear in every case in which coercion is applied with sufficient vigour to make the man intended to be protected admit that he is not.

There again, if I may say so with respect, nothing which I have said in any way throws doubt upon the accuracy of that observation. It is perfectly clear that, if the hirer is induced to consent to a seizure, and if such consent is effective, the protection of the Act will be entirely illusory.

I do not think that I need further pursue the rather embarrassing task of examining the language of MACKINNON, L.J., in that case, but I must confess that I do not read it as lending any countenance to the suggestion that, in such a case as the present, where there is a perfectly *bona fide* separate contract, a remedy either under the hire-purchase agreement or under the separate contract is being enforced for the purposes of the subsection any more than would be the case if the possession of the property had been handed back in pursuance of a right conferred upon the hirer by the agreement itself. I entirely agree with the decision of UTHWATT, J., and I would dismiss the appeal.

MACKINNON, L.J. : I think that this is an extremely difficult case. The difficulty arises because of the novel terms of the Courts (Emergency Powers) Act, 1939, a piece of legislation which, perhaps for very good reasons, introduced the greatest possible interference with our preconceived ideas of freedom of contract, and the terms of which are obscure. I find myself also hampered by the fact that there is the previous decision in *Bowmaker, Ltd.* v. *Tabor* (1), to which I was a party, which must be differentiated if this present case is to be decided with a different result.

In this case, the plaintiffs and the defendant became bound one to another in Sept., 1938, by a contract in the more or less familiar form of a hire-purchase agreement. There was the usual provision that the hirer should keep the goods so long as she paid the specified instalments, and eventually, I suppose, having paid a certain amount, become the owner of the goods for a nominal purchase price, and there was the usual provision that, if there was default in the payment of these instalments, certain results should follow, one being that the plaintiffs were to have the right to resume possession of the goods and take them away. That default happened, and the plaintiffs became clothed with the legal right under that contract to take possession of the goods. They were further clothed with a self-working remedy of going and taking possession of the goods without referring to a court for an order to obtain possession.

In order to test the question which has arisen here, let us assume that they have exercised that right and are found to have retaken possession of the goods, and that this complaint is brought against them: "By that action of retaking possession of those goods, you have infringed the provisions of the Courts (Emergency Powers) Act, 1939, which provides that a person shall not be entitled, except with the leave of the appropriate court, to proceed to exercise any remedy available to him by way of the taking of possession of any property. You became clothed with the right to take possession of the property under the default clause in the hire-purchase agreement, and you have taken possession of that property. Why have you not broken the terms of the Act?" The answer suggested is: "We have not broken the terms of the Act. It is true that we were clothed with that right and that remedy, and it is true that in appearance we have exercised that right and that remedy, but it is not a breach of the Act, having regard to certain communications by way of letters which have passed between us and the defendant after the arising of our right and before the exercise of our remedy." That was precisely the same defence as that which was sought to be relied on in *Bowmaker, Ltd.* v. *Tabor* (1). There the right to take possession had arisen, and the right had been exercised, but it was argued that there had been no infringement of the Act, because, between the arising of the right and its exercise, the defendant had signed a document saying:

> I hereby declare that it is my desire voluntarily to terminate the hiring under the above hire-purchase agreement, and to surrender the vehicle concerned.

Would the decision in *Bowmaker, Ltd.* v. *Tabor* (1) have been different if, instead of the document which had been signed in that case being in the terms which I have just read, it had been in these terms: "In consideration of the sum of 6*d*., which I hereby acknowledge to have received from you, I agree to put an end to the hiring of the goods under the hire-purchase agreement and to surrender the goods to you"? If that does make all the difference, then it is quite apparent that the protection sought to be provided by this Act, the policy of which has been eloquently developed by Farwell, J., in his decision in *Soho Square Syndicate, Ltd.* v. *Pollard & Co., Ltd.* (2), can be entirely frustrated. I do not think that there is any essential difference between the document signed between the arising of the right of the plaintiffs to take possession and their exercise of it in *Bowmaker, Ltd.* v. *Tabor* (1) and a document the effect of which would be exactly the same but which is in these terms: "In consideration of the sum of 6*d*. received from you, I agree to put an end to the hiring of the goods under the hire-purchase agreement and to surrender the goods to you."

It is said, and it is no doubt true, that the agreement with Miss Ross, the document here in question, is not an illusory or colourable contract in order to achieve an evasion of the Act, but that it is a genuine contract for good and ample consideration. The answer to that argument is that this is not the occasion on which to consider that question. If I am right in thinking that, before exercising the right with which they were originally clothed (the right to retake possession of these goods), the plaintiffs were under an obligation, by reason of the Act, to apply to the court, the court, upon such application would readily see that it was a genuine transaction, and one which without the slightest hesitation the court would give leave to enforce. I do not think, however, that it is for the court, in considering whether the Act has been broken, to go on to consider the later question which will arise for it—namely, whether, in the circumstances, leave to enforce the remedy ought to be given to the plaintiffs.

It has been argued by counsel for the respondents, and I agree, that there is considerable difficulty, if not a vagueness, in the use of the word " remedy " in sect. 1 (2) of the Act, and it may be that it would be equally difficult in *Bowmaker, Ltd.* v. *Tabor* (1) to say that the plaintiffs were exercising a remedy rather than exercising a right. If what they did in *Bowmaker, Ltd.* v. *Tabor* (1) was exercising a remedy, I think that what the plaintiffs did, or desired to do, in this case was equally so, though in both cases it might well be said that it is not so much a remedy as a right. The truth is, I think, that by taking the goods the plaintiffs were exercising the remedy which had been given to them, which had come into existence by virtue of the terms of the hire-purchase agreement, and which arose upon the default of Miss Ross under that agreement. I think that they were, or would be, exercising that remedy, and they are none the less exercising that remedy because they can say that, between the initiation of their right and the exercise of their right, certain other communications passed, and a certain other contract was made, between them and the defendant. It results from these considerations that, most unhappily, I find myself unable to come to the same conclusion as Lord Greene, M.R., and I think that this appeal should be allowed.

Clauson, L.J. : In this case, I have the misfortune to find myself unable to accept the views expressed by Uthwatt, J., in his judgment, and also I find myself unable to agree with the views expressed by Lord Greene, M.R. In the result, I am in agreement with the views expressed by MacKinnon, L.J. I should have been glad to confine myself to expressing my concurrence with his views, but, as I approach the matter from a somewhat different angle, I must express the reasons for the conclusions at which I have arrived.

The summons is taken out by a company which has been spoken of as the owners. They claim by their summons to be entitled to retake possession of certain articles from Miss Ross under the terms of an instrument in writing, undated, but made on or about June 5, 1941. It is common ground that the instrument in writing consists of certain letters before us, and I want to make the observation that the plaintiffs are claiming to retake possession under the terms of a document which bears a date after that on which the Courts (Emergency Powers) Act, 1939, came into force. That date was late in 1939, and the Act was brought into force by an order in council. Since *Bowmaker, Ltd.* v. *Tabor* (1) was decided, the Liabilities (War-Time Adjustment) Act, 1941, has been passed, and, although it has not been referred to in argument, I do not feel that I should be doing my duty if I did not draw attention to its provisions.

As the Courts (Emergency Powers) Act, 1939, stood at the time of the decision in *Bowmaker, Ltd.* v. *Tabor* (1), there was a proviso to sect. 1 (2) in these terms :

> Provided that this subsection shall not apply to any remedy or proceedings available in consequence of any default . . . in the performance of an obligation . . . arising by virtue of a contract made after the commencement of this Act . . .

Part II of the Act of 1941, entitled " Extension of certain Enactments to Contracts made after commencement of War," provides by sect. 26 (2) as follows :

> A person shall not be entitled, except with the leave of the appropriate court—(*a*) to exercise or take any of the remedies or proceedings mentioned in sect. 1 (2) of the principal Act, other than those mentioned in para. (*c*) and para. (*d*) of the proviso to that subsection, which are available to him in consequence of any default in the performance of an obligation arising by virtue of a contract made after the commencement of the principal Act . . .

I ought to mention that the hire-purchase agreement to which we have been referred was dated considerably earlier than the commencement of the 1939 Act. After that time, however (I take this from the affidavit in support of the summons), Miss Ross fell into arrears in her payments and desired to have her liabilities under the hire-purchase agreement modified. Para. 9 of the affidavit in support of the summons states as follows :

> As a result [of the circumstances referred to], the agreement contained in the letters on pages 12, 13 and 14 of the bundle of correspondence was arrived at.

That was the agreement under which, as I read the summons, the owners now claim to be entitled to retake possession. That agreement contains this as one of the terms :

> It is clearly understood between us that upon my returning the goods as agreed to you, that I shall be under no further liability to you for arrears of hire.

That is signed by Miss Ross. As I envisage the matter, what the owners are seeking to do in this case is to obtain a decision that, without applying to the court under the Courts (Emergency Powers) Act, 1939, they may exercise the remedy available to them by reason of the contract contained in the correspondence, the remedy being that, in default of the goods being returned to them—a rather inaccurate expression in the circumstances—they claim the right, as appears from their summons, to retake possession of them. The position in fact is that the goods are lying in their hands simply for storage purposes, but the whole case has been argued on the footing that what the owners seek to do is to turn themselves from being bailees (mere storers of the furniture) into persons freely owning the furniture and free from any obligations to the hirer. It appears to me that, in claiming to retake possession of the articles in the sense which I have already explained, they are proceeding to exercise a remedy which is available to them in consequence of a default in the performance by the hirer of her obligation to return the goods. If that is so, I can see no escape from the position that they are claiming to do something which is distinctly and clearly forbidden by the Act. The act of retaking possession—that is to say, the act of turning themselves from bailees into owners—is an act which they claim the right to do by virtue of that contract of June, 1941, and they are doing it by way of remedy so as to obtain for themselves the benefit of the contract. I see no escape from the position that that is forbidden by the Act, and, accordingly, that UTHWATT, J., came to a wrong conclusion.

I agree in the fullest terms that, on my interpretation (and I wish that I could find some more limited interpretation), the Act will hit a large number of transactions which it can hardly be supposed that the legislature intended to hit. It may be that the legislature thought that it would not matter very much, and that actions would not be raised in cases where there was no real need for it. However, the fact that by the language used the legislature may have enacted something which went beyond what one would suppose to have been the original intention does not, in my view, justify me in putting a limitation on the words of the Act for which I can find no justification in the words as they stand. For these reasons, I agree with MACKINNON, L.J., that the appeal should be allowed.

The contract under which the plaintiffs seek to take possession is an instrument in writing, undated, but made on or about June 5, 1941, and that, of course, is the contract contained in the correspondence. That is the material contract, and, but for the change of the law in 1941, there might have been considerable difficulty, because the contract material to be considered is one made after the commencement of the original Courts (Emergency Powers) Act, 1939—namely, in June, 1941.

Appeal allowed.

Solicitors: *Tudor & Rowe* (for both parties).

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

Re HALL, HOLLAND *v.* ATTORNEY-GENERAL.

[COURT OF APPEAL (Lord Greene, M.R., and Luxmoore and du Parcq, L.JJ.), **November 3, 4, December 1, 1941.**]

Estate Duty—Property deemed to pass—Tenant for life paying duty—Release of charge for duty paid—Whether sum representing duty part of estate of tenant for life passing on her death—Finance Act, 1894 (*c.* 30), *ss.* 5 (2), 9 (1), (6), 22 (2)—*Finance Act,* 1914 (*c.* 10), *s.* 14.

The testator was entitled at his death to certain leasehold and freehold property (hereinafter referred to as the Mornington Estate) which he devised to his wife, Mrs. H., for life, with a power of appointment by will or deed in favour of children or remoter issue. Mrs. H. out of her own money paid estate duty on this property amounting to £7,921 2*s.* 6*d.*, and during her life, by deeds made in 1928, 1930, and 1936, respectively, she appointed portions of the Mornington Estate (or investments representing a portion of it which had been sold) to her granddaughter absolutely free of all trusts, but subject to her prior life interest. The appointments in 1930 and 1936 were given effect to by conveyances made in 1934 and

1936 respectively. Subsequently, the rest of the estate was sold and the proceeds invested. The will of Mrs. H., dated Dec. 1, 1937, contained an appointment of all the settled property which had not been subject to the deeds, and Mrs. H. died on Oct. 14, 1938. The Crown claimed estate duty on the sum with which Mrs. H. had paid the estate duty on her husband's death, contending that a charge had thereby been created in her favour by virtue of the Finance Act 1894, s. 9 (6). The first respondent contended that it had not been the intention of Mrs. H. to create a charge on the property, and that this was shown by her conduct. It was conceded by all parties, however, that, if such a charge had arisen, it was released in 1920 by the terms of a letter of June 13, 1920, in which Mrs. H. used the words: " which I paid out of my own funds as I would not have a charge on the property." The Crown further contended that, if the charge had been released, estate duty was payable, on the basis that *(a)* by not reclaiming the sum paid Mrs. H. made a personal settlement of this amount to be held on the trusts of her will, or, alternatively, *(b)* the settled property was increased by the sum paid in respect of estate duty, which amount had not paid estate duty on the death of the testator, or, alternatively, *(c)* that sum was a gift, and estate duty was payable on a proportion under the Finance Act, 1894, s. 2 (1) *(c)*, in that immediate enjoyment was not assumed by the donee to the exclusion of the donor :—

Held : (i) on the death of the testator duty was paid on the property unincumbered by any charge, whether in favour of the Crown or of the tenant for life, and the same unincumbered property passed on the death of the tenant for life, and, therefore, no further duty was payable.

(ii) the tenant for life was not a person competent to dispose of the part of the settled property represented by the sum paid for death duties on the death of the testator.

(iii) the payment of such death duties by the tenant for life was a gift, but it was a gift " to the entire exclusion of the donor, or of any benefit to her by contract or otherwise," despite the fact that the effect of the gift was to avoid her liability to pay interest on the sum charged on the estate for duties. The claim for estate duty on the sum paid by the tenant for life in respect of death duties failed.

Decision of Morton, J. ([1941] 2 All E.R. 358) *affirmed.*

[**EDITORIAL NOTE.** The Court of Appeal have affirmed the decision of Morton, J., in this case. The contention of the Crown is that, since the tenant for life has paid out of her own moneys the death duties, which would normally be paid out of the capital of the trust, an equivalent additional amount must have accrued to the capital of the trust fund and have passed on the death of the tenant for life. Both courts have rejected all the Crown's contentions on this matter, but it appears certain that the case will go to the House of Lords.

As to Property of which Deceased is Competent to Dispose at his Death, see HALSBURY, Hailsham Edn., Vol. 13, pp. 234-236, para. 225; and for Cases, see DIGEST, Vol. 21, pp. 42, 43, Nos. 266-272.]

Cases referred to :

(1) *Lord Advocate* v. *Moray* (*Countess*), [1905] A.C. 531; 21 Digest 42, *266*; 74 L.J.P.C. 122; 93 L.T. 569.

(2) *A.-G* v. *Worrall*, [1895] 1 Q.B. 99; 21 Digest 12, *54*; 64 L.J.Q.B. 141; 71 L.T. 807.

(3) *Cowley* (*Earl*) v. *Inland Revenue Comrs.*, [1899] A.C. 198; 21 Digest 7, *27*; 68 L.J.Q.B. 435; 80 L.T. 361.

(4) *Re Anson, Buller* v. *Anson*, [1915] 1 Ch. 52; 21 Digest 42, *267*; 84 L.J.Ch. 347; 111 L.T. 1065.

(5) *Re Payne, Poplett* v. *A.-G.*, [1940] Ch. 576; [1940] 2 All E.R. 115; Digest Supp.; 109 L.J.Ch. 369; 163 L.T. 100.

(6) *A.-G.* v. *Seccombe*, [1911] 2 K.B. 688; 21 Digest 13, *59*; 80 L.J.K.B. 913; 105 L.T. 18.

(7) *Re Howe's* (*Earl*) *Settled Estates, Howe* (*Earl*) v. *Kingscote*, [1903] 2 Ch. 69; 21 Digest 43, *277*; 72 L.J.Ch. 461; 88 L.T. 438.

(8) *A.-G.* v. *Montagu* (*Lord*), [1904] A.C. 316; 21 Digest 25, *140*; 73 L.J.K.B. 707; 90 L.T. 726.

(9) *Northumberland* (*Duke*) v. *A.-G.*, [1905] A.C. 406; 21 Digest 84, *602*; 74 L.J.K.B. 734; 93 L.T. 88.

Appeal by the Crown from an order of Morton, J., dated May 7, 1941, and reported [1941] 2 All E.R. 358, where the facts are fully set out.

J. H. Stamp for the appellant.

C. E. Harman, K.C., and *Hubert A. Rose* for the first respondent, Lady Holland, the sole executrix of the will of her mother, Mrs. Mary Kate Hall, the tenant for life.

Wilfrid M. Hunt for the second respondent, Miss Holland, granddaughter of the testator and daughter of Lady Holland.

Stamp : Under the Finance Act, 1894, the widow gets a charge automatically on paying the estate duty. There is no doubt that she did not want a charge. It is admitted by the Revenue that, by reason of matters subsequent, the charge has been released. The question which arises is, therefore, whether, when a surviving spouse pays the estate duty, the sum so applied is exempt from death duties on the death of the survivor. The widow refused to have refunded to her the estate duty which she had paid. She executed a vesting deed under the Settled Land Act, 1925, vesting the property in herself, without any reference to the charge. In the present case, if the widow had power to charge the property with £7,900, that sum forms part of the property of which she had power to dispose within the meaning of the Finance Act, 1894, s. 22 (2) (*c*). In *Lord Advocate* v. *Moray* (*Countess*) (1), it was argued that the charge was not effective under the statute, because in Scottish law various formalities are required. That argument was not accepted. One way of bringing the £7,900 within the Act would be to show that it was a gift to the persons who benefited under the settlement. In *A.-G.* v. *Worrall* (2), it was held that the gift of a mortgage debt was a gift within the meaning of the Customs and Inland Revenue Act, 1889, s. 11. The amount applied by the widow in discharge of the debt on the release of her charge was a gift to the persons interested under the settlement, however much she retained a benefit during the remainder of her life. If there had been no question of exemption under the Finance Act, 1894, s. 5, and if Mrs. Hall had been an ordinary tenant for life, the liability of the property appointed and released would have been incontestable. The tenant for life had a power of appointment among her issue and could keep the property intact whether she kept the charge alive or disclaimed it. It is abundantly clear that, at the moment when Hall died, the value of the estate was the Mornington Estate less £7,900. That sum was provided by the widow. If the estate had been left subject to a mortgage debt of £7,900, and if Mrs. Hall had paid that off, it could not be doubted that, to the extent of £7,900, the succession would have been derived from her : *Cowley* (*Earl*) v. *Inland Revenue Comrs.* (3). In the present case, it is possible to put one's finger upon an item and say that that item has not paid duty. What Mrs. Hall did was to bring £7,900 into the settlement and leave it there for the benefit of her successors. That is a clear case of what the Act intended to charge. It is not only within the intention of the Act but also within its language. An equity of redemption subject to which duty has been paid is not the same thing as property freed from the charge. If part of this property is derived from Mrs. Hall, it cannot be property which was part of Hall's estate. It is a fund which has gone into, and helped to swell, the whole body of the settled property. [Counsel referred to *Re Anson, Buller* v. *Anson* (4).]

Harman, K.C. : That which MORTON, J., calls the Mornington Estate—namely, the property which is described in the will of the testator, and which he devised—was by that will made settled property, and it was settled upon his wife for life with remainders over. That being the settlement, and the property having paid duty on the death of the husband, it does not pay duty again on the death of the wife. The sum of £7,900 is the duty upon the whole fee simple of the Mornington Estate. That estate cannot be required to pay duty again on the death of the wife. The present case is an attempt to make it do so in part, because, it is said, on the death of the wife the estate can be divided into a mortgage and a notionally unincumbered part, and duty is payable upon the incumbrance. In the present case, the estate was not incumbered apart from the death of the settlor, and the payment of duty on the death of the husband is sufficient to free the property from estate duty until it gets into the hands of somebody competent to dispose of it. What Mrs. Hall did in 1920 amounted to a release. It is not enough to say that somewhere in the capital moneys one can find a portion of the money which represents the statutory charge which existed in 1920. The present case is an attempt to tax the same thing twice, because the value of the estate which passed on the husband's death included this sum of £7,900. There is a presumption that, when a limited owner pays off a charge, he does it for his own benefit. That presumption, however, is rebuttable. In *A.-G.* v. *Worrall* (2), a payment had to be made to the donor, and that case decided that it was sufficient if a payment were made by the donee, although it was not made out of the donation. In the present case, the release of the charge, even if it was a gift, was not such a gift as would attract duty. When the charge was released, the position of the tenant for life was not altered. The subject-matter of the tax must exist at the death, in order that it may be taxable: *Re Payne, Poplett* v. *A.-G.* (5). That case depends upon the meaning to be attached to the words "property taken." [Counsel referred to *A.-G.* v. *Seccombe* (6), *Lord Advocate* v. *Moray* (*Countess*) (1), *Re Howe's* (*Earl*) *Settled Estates, Howe* (*Earl*) v. *Kingscote* (7) and *Re Anson, Buller* v. *Anson* (4).]

Stamp, in reply, referred to *A.-G.* v. *Montagu* (*Lord*) (8) and *Northumberland* (*Duke*) v. *A.-G.* (9).

LORD GREENE, M.R. [delivering the judgment of the court]: The facts relating to this appeal are fully set out in the judgment of MORTON, J., and we need not repeat them. There is, however, one matter of fact to which reference must be made. It was argued on behalf of the Crown that, when the testator's widow, Mrs. Hall, paid the duty on the real estate which passed on his death, she obtained a charge upon it under the Finance Act, 1894, s. 9 (6), but it was conceded that upon this hypothesis she released the charge at latest in 1920. MORTON, J., accepted this argument. It is not necessary to express any opinion upon this matter, since before us it was conceded on behalf of the Crown, and we agree, that, for the purposes of the first and principal argument for the Crown, the position would, for all relevant purposes, be the same whether Mrs. Hall obtained a charge herself or merely by the payment extinguished the charge imposed in favour of the Crown by sect. 9 (1) of the Act, while, upon other arguments for the Crown, the result, as will appear, is the same whatever be the true view. Accordingly, we express no opinion on the questions whether a person with a limited interest paying the estate duty can refuse to accept the charge to which sect. 9 (6) entitles him, and whether, if so, Mrs. Hall, on the facts of this case, ought to be regarded as having done so. We will deal with the first argument on the footing that the payment of the duty by Mrs. Hall extinguished the charge imposed in favour of the Crown by sect. 9 (1) and that she obtained no charge herself under subsect. (6) or otherwise.

The first argument presented on behalf of the Crown was to the following effect. The exemption granted by sect. 5 (2) of the Act (as amended by the Finance Act, 1914, s. 14) applies only where the settled property in respect of which exemption is claimed is the same property as that which bore duty on the death of the first to die of the parties to a marriage. It was said that in the present case this could not be asserted, since, when the settled property came into existence as such, it had impressed upon it a charge in favour of the Crown under sect. 9 (1), and, accordingly, was, to the extent of the duty paid, not the same property as that which passed free from that charge on the death of Mrs. Hall. This argument is, in our opinion, based upon a misconception. The property upon which the charge in favour of the Crown was impressed was the unincumbered property, as the language of the subsection clearly recognises. It is, of course, fallacious to speak of moments of time elapsing between the death of the husband and the imposition of the charge. Nevertheless, the settled property has unquestionably, for the purposes of the subsection, a separate existence, since it is in respect of the unincumbered property, and not in respect of the property as affected by the charge, that the duty is imposed. The argument down to this point really involves treating the property in respect of which duty was paid on the death of the testator as the incumbered property which it clearly was not.

The argument was then put in a broader way. It was said that, even if the objections which we have summarised are valid, nevertheless the property as it passed on the death of Mrs. Hall was derived under a different title from that which existed at the death of her husband, and must be regarded as a composite property made up, to the extent of the amount of the duty paid by Mrs. Hall, of property which she had herself brought into the settlement. The result, it was said, is that, to the extent stated, the property must be regarded as different from that which bore duty on the death of the testator. This argument involves the proposition that, where, at a date actually (or, as in the present case, notionally) subsequent to the death of the first spouse, a charge is imposed upon the settled property—for example, by the widow as tenant for life in exercise of statutory powers—and that charge is, before the death of the other spouse, paid off and extinguished otherwise than by the expenditure of settled funds—for example, by the widow out of her own pocket—the property thus freed from the charge which passes unincumbered on the death of the second spouse is, for the purposes of the subsection, different from that which passed on the death of the first spouse. In other words, the property which passes on the death of the second spouse is to be regarded as a composite property made up of two elements—namely, (i) the residuum of the original property left after the amount of the charge has been deducted from it, and (ii) the amount so deducted, which must be treated as restored to the settlement on the extinguishment of the charge, or, rather, as the subject-matter of a fresh settlement by reference. The attractiveness of this argument, in our opinion, lies in its subtlety, and not in its soundness, for we are unable to accept it. We can find no justification in the language of the subsection for dissecting the property which passed on Mrs. Hall's death in this way. That property was the unincumbered estate, just as the property which passed on the death of her husband was the unincumbered estate. Once this fact is established, the circumstance that in the interval a charge has both come into existence and gone out of existence appears to us to be irrelevant. We agree with the observation that the view presented on behalf of the Crown would never have occurred to anyone if the case had not been one of two spouses, but had been, for example, one of father and son. It may well be that, if a part of the settled property had actually passed out of settlement, for example, on a sale by the widow as tenant for life, and this had been bought back by her and brought into the settlement, different considerations would apply, but the present is not that case. We agree with the view taken by MORTON, J., on this branch of the argument.

Another point of construction on sect. 5 (2) was raised by counsel for the Crown. The exemption granted by the subsection ceases to apply when a person dies who "had been at any time during the continuance of the settlement competent to dispose of such property." Upon this expression, counsel for the Crown raised an argument based on the assumption that, when Mrs. Hall paid the duty, she obtained a charge under sect. 9 (6), and, for the purpose of considering it, we will treat that assumption as correct. It was said that Mrs. Hall, on obtaining the charge, became "competent to dispose" of the settled property for the purpose of enforcing the charge, and that, accordingly, duty became payable on her death to the extent of the amount of the charge. There is, in our opinion, a short answer to this argument, to be found in the definition in sect. 22 (2) (*a*) of persons deemed competent to dispose, which clearly does not include a person holding a charge of the present description.

It will have been noticed that, for the purpose of discussing these arguments, we have ignored the fact that Mrs. Hall in her lifetime made three appointments of parts of the settled property in favour of Miss Holland, accompanied by surrenders of Mrs. Hall's life interest. Of these appointments and surrenders, two took place more than three years before the death of Mrs. Hall. The property comprised in these two transactions, accordingly, is not to be deemed to have passed on the death of Mrs. Hall, and there was to that extent no need for the respondents to rely on the exemption granted by sect. 5 (2). It was accordingly conceded by counsel for the Crown that, even if he was right in claiming that the exemption did not apply, duty would be payable on a proportionate part only of the amount of the duty which Mrs. Hall paid on the death of her husband.

We now turn to the last argument put forward on behalf of the Crown, which is quite independent of sect. 5 (2). It was based on the Finance Act, 1894, s. 2 (1) (*c*), under which property passing on the death of the deceased is to be deemed to include

> . . . property taken under any gift, whenever made, of which *bona fide* possession and enjoyment shall not have been assumed by the donee immediately upon the gift,

and thenceforward retained to the entire exclusion of the donor, or of any benefit to him by contract or otherwise.

These words are incorporated in that subsection by the reference to the Customs and Inland Revenue Act, 1881, s. 38 (2) (*a*), as amended by the Customs and Inland Revenue Act, 1889, s. 11. It was said that by paying the duty Mrs. Hall made a gift either to the persons interested in remainder or to the trustees for their benefit, it matters not which. This contention appears to us to be correct, but, as the gift was made more than three years before the death of the donor, Mrs. Hall, it must appear that the gift was not retained by the donee " to the entire exclusion of the donor, or of any benefit to [her] by contract or otherwise." In order to answer this question, it is necessary to ascertain the subject-matter of the gift. It was argued by counsel for the Crown that the gift was a gift of the £7,900. On this basis, and assuming that Mrs. Hall did not herself obtain a charge, counsel for the Crown contended that there was a " benefit " to Mrs. Hall " by contract or otherwise," in that she was thereby relieved of the obligation under which she lay as tenant for life to keep down the interest on the charge in favour of the Crown. MORTON, J., took the view that the remaindermen took an immediate benefit, since a burden was removed from the inheritance, a benefit which thereafter they retained to the entire exclusion of the donor or any benefit to her, by contract or otherwise. We agree with this conclusion, although we are not sure that it does not imply a view as to the subject-matter of the gift inconsistent with the assumption on which it was based—namely, that Mrs. Hall made a gift of the £7,900. The better view, in our judgment, is that the payment of the £7,900 accomplished a dual purpose. It extinguished the liability of Mrs. Hall as between herself and those interested in remainder to keep down the interest, and it extinguished a charge on the inheritance. It was the extinguishment of that charge by means of a money payment which was the subject-matter of the gift, and not the money payment itself. The fact that the money payment operated also to relieve Mrs. Hall of a liability did not derogate from the completeness of that gift. It was not a reservation from the subject-matter of the gift, nor was it a benefit conditioning the gift. As regards Mrs. Hall, it was merely the extinguishment of her liability. If the argument on behalf of the Crown were accepted, it would lead to the result that no person who was under a liability for interest could discharge the principal debt without being held to have obtained a benefit within the meaning of the statute. Thus, if a remainderman mortgaged his interest in remainder and the tenant for life joined in the mortgage in order to guarantee payment of the interest during his life, and if thereafter the tenant for life paid off the mortgage, it would follow, on the argument for the Crown, that the gift which he thus made to the remainderman was one possession and enjoyment of which were not " assumed to the entire exclusion of the donor or of any benefit to him by contract or otherwise," in that the effect of the payment was to free the tenant for life of a liability which would have lasted during the rest of his life. In truth, the payment in such a case would operate *uno flatu* to extinguish two liabilities, and the whole transaction would have come to an end.

This question was dealt with by MORTON, J., on the basis that Mrs. Hall obtained a charge which she subsequently released. On that basis, the position immediately before the release was that Mrs. Hall was entitled to the rents and was also the holder of a charge the interest on which, if it had been vested in a third party, she would have been bound to keep down. In these circumstances, we are unable to see what benefit she could be said to have had from the release. Her position before and after the release was precisely the same. That part of the income which she was bound before to pay to herself as chargee she became entitled, after the release, to keep as tenant for life. MORTON, J., took this view, and we agree with him. The appeal is dismissed with costs.

Appeal dismissed with costs. Conditional leave to appeal to the House of Lords.

Solicitors: *Solicitor of Inland Revenue* (for the appellant); *Kingsford, Dorman & Co.*, agents for *Shepheards & Bingley*, Kensington (for the first respondent and for the second respondent).

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

HATHAWAY *v.* TURNER.

[KING'S BENCH DIVISION (Lawrence, J.), **September 29, 1941.**]

Income Tax—Schedule E—Cessation of office—Deputy town clerk becoming town clerk of another borough—Finance Act, 1927 (*c.* 10), *s.* 45 (5).

The respondent was deputy town clerk of Rotherham till Sept., 1939, when he was appointed town clerk of Scarborough. He contended that, as, in his new position, he was carrying on the same work as before, there had been no cessation of office within the meaning of the Finance Act, 1927, s. 45 (5):—

HELD: the taking up of an office under a new employer involves cessation of office within the meaning of the subsection. The fact that the character of the work remains unaltered does not prevent cessation.

[**EDITORIAL NOTE.** It is difficult to draw general conclusions from particular cases, but the judgment in this case does appear to support the general proposition that a change of employer involves a cessation of office within the meaning of the Finance Act, 1927, s. 45 (5). It is held that the fact that the employee will be doing practically the same work in the new employment does not prevent the cessation of the office. The decision is of importance, as, in many cases, it makes a substantial difference in the amount of the assessment.

AS TO CESSATION OF OFFICE, see HALSBURY, Hailsham Edn., Vol. 17, pp. 218, 219, para. 441; and FOR CASES, see DIGEST, Vol. 28, p. 88, Nos. 508-512.]

Cases referred to:

(1) *May* v. *Falk* (1932), 17 Tax Cas. 218; Digest Supp.
(2) *Thomas* v. *Inland Revenue Comrs.*, Leaflet No. 111.

APPEAL by the Crown from a decision of the General Commissioners. The facts are fully set out in the judgment.

Reginald P Hills for the appellant.

The respondent appeared in person.

LAWRENCE, J.: This is an appeal from the General Commissioners, who have decided that the respondent did not cease to hold an office or employment within the meaning of the Finance Act, 1927, s. 45 (5), and that, therefore, the additional assessment which was made upon him was invalid. The respondent was deputy town clerk of Rotherham until Sept., 1939. On Sept. 28, 1939, he was appointed town clerk of Scarborough, at a salary higher than that which he had been receiving as deputy town clerk of Rotherham. The only question which arises in the case is whether, in such circumstances, he ceased to hold an office or employment within the meaning of the Finance Act, 1927, s. 45 (5). The General Commissioners have held that he did not cease to hold an office. They held that, on the facts before them, there was no cessation of employment, and they accordingly discharged the additional assessment. They appear to have been influenced to some extent by the facts that in previous years the respondent, having been assistant solicitor to the Leicester Corporation, was appointed town clerk of Aberystwyth, and that on that occasion the Revenue did not make any additional assessment in accordance with what the General Commissioners here call the principle of cessation, and again that in Nov., 1936, when the respondent was appointed deputy town clerk of Rotherham, at a salary higher than that which he had received as town clerk of Aberystwyth, the principle of cessation was not applied. Those facts are, in my opinion, entirely irrelevant, because what the commissioners may have thought it right to do in those circumstances does not in any way prevent them from asserting the true principles of law on a subsequent occasion. The General Commissioners were also influenced, apparently, by *May* v. *Falk* (1), upon which the respondent principally relies. That was a case in which a director of the Imperial Tobacco Company, who was also secretary of that company, was in receipt of £300 per annum as director of the company and £1,250 as secretary of the company. On a certain date, he ceased to be secretary, and was appointed a member of the executive committee of directors of the company, and as such received a salary amounting in all to £5,300 per annum. Ordinary directors received fees of £300 per annum, but those who carried on the executive management of the company received £5,000 per annum. On that set of facts, the employer being the same company, the special commissioners decided that there had been no cessation of office, and FINLAY, J., upheld that decision. There was a division of opinion between the two commissioners, and one of them had withdrawn his opinion, so that it was decided, therefore, by the other alone. FINLAY, J., held that there was some evidence to support the commissioner's decision. Those facts are entirely different from those of this case, principally because there the employer was the same and here the employer is different in each case. The respondent strongly relied upon that case, said that it was decided upon a question of fact, that FINLAY, J., had thought himself bound by that decision on the question of fact, and that, therefore, I ought to regard myself as bound by the decision of the General Commissioners in this case.

The Crown relied upon *Thomas* v. *Inland Revenue Comrs.* (2). There the taxpayer was employed at first at a certain salary and in certain circumstances. Then the firm employing him was turned into a limited company, when he was employed by the limited company at a different remuneration and with certain extended duties. The General Commissioners decided that there had been a cessation of his office. The majority of the Court of Session held that the mere fact that there has been a change of employer is sufficient to establish that there has been a cessation of employment, but LORD CARMONT dissented upon that point, although he agreed that, on the other facts, there had been a cessation of employment. The respondent contends that that case is is entirely distinguishable from the present, and that it is consistent with his main contention, which is that the matter is a question of fact and that the decision of the commissioners ought, therefore, to be affirmed. He supports this by saying that in that case the Court of Session was affirming the commissioners, and he draws attention to the fact that LORD CARMONT dissented upon the question of law, or question of fact and law, that a fresh employer constitutes fresh employment. He also distinguishes the case upon the ground that there the work which the taxpayer was carrying out was different from that which he previously carried out, and he contends that the work which he carries out as town clerk of Scarborough is substantially the same sort of work as he carried out as deputy town clerk of Rotherham. He also relies upon the fact, which he alleges to be true, that civil servants of the Crown are not treated as ceasing to hold their office and as holding a new office when they change their offices under the Crown. As to that, there is nothing in the case about it. I have not been informed as to the practice, and I think that the matter is irrelevant.

In my opinion, the argument that the respondent is carrying on the same work as he did before is not well-founded. The fact that the work is similar in its nature is not the same as saying that it is the same work, and I am of opinion that the majority in the Court of Session were right in holding that, when a man ceases to hold an office or employment under one employer and takes up an office or employment under another employer, he must cease to hold the office or employment under the first employer. It is clear from Sched. E, r. 6 (*j*), that offices or employments of profit under a local authority are offices or employments of profit which have to be taxed under Sched. E, and it is impossible, in my opinion, to say that a person who has ceased to be employed by a certain local authority has not ceased to hold the office or employment of profit which he was holding under that authority. I am therefore of opinion that the facts of this case as stated by the General Commissioners are such that it was impossible for them as a matter of law to hold that the respondent had not ceased to hold the office of deputy town clerk of Rotherham within the meaning of the Finance Act, 1927, s. 45 (5), and the appeal must, therefore, be allowed with costs.

Appeal allowed with costs.

Solicitor: *Solicitor of Inland Revenue* (for the appellant).

[*Reported by* D. K. BELCHER, *Barrister-at-Law.*]

HENRIKSEN *v.* GRAFTON HOTELS, LTD.

[KING'S BENCH DIVISION (Lawrence, J.), **October 1, 1941.**]

Income Tax—Deduction against profits—Monopoly value of licensed premises—Licensee the lessee of the premises—Licensing (Consolidation) Act, 1910 (*c.* 24), *s.* 14.

In arriving at their income tax assessments, the respondents claimed to deduct instalments of monopoly value paid in respect of licensed premises of which they were the tenants. The lease provided that the respondents should pay all such charges, and they contended that the monopoly value payments were, therefore, payments made under a contractual liability, and in the course of, and for the purposes of, their trade :—

HELD : monopoly value, though payable by instalments, is imposed as a lump sum, and partakes of the quality and nature of capital. A tenant's undertaking to pay the instalments does not transform those instalments into income charges.

[**EDITORIAL NOTE.** In this case the judge has followed his decision in *Kneeshaw* v. *Abertolli* (1). It does not appear from the facts in that case whether the licensee was the owner or the tenant of the licensed premises. In the present case the licensee was the tenant, and it was argued that, since the instalments of monopoly value were made payable as outgoings, they became charges on the income and were proper deductions to be made on an assessment for income tax. The judge has decided against this argument, taking the view that these payments are in all cases capital payments.

AS TO PAYMENTS IN RESPECT OF LICENCES, see HALSBURY, Hailsham Edn., Vol. 17, p. 131, para. 249 ; and FOR CASES, see DIGEST, Vol. 28, pp. 56, 57, Nos. 284-292.]

Case referred to :

(1) *Kneeshaw* v. *Abertolli*, [1940] 2 K.B. 295 ; [1940] 3 All E.R. 500 ; Digest Supp. ; 109 L.J.K.B. 760.

APPEAL by the Crown from a decision of the General Commissioners. The facts are fully set out in the judgment.

The Attorney-General (*Rt. Hon. Sir Donald Somervell, K.C.*) and *Reginald P. Hills* for the appellant.

S. Pascoe Hayward for the respondents.

LAWRENCE, J. : This is an appeal from the General Commissioners, who have decided that the respondent was entitled to deduct for income tax purposes the sums which were paid by the respondents in respect of monopoly value of licensed premises of which they were the tenants. This point came before me on a previous occasion in *Kneeshaw* v. *Abertolli* (1), when I decided that a sum paid as monopoly value on the grant of a licence in respect of licensed premises was a capital payment, and could not be deducted in an assessment to income tax. In that case, I followed a number of cases as to the nature of a payment for monopoly value decided by various courts, including the House of Lords, but there were no cases upon the question as to what was a capital payment for the purposes of income tax.

Counsel for the respondents admits that it would be difficult to distinguish *Kneeshaw* v. *Abertolli* (1) from the present case, except for the fact that it does not appear, either from the special case or from the report in that case, whether the licensee was the owner of the premises or whether he was a tenant, and in the present case the respondents are the tenants of the premises and have paid the instalments of monopoly value in pursuance of cl. 2 (14) in the lease, which provides as follows :

> The tenants will pay all charges which may be imposed in respect of the said licences or any of them by virtue of the Licensing (Consolidation) Act, 1910, or any amendments thereof and in default the landlords may pay all such costs, charges and expenses; and moneys expended by them for that purpose shall be repayable by the tenants on demand and may be recovered by action forthwith.

Counsel for the respondents therefore contends, on that clause in the lease, that the payments which were made by the respondents in pursuance of that clause were payments made by them under a contractual liability, and were made in the course of, and for the purposes of, their trade. He says that the tenants might just as well have agreed with their landlord that the landlord should bear the payment of the monopoly value and that the rent should be increased correspondingly, in which case the tenants would undoubtedly have the right to deduct, for the purposes of income tax, the amount of the rent. It appears to me, however, that, for income tax purposes, it is impossible to disregard the form in which the lease is framed. It is perfectly clear upon all the authorities that no sum of a capital nature paid by a trader is deductible for income tax purposes, and, therefore, it is necessary to see whether or not the sum which the respondents paid is of a capital nature. If it were rent, no doubt it would not be a payment of a capital nature. However, it is not rent, and the tenants and their landlord have not agreed that the tenants shall simply pay a rent for these premises. What they have agreed is that the tenants shall bear the charges imposed in respect of the Licensing (Consolidation) Act, 1910. It is clear, I think, from the authorities to which I have alluded in *Kneeshaw* v. *Abertolli* (1), and from the fact that the monopoly value is imposed as a lump sum, though payable by instalments, and as a condition of the grant of the licence, that the quality and nature of the monopoly value are a capital quality and nature, and it seems to me impossible to hold that, when the tenants undertake to pay those charges, the charges alter their quality and nature and become income charges. For these reasons, I am of opinion that there is no distinction which can be made between the present case and *Kneeshaw* v. *Abertolli* (1), and I adhere to the decision which I gave in that case. This appeal must be allowed with costs.

Appeal allowed with costs.

Solicitors: *Solicitor of Inland Revenue* (for the appellant); *Bower, Cotton & Bower* (for the respondents).

[*Reported by* D. K. BELCHER, *Barrister-at-Law.*]

DE BUSE AND OTHERS *v.* McCARTY AND STEPNEY BOROUGH COUNCIL.

[COURT OF APPEAL (Lord Greene, M.R., and Goddard and du Parcq, L.JJ.), **October 28, 29, 1941.**]

Libel and Slander—Privilege—Statutory duty—No common interest to make and receive communication—Report of committee to borough council—Metropolis Management Amendment Act, 1856 (*c.* 112), *s.* 9.

The three appellants, employees of the Stepney Borough Council, claimed damages for libel from the respondents, the town clerk and the borough council. There had been thefts of petrol in the public cleansing department of the council, in respect of which two employees of the council had been prosecuted and convicted. One of them made certain accusations against certain other employees, and the council appointed a special committee to investigate the system of administering the petrol supply of the department, and also to investigate the general question of the dishonesty which had taken place. On Jan. 30, 1939, the committee made a report to the council. The report contained a list of the names of the employees who had been accused of being concerned in the stealing of the petrol. The names of the appellants were amongst them. The committee stated that the accusations had been reiterated before them, and that the employees concerned had emphatically denied them. The committee also stated that they deemed it expedient to have a proper regard to the attitude and demeanour of the named employees, and, with one exception, the committee recommended the removal of the named employees from their positions and their transfer to other positions. The report was published in an agenda, a copy of which was sent to the public libraries in the borough, while a copy was also affixed on or near the door of the town hall. It was in respect of these publications that complaint was made. The respondents contended that the council was bound to make such publication by reason of the provisions of the Metropolis Management Amendment Act, 1856, s. 9, and also that the council and the ratepayers had a common interest in the subject-matter of the words complained of, and that, consequently, the occasion was privileged:—

HELD: (i) assuming the matter complained of to be defamatory, there was nothing in the Metropolis Management Amendment Act, 1856, s. 9, which justified the publication either on or near the door of the town hall or in the public libraries.

(ii) the plea of privilege failed, because the council had no interest or duty in common with the ratepayers which would justify the publication of the report to the ratepayers before it had been considered by the council itself. Also, the ratepayers had no interest or duty to receive the communication at the time when it was published.

Hunt v. *Great Northern Ry. Co.* (2) *distinguished.*

[**EDITORIAL NOTE.** It is often necessary for a public body to refer the detailed consideration of a particular matter to a committee of its members. After consideration in committee, the matter usually forms the subject of a report which is considered at a full meeting. Such a report is in the nature of a private document passing between the committee and the public body, and, until it has been approved and acted on, it is not a matter of interest to persons other than members of the body. Here it was sought to contend that such a report to a borough council was a matter in which the ratepayers were interested and that a publication of the report to them was privileged. This contention the Court of Appeal has rejected. It will be noted that the publication in fact was to the users of the public libraries of the borough, which would be a much wider publication than that to the ratepayers.

AS TO PRIVILEGED REPORTS, see HALSBURY, Hailsham Edn., Vol. 20, pp. 485, 486, para. 592; and FOR CASES, see DIGEST, Vol. 32, p. 141, Nos. 1723-1729.]

Cases referred to:

(1) *Adam* v. *Ward*, [1917] A.C. 309; 32 Digest 129, *1608*; 86 L.J.K.B. 849; 117 L.T. 34.

(2) *Hunt* v. *Great Northern Ry. Co.*, [1891] 2 Q.B. 189; 32 Digest 121, *1528*; 60 L.J.Q.B. 498.

(3) *R.* v. *Rule*, [1937] 2 K.B. 375; [1937] 2 All E.R. 772; Digest Supp.; 106 L.J.K.B. 807; 157 L.T. 48.

(4) *Livingstone* v. *Westminster Corpn.*, [1904] 2 K.B. 109; 38 Digest 141, *1048*; 73 L.J.K.B. 434.

APPLICATION by the plaintiffs for judgment or a new trial on appeal from a verdict and judgment at a trial before WROTTESLEY, J., and a special jury, dated May 19, 1941. The facts are fully set out in the judgment of LORD GREENE, M.R.

Gerald Gardiner and *M. R. Nicholas* for the appellants.

G. D. Roberts, K.C., *Cecil R. Havers, K.C.*, *Valentine Holmes* and *C. Erskine Simes* for the respondents.

Gardiner: The action was really an action for wrongful dismissal in the guise of a libel action. As regards the defence of privilege, where there is a matter in which A and B have a common interest, A is not justified in publishing defamatory matter to persons other than B unless that be the only practicable way of making the communication to B. *Adam* v. *Ward* (1) appears to be the only reported case in which it was held that publication to the whole world was privileged. In the present case, it is said that the respondents had to publish the agenda in the manner in which they did by reason of a statutory requirement. That is not the effect of the statute. In *Livingstone* v. *Westminster Corpn.* (4), it was said that it would have been sufficient to say, in the public notice, that the council would consider the report contained in the agenda, and that the report itself did not require setting out in the public notice.

Roberts, K.C.: In the absence of malice, publication in this particular case was privileged. The question is whether or not the ratepayers have a legitimate interest in the findings of this committee. The report was to be discussed at a meeting of the council at which the public might be present. As the public are entitled to be present, they are entitled to know what the committee has put in its report. The representatives of the press are also entitled to be present. As to whether or not the publication has been unnecessarily wide, I refer to GATLEY ON LIBEL AND SLANDER, p. 287. If there is a duty owing to ratepayers, privilege is not destroyed if the matter in question is also published to other people in the borough. [Counsel referred to *R.* v. *Rule* (3).]

LORD GREENE, M.R.: In the action out of which this appeal arises, three employees of the Stepney Borough Council claim from the town clerk and from the council itself damages for libel. There were separate actions, I think, which were consolidated, and I will refer to them as one action. In the defence there was no plea of justification. It was denied that the words complained of bore, or were capable of bearing, the meaning alleged, or of bearing any defamatory meaning, and a claim of qualified privilege was raised. At the hearing before WROTTESLEY, J., the latter ruled, on the plea of privilege, in favour of the defendants, and also ruled that there was no evidence of malice fit to be put before the jury. In view of the opinion which I have formed on the question of privilege, the matter of malice does not arise for decision. We have heard no argument upon it, and it is unnecessary to refer to it again.

The circumstances in which the alleged libel came to be published are briefly these. There had been in the public cleansing department of the council a certain leakage, in the metaphorical sense, of petrol, and two employees of the council had been prosecuted and convicted in regard to that. One of them had made accusations against certain other employees of the council in connection with the thefts of petrol which had taken place, and the council thought it desirable to investigate the system of administering the petrol supply of the department and the general question of the dishonesty which had taken place. That task they entrusted to a special committee. That committee made a report to the council on Jan. 30, 1939. The report stated the steps which the committee had taken to carry out their terms of reference, and set out a list of the names of employees accused by the employee to whom I have already referred of being concerned in the stealing of the petrol. In the list so given appeared the names of the present plaintiffs. In the last two paragraphs of their report, the committee stated that the accusations had been reiterated before them, but that the employees against whom they were made emphatically denied them. It was also stated that, in reaching their final conclusion, the committee deemed it expedient to have a proper regard to the attitude and demeanour of the employees named.

The report contains no finding of fact in terms one way or the other as to whether or not the committee found the charges proved in whole or in part, but in the last paragraph of their report the committee say, putting it shortly: "As a result, we recommend the removal of the named employees from their present positions in the public cleansing department and a transfer to other positions, with the exception of one man, to whom special considerations apply." For the purpose of the present discussion, we must assume, although it is not admitted by the defendants, that the words contained in that report, to which I have briefly referred, in reference to the plaintiffs were defamatory. The plea of privilege set up by the defence was based entirely upon certain statutory provisions. It is asserted that the publication complained of was made in pursuance of those provisions, which not merely gave power to the council to publish the alleged libel in the way in which they did, but imposed upon them a duty to do so.

The actual publication complained of was the sending by the town clerk, in the ordinary routine of his duty, according to what appears to be the regular practice of the council, of copies of a document to the various public libraries in the borough, where they would be available for perusal by anyone entitled to use the public libraries. That class would, of course, include ratepayers, but would also include members of the public who were not ratepayers at all, and who were not even electors in the borough elections. I must mention, further, another publication, which is not in fact complained of in the action, and that is a publication by affixing the document in question to the door of the town hall, or on some appropriate notice-board there, whichever it was in fact.

The document was a bulky object of some 77 printed foolscap pages, giving notice of a specially convened meeting of the borough council to be held at the town hall on Feb. 22, 1939. It set out the agenda for the meeting, a substantial part of which concerned the consideration of reports which were being made to the council, one of them being the report of the special committee to which I have referred. That report, like the other reports submitted, was set out in full. No doubt it is extremely convenient for the councillors who are proposing to attend the meeting to have before them a document of this kind, which enables them to study the particulars of the business which is going to come before the meeting.

The defence, as I have said, relied on certain statutory provisions. For the present purpose, it is not necessary to go into the details of the provisions or to see exactly how the present law with regard to giving notice of meetings of borough councils has come into being. It is sufficient to say that, by the London Government Act, 1899, the powers of vestries were transferred to borough councils, and that, by the Metropolis Management Amendment Act, 1856, s. 9, provision is made for giving notice of meetings of vestries (now replaced by borough councils) in these words:

> Every meeting of any vestry constituted by the Metropolis Management Act, 1855 . . . may be convened by transmitting through the post or otherwise notice, signed by the clerk to the vestry, to each vestryman, at his usual or last known place of abode in England, of the place and hour of holding the same, and the special purposes thereof, three days before the day appointed for such meeting, and also by affixing at the same time notice thereof on or near the door of any building where the said meeting is to be holden . . . A

Then the section goes on to provide that it shall not be necessary for notice of any such meeting to be further or otherwise signed or published. B

It is perfectly clear that that section is limited to the giving of notice to the members of the council and to the affixing of the notice on the town hall. It neither provides for, nor justifies, the sending of the notice in this case to the public libraries of the borough. Nevertheless, the defence, in para. 14, says this:

> The defendant council, in ordering copies of the notice of all meetings to be sent to the public libraries in the borough, were acting under the implied power conferred on them by the Metropolis Management Amendment Act, 1856, s. 9, and in discharge of the duty imposed upon them by the said section to give public notice of every meeting of the said council. C

That paragraph, in my opinion, entirely lacks justification. Assuming that the publication of this document to the public libraries was the publication of a defamatory document, no foundation for a plea of privilege is to be found in the assertions contained in the defence. D

Before I leave the section relied on, I may refer to an argument which was put forward in support of the allegation relied upon in the defence—namely, that the notice which the section requires to be affixed to the town hall must be one which not merely sets out in sufficiently explanatory terms the agenda for the meeting but also contains all the full particulars, documentary and otherwise, which are going to be referred to at the meeting and which it is obviously convenient for the councillors themselves to have. It is said that a E notice which falls short of that is not a notice of the special purposes of the meeting. I cannot accept that view. It seems to me that all that the statute requires and justifies is the giving of a notice which specifies with sufficient clarity what the special purposes of the meeting are going to be, and that to rely upon the section as justifying the publication of a report of a committee, which is going to be considered at the meeting, is not possible under the language of a section which is considering something much more limited and practicable. F In the ordinary way, of course, it matters not a bit if the council, for reasons of policy or convenience, think it desirable to put the whole of a document like this outside the town hall for public inspection. When the document contains defamatory matter, however, the situation becomes entirely different, and what might have been a perfectly harmless act on the part of the council, done from *bona fide* reasons of convenience, becomes something which the G section, in my judgment, does not justify.

The defence based on that paragraph, and on sect. 9 of the Act of 1856, was one which, as I have said, really did not bear investigation, and accordingly counsel for the respondents made a formal application for leave to amend the defence by inserting a new paragraph, not based on the statutory provisions to which I have referred, and alleging that the council had a common interest with the ratepayers in the borough in the subject-matter of the words complained H of, and that it was the duty of the council, or it was reasonably necessary or proper for them, or else it was both the duty of the council as well as being reasonably necessary or proper for them for the conduct of their business, to publish the words complained of to the ratepayers by all reasonable and convenient means. I have not read the paragraph textually, but that is the gist of it.

It appears, and counsel for the appellants very properly admitted, that in the court below the argument proceeded on the basis of such a plea, a plea which, as I have already said, is not to be found in the defence as delivered. I wish to say, as I have said more than once, that, in cases where any important deviation from the pleadings takes place, either in accordance with the ruling of the judge or by the tacit consent of counsel at the trial, it is of the utmost importance that that deviation should be put into the form of a proper amendment to the pleadings, that the amendment should be formally applied for, and that the judge should formally rule upon it. I take the view very strongly that it is the duty of counsel in conducting a case to see that that procedure is regularly followed. If it is not, difficulties always arise in this court. However, the actual amendment in the present case was admitted by counsel for the appellants, as I have said, to embody the substantial argument which was adduced below. We accordingly allowed the amendment to be made, and the whole question for us to consider in this appeal is whether or not the claim of privilege which is set up by the amendment is established. The requirements for such a plea can be taken, of course, from many passages in judgments, but they are very conveniently stated in a passage in the opinion of LORD ATKINSON in *Adam* v. *Ward* (1) to which DU PARCQ, L.J., referred in the course of the argument. LORD ATKINSON said, at p. 334:

> It was not disputed, in this case on either side, that a privileged occasion is, in reference to qualified privilege, an occasion where the person who makes a communication has an interest or a duty, legal, social, or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential.

I prefer myself that language which requires the interest or duty to be an interest or duty to make the particular communication in question to language which is sometimes found which refers to an interest in the subject-matter of the communication. The latter phrase appears to me to be vague and to leave uncertain what degree of relevance to a particular subject-matter the communication has to bear. However, adopting the language of LORD ATKINSON, we have to consider, in the first instance, what interest or duty the council had to communicate to the ratepayers the report of a committee which the council was proposing to take into its consideration, and which contained not merely statements with regard to the administration of the petrol supply and with regard to the steps which had taken place, but also set out the names of employees who had been accused of complicity in those thefts and made the report and recommendation in relation to them to which I have already referred.

I cannot myself see that it can possibly be said that the council was under any duty to make that communication to the ratepayers. The matter was at that stage, in a sense, *sub judice*, because the committee's report by itself was a thing which could have no practical value unless and until it had been taken into consideration by the council and the council had come to some decision upon it. That decision might have been that the report be adopted, or it might have been that the report be not adopted, or it might have been that the report be referred back to the committee. The appointment of committees of that kind is part of the internal management and administration of a body of this description, and, whatever the duty or the interest of the council might have been after it had dealt with the report and come to some decision upon it, I cannot myself see that at that stage in the operation of the machinery of the borough's administration there was any duty whatsoever to tell the ratepayers how the wheels were going round. There may well have been a duty of the council, or, if not a duty, at any rate an interest in the council, to inform the ratepayers of the result of its own deliberations.

If I am right in thinking that there was no duty to make the communication to the ratepayers at that stage, was there an interest in the council to do so? There, again, I cannot see how it can be said that the council had, at that stage of the inquiries, an interest to communicate to its ratepayers the circumstance that the committee had reported in those terms. It is perfectly true—and, indeed, obvious—that the committee itself had both an interest and a duty to make a report to the council, but there could be no common interest, as far as I can see, between the council and the ratepayers to have what, in the circumstances, was only a preliminary stage in the investigation communicated to the ratepayers in the form in which it was communicated. Indeed, counsel for the respondents was constrained to agree, and I think that his argument logically compelled him to agree, that the line could not be drawn at the formal reports of committees. If his argument was right, he conceded that, if the council received from an outside source a letter charging either some member of the council or some employee of the council with, let me say, dishonesty, and the council was proposing at a meeting to consider that communication, it would have an interest and a duty in common with its ratepayers to communicate to the ratepayers, not merely the fact that it was going to investigate a charge against an un-named member of its body or an employee, but also the actual terms of the letter making the charge as well as the name of the person charged.

In my judgment, it would be insufferable if the council, which must be expected to act on reasonable lines, should be in a position to say that a communication of that kind of a matter which is going to be examined and is on the face of it clearly defamatory is a thing which it has an interest or a duty to publish broadcast to its ratepayers. In the present case, of course, it is not so extreme as that, in the sense that the matter, when it was to be brought before this meeting of the council, had been the subject of investigation by a committee, but, as I have pointed out, that did not bring the matter to a stage where any effective action was necessarily going to be taken or where any confirmation of the report by the council was to be assumed.

I have dealt with the question of the interest or duty of the council, and, looking at the other side of the picture, I cannot myself see what interest or duty the ratepayers had to receive the communication. That ratepayers are interested in the proper administration and safeguarding of their property is, of course, obvious. That they are interested in the way in which their council conducts its business is, of course, obvious, but what I may call the internal working of the administrative machine, and all the details of its domestic deliberations, in a case of this kind, are things in which I should have thought ratepayers are not interested unless and until they emerge in the shape of some practical action or practical resolution. The result, therefore, upon the whole case, is that, in my opinion, contrary to the view taken by the judge, the plea of privilege cannot be made good.

Before I leave the case, I ought to refer, for the purpose of distinguishing it, to *Hunt* v. *Great Northern Ry. Co.* (2), which was relied upon on behalf of the respondents. I refer to that case because it brings out very clearly, in my judgment, the distinction between a case where there was an obvious interest to make the communication and an obvious interest to receive it and a case such as the present, where that could not be said. It was a case where the defendant railway company had dismissed a guard in their service on the ground that he had been guilty of gross neglect of duty. They published his name in a printed circular which they distributed among their servants, and they stated that he had been dismissed and gave the grounds of his dismissal. I should have thought that, but for the fact that it was argued, it could scarcely have been argued in that case that the occasion was not one which made the communication a privileged one, because it was clearly to the interest of the railway company to bring home to its employees the type of action which was regarded by it as a proper subject for punishment by dismissal, and it was to the interest of the employees to know that too. There, however, the matter was not in the stage of deliberation, as was the case in the present case. It was an action which had been definitely taken. I cannot help thinking that the decision would have been very different in *Hunt's* case (2) if the railway company, before the meeting of the board or whatever it was that decided to take this action, had published to the employees the facts that a man had been charged with this gross neglect of duty and that the directors were proposing to consider it at their next meeting. That would have put a totally different complexion on the case. In my opinion, this appeal succeeds.

I have dealt with the publication in the public libraries as though it were merely a publication to ratepayers, and, on the basis of its being a legitimate publication to ratepayers. the amended defence was drawn. I did not find it necessary to deal with the argument that, even if, as a communication to ratepayers, privilege had been established for it, nevertheless a communication which laid the whole matter open to those who frequent the public libraries was not justified. I mention this point only because I do not wish it to be thought that I am expressing any opinion one way or the other on that matter.

GODDARD, L.J.: In differing from the judge, I will add a few words to the judgment which LORD GREENE, M.R., has just delivered, and with which I entirely agree. The only plea which was originally set up in the defence was not, in my view, a plea of privilege at all. It was a plea that the council were not only justified in publishing what they did, and in the manner in which they did it, but were obliged so to publish it by virtue of the Metropolis Management Amendment Act, 1856, s. 9. Quite apart from the facts that that Act provides for notice of a meeting of the vestry (now the borough council) to be given by affixing a notice to the door of the town hall, and that this notice was sent to the public libraries, the statute does not, in my opinion, justify the council in doing, or oblige them to do, anything approaching what they did in this case. Of course, if it had justified them in publishing, or obliged them to publish, this report on the door of the town hall, the fact that they also sent it to the public libraries would have a very great bearing on the question of damages, because, if the statute required the borough council to broadcast this matter by affixing it on the door of the town hall, the fact that a little extra publicity was given to it by sending it to the public libraries would, at any rate, show that the plaintiffs were entitled to no more than nominal, or something approaching nominal, damages. The statute, however, does nothing of the sort.

What the statute requires is that, when a borough council are going to hold a meeting, notice of the time and place at which the meeting will be held is to be given, and the special purposes for which it is being held are to be stated. The fact that they are told to state the special purposes does not require them to publish libels. It may be that in some particular case the circumstances may be such that it is almost impossible not to put up a defamatory notice, or a notice which may be defamatory. For instance, if one of the special purposes for which the meeting of the borough council was convened was to consider the dismissal of a certain official, I suppose that a notice which said that the special purpose of the meeting was to consider the dismissal of A.B., the medical officer or the town clerk, or whoever it might be, would be justified under the statute, although it might be that it would be said to be defamatory. The fact that they are told to publish the special purposes of the meeting, however, does not mean that they are to publish the reports and so forth which will be considered at the meeting.

The special purpose for which this meeting of the council was held was the consideration of various reports, and, so far as the case we are now considering was concerned, all that the statute required was that the notice should have stated that among the purposes of the meeting was the consideration of the report of a special committee appointed to inquire into the loss of petrol from the council's Gunthorpe Street depot. That was all. The council no doubt found it convenient to send out to all their members the full agenda of the business which would be brought before them at the meeting, and the councillors no doubt desired that, if a report was to be considered at the meeting, a copy should be sent to them, and of course there is no doubt that the council do send a copy of any report to the councillors, or cause a copy to be sent. Privilege at once obtains to that publication as between the council and the councillors. However, although they may find it convenient, for the purposes of complying with the statute, to put up the full agenda on the town hall door, if they or their advisers are of opinion that the section justifies them in thus making public a libel which there is no necessity for them to make public, the sooner they alter their practice the better, because the statute is no defence whatever.

With regard to the amended defence, I can add very little to what has been said by LORD GREENE, M.R. I can see no ground whatever for saying that, because a committe which has been appointed to inquire into a certain matter has made a report to the council, which the council may or may not adopt, and which they may consider without mentioning names until they have decided whether or not to adopt the report adversely to the people named in it, the council can have any interest in informing their ratepayers of the contents of that document, which is, indeed, a confidential document between the committee and the council. If it were otherwise, a very serious state of affairs would result. I expect that borough councils, like other public bodies and public officials, get many letters making charges or complaints against people, both their own members or officials and other ratepayers who are resident in the borough. If it were to be held that the publication of this document was privileged and that the council had an interest in communicating it to the ratepayers, we should have to hold that any council which adopted the course of putting in their agenda libellous letters which they might have received by way of complaint and then broadcasting them by posting them outisde the town hall would be protected.

It might well be, also, that highly confidential documents would be received by the council and would have to be considered at a council meeting. For instance, complaints in regard to the conduct of a high official might be made direct to the Minister of Health by some disgruntled ratepayer. The Ministry of Health might send off that complaint, which might be wholly libellous, and which might do untold damage to the individual, and ask the council's observations upon it. Can it be said that the council would be justified in publishing that letter which they received from the Minister of Health, or from any other government department, merely because they were going to take it into consideration at their meeting ? They might come to the conclusion that it was absolutely groundless. I can see no ground whatever for saying that the occasion on which this document was published comes within the orbit of the privilege which attaches to the occasions on which documents are published where the persons publishing them and the persons to whom they are published have a common interest. In my opinion, there is no ground whatever for saying that this was a privileged occasion, and, consequently, the appeal succeeds.

du Parcq, L.J. : I agree, and I might say that I have nothing to add to the reasons fully set out in the judgments which have been delivered, but for the fact that I should like to say a few words about *R.* v. *Rule* (3), which was cited to us by counsel for the respondents and was also cited, I understand, to the judge below. That case was decided in the Court of Criminal Appeal, to which I was a party. I still feel no doubt that it was correctly decided, and I think also, if I may say so, that the reasons given for the decision were right. It seems to me to be a very long way from deciding anything which can give support to the arguments of the defendants here. What that case decided may be stated shortly. The court had to assume that the defendant in that case had acted honestly and with a belief in the truth of his statement. He was an inhabitant of Southampton, and, according to him, he had evidence of gross and criminal misconduct on the part of an important member, or on the part of important members, of the local police force. Nobody can doubt that he had an interest to communicate such facts, if facts they were, if not a duty to do so, to the Secretary of State for Home Affairs, and the only question before the court was whether, if, in order to effect the object of acquainting the Secretary of State with those facts, he approached the Secretary of State through the Member of Parliament for the Division, it could be said that there was a sufficient interest in the Member of Parliament to receive the complaint. The court said that there was.

It seems to me to be a result which would not startle anybody, because most people would say, I imagine, that a constituent was fully entitled to seek the aid of the Member representing the Division to bring alleged facts reflecting on the conduct of a public official before the Minister of the Crown responsible for dealing with them. That, and that alone, was decided by that case. To find an analogy to the present case—and I am not sure that it would not be a perfectly clear analogy—one would have to assume (if such an assumption might for a moment be made without any reflection on Members of Parliament, because I am assuming something which is very unlikely to happen in fact) that a Member of Parliament receiving such information from a constituent were to say, " It is to my interest to show how vigilant I am in all that concerns my constituency," and, in order further to protect that interest, were to read out to a meeting of his electors, whom he would say were equally interested in the conduct of public officials in the Division, those highly defamatory statements which had been handed to him for transmission to the Secretary of State for further consideration. I cannot imagine any person of reasonable intelligence, to say nothing of any court of law, holding that in such a case a legitimate interest was being furthered or protected by what the Member of

Parliament had done. As I have said, there is no support in *R.* v. *Rule* (3) for the argument of the defendants, and I have only to add once more that I agree entirely with what has been said by LORD GREENE, M.R., and by GODDARD, L.J.

Appeal allowed with costs. New trial ordered.

Solicitors: *Pattinson & Brewer* (for the appellants); *J. E. Arnold James* (for the respondents).

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

Re HUNTER'S LEASE, GILES *v.* HUTCHINGS.

[CHANCERY DIVISION (Uthwatt, J.), **November 19, 1941.**]

Landlord and Tenant—Lease—Covenant running with the land—Proviso for payment of £500 if lease not renewed—Liability of assignee of reversion.

The effect of a proviso in a lease for a term of 5 years was that at the expiration of the term the landlord came under an obligation to pay £500 to the tenant, subject to the qualification that, if the tenant was willing to acquiesce in the non-payment of this sum, he might continue in occupation, in which case the landlord was bound to grant him a lease for a further term of five years, such new lease to contain all the provisions which appeared in the original lease. On the expiration of a second term of five years the plaintiff was unwilling to continue the tenancy, and claimed from the defendant, to whom the original landlord had assigned the reversion, the sum of £500 under the above proviso. The defendant contended that the burden of the covenant did not run with the land:—

HELD: the proviso did not touch and concern the land so as to run with the reversion, and the burden of such a covenant could not be enforced by the tenant against an assignee of the reversion.

[**EDITORIAL NOTE.** The main argument urged on behalf of the landlord was that, since a covenant for renewal has been held to run with the land and bind the assignee of the reversion, this covenant, which was in effect a covenant for renewal, should be subject to the same rule. It is pointed out, however, that the decision that a covenant of renewal runs with the land is regarded as an extension of the principle and that it has been said that no further extension in that direction ought to be allowed. A renewal of the lease, it is said, does not really touch or concern the land, and the decisions to the effect that such a covenant runs with the land are difficult to justify. The judge has taken the view that a decision to the effect that the liability to pay the sum of £500 under the proviso here considered would be an extension of the principle, and, as the Court of Appeal had clearly said that it ought not to be extended, such a decision would be wrong in the circumstances of this case.

AS TO COVENANTS RUNNING WITH THE LAND, see HALSBURY, Hailsham Edn., Vol. 20, pp. 356-359, paras. 431-435; and FOR CASES, see DIGEST, Vol. 31, pp. 68, 69, Nos. 2159-2163.]

Cases referred to:

(1) *Thomas* v. *Hayward* (1869), L.R. 4 Exch. 311; 31 Digest 156, *2897*; 38 L.J.Ex. 175; 20 L.T. 814.

(2) *Dewar* v. *Goodman*, [1909] A.C. 72; 31 Digest 145, *2806*; 78 L.J.K.B. 209; 100 L.T. 2.

(3) *Inchiquin* (*Earl*) v. *Burnell* (1795), 3 Ridg. Parl. 376, 420, 422, 424; 31 Digest 143, case *2786 i.*

(4) *Hill* v. *Booth*, [1930] 1 K.B. 381; Digest Supp.; 99 L.J.K.B. 49; 142 L.T. 80.

(5) *Woodall* v. *Clifton*, [1905] 2 Ch. 257; 30 Digest 473, *1357*; 74 L.J.Ch. 555; 93 L.T. 257.

SUMMONS to determine, *inter alia*, whether a tenant was entitled to the payment of the sum of £500 under a proviso contained in his lease.

By a lease, dated Dec. 1, 1930, the landlord, Samuel Hunter, demised certain premises forming part of No. 24, Palace Avenue, Paignton, in the county of Devon, to Henry Bowden Giles, the plaintiff in the present action, for a term of 5 years from Sept. 29, 1930, at the rent therein mentioned. The terms of the lease included a proviso as follows:

Provided also that the term hereby created shall be determinable at any time during the said term by the lessee upon giving the lessor three calendar months' notice

> in writing expiring on any quarter day and at the expiration of the term hereby created or the sooner determination thereof by the lessee as aforesaid the lessor shall forthwith pay to the lessee the sum of £500. In the event of the lessor being for any reason unwilling upon such expiration or determination to pay to the lessee the said sum of £500 then the lessee may at his option continue in occupation of the demised premises and the lessor shall in such case grant to the lessee a lease of the demised property for a further term of 5 years to commence from the expiration of the term of 5 years hereby created and to contain similar conditions as to determination by the lessee and payment to him of a similar sum by the lessor such lease to be again if required by the lessee and in lieu of the immediate payment of the said sum of £500 similarly renewed by the lessor from time to time until the lessor shall pay to the lessee the said sum of £500 the lease to be in similar form and upon the same terms as hereinbefore contained. Provided nevertheless that in the event of the lessee not desiring so to continue in occupation of the demised premises after determination by him in manner aforesaid of the term hereby created the lessee shall be entitled to the payment by the lessor of the said sum of £500 forthwith.

The landlord being unwilling to pay the sum of £500 on the expiration of the term of 5 years on Sept. 29, 1935, the tenant agreed to continue in occupation for a further term of 5 years from the date of such expiration. By a conveyance, dated Nov. 24, 1938, the landlord assigned the premises to Ernest Hutchings, the defendant in the present case, in fee simple, subject to and with the benefit of the lease. On the expiration of the further term on Sept. 29, 1940, the tenant was not desirous of further continuing the tenancy. He gave up possession of the premises, and the tenancy ceased. The tenant claimed from the defendant on such expiration the payment of the sum of £500 under the above proviso.

Michael Bowles for the plaintiff.

Hubert Rose for the defendant.

UTHWATT, J.: In my judgment, the proper construction of this lease is that, at the expiration of the term of five years granted by the lease, the landlord came under an obligation to pay to the tenant the sum of £500, subject to the qualification that, if the landlord did not for any reason wish to pay that sum, and if the tenant was willing to acquiesce in non-payment, then the tenant might continue in occupation, and in that case the landlord became bound to grant to the tenant a further lease of the demised property for a further term of 5 years, such new lease to contain all the provisions which appeared in the original lease. The parties to this suit are the original tenant and the estate owner of the premises leased, who bought the reversion of the lease from Samuel Hunter, the original landlord.

The question which I have to determine is whether the present reversioner is bound under that covenant to pay the sum of £500 to the tenant, for the tenant did not desire to continue in occupation at the expiration of the second term, and insisted upon the performance of the obligation. So far as the terms of the lease itself are concerned, "the lessor" is defined as including:

> . . . the estate owner or estate owners for the time being of the reversion of the premises hereby demised expectant on the term hereby granted.

Thus, the lease upon its terms, as a matter of English language, throws upon the landlord for the time being the obligation to pay the £500. However, that, of course, is not conclusive. The question is whether the burden of that obligation passes on the assignment of the reversion. The position at law, as I understand the matter, is this. At common law, the assignee of a reversion is not liable to the tenant in respect of any of the covenants and conditions contained in the lease. That appears to be the orthodox view, and is so stated in WILLIAMS AND SAUNDERS. In that state of circumstances, the statute, Grantees of Reversions and Lessees, 1540, provided, in substance, that the tenants were to have the like remedies on covenants and conditions contained in the lease against assignees of the reversion as they had against the original grantor of the lease. That Act was replaced by the Conveyancing Act, 1881, s. 11, and the provision which is now in force is to be found in the Law of Property Act, 1925 s. 142 (1), which, so far as it is material, provides as follows:

> The obligation under a condition or of a covenant entered into by a lessor with reference to the subject-matter of the lease shall, if and as far as the lessor has power to bind the reversionary estate immediately expectant on the term granted by the lease, be annexed and incident to and shall go with that reversionary estate, or the several parts thereof, notwithstanding severance of that reversionary estate, and may be

taken advantage of and enforced by the person in whom the term is from time to time vested by conveyance, devolution in law, or otherwise. . . .

Prior to the passing of the Conveyancing Act, 1881, it had been decided that the burden of covenants by the landlord contained in a lease did not pass to his assignee unless those covenants touched and concerned the thing demised, and there is authority for the view that, in construing the Conveyancing Act, 1881, and so also in construing the Law of Property Act, 1925, the ambit of the covenants the burden of which passes to the assignee of the reversion for the time being remains the same as it was before the passing of the Conveyancing Act, 1881. One is left, therefore, with the old question whether the covenant in question touches and concerns the thing demised. Upon the question whether particular covenants touch and concern the thing demised, there is a wealth of authority in the case of covenants entered into by tenants. There is less authority in the case of covenants entered into by landlords, for covenants by landlords are in fact less common than covenants by tenants, but it appears to me that the principles which govern the two cases are exactly the same. A good many authorities which have been cited to me are directed to showing what is meant by the phrase "touch and concern the thing demised." One important authority is *Thomas* v. *Hayward* (1). The headnote in that case is as follows :

> Where in a lease, the lessee having covenanted to use the demised premises as a public-house, the lessor covenants not to build or keep any house for the sale of spirits or beer within half-a-mile of the demised premises ; the lessor's covenant does not run with the land so as to enable the assignee of the lease to sue him upon it.

In his judgment, CHANNELL, B., put the point of the decision quite shortly. He said, at p. 312 :

> A covenant runs with the land only when it touches, that is, when its operatiod directly, and not merely collaterally, affects the thing demised. It cannot be sain that this covenant does so.

That case was approved by the Court of Appeal in *Dewar* v. *Goodman* (2). There is no doubt, to my mind, that, if the covenant in this case had been merely a covenant on the part of the landlord to pay a sum of £500 on the expiration or sooner determination of the lease, the burden of that covenant would not have fallen upon the assignee of the reversion. The interest included in the demise would not be affected by such a covenant. Valuable as it might be to the tenant, it would not in any sense touch or concern the interest which is the subject-matter of the lease. As I understood the argument of counsel for the plaintiff, he was not prepared to dispute this, and, indeed, in the light of *Inchiquin* (*Earl*) v. *Burnell* (3) and *Hill* v. *Booth* (4), he could not very well do so. However, he puts his point in this way. He says that this covenant for the payment of £500 was never intended to stand alone, that it was merely part of the arrangement which governed the continued occupation by the tenant of the premises under the lease, that it is erroneous to regard the tenant as having a lease for a term of five years only, and that what the tenant had in substance was much more, that he had a lease of five years under which he had a right to go on, the landlord being entitled to avoid that right by paying the sum of £500. He argued, and argued with some force : "If a covenant for renewal touches and concerns the thing demised, why does not this covenant also touch and concern the thing demised ?" I regret that I am unable to accept that argument. In the first place, I have to bear in mind what was said by the Court of Appeal in *Woodall* v. *Clifton* (5). In that case, ROMER, L.J., delivering the judgment of the court upon the question whether an option to purchase contained in a lease ran with the lease so that an assignee of it could take advantage of it, first of all dealt with the nature of such an option, and said, at p. 279 :

> The covenant is aimed at creating, at a future time, the position of vendor and purchaser of the reversion between the owner and the tenant for the time being. It is in reality not a covenant concerning the tenancy or its terms. Properly regarded, it cannot, in our opinion, be said to directly affect or concern the land, regarded as the subject-matter of the lease, any more than a covenant with the tenant for the sale of the reversion to a stranger to the lease could be said to do so. It is not a provision for the continuance of the term, like a covenant to renew, which has been held to run with the reversion, though the fact that a covenant to renew should be held to run with the land has by many been considered as an anomaly, which it is too late now to question,

though it is difficult to justify. An option to purchase is not a provision for the shortening of the term of the lease, like a notice to determine or a power of re-entry, though the result of the option, if exercised, would or might be to destroy the tenancy. It is, to our minds, concerned with something wholly outside the relation of landlord and tenant with which the statute of Henry VIII was dealing.

One has, therefore, the authority of the Court of Appeal on two points—namely, (i) that an option to purchase given to the tenant does not touch and concern the thing demised, and (ii) that the rule which treats as running with the lease the benefit of the covenant for renewal is difficult to justify. Returning to the particular covenant which I have to consider here, I think that the primary obligation is the obligation of the landlord to pay £500 on the expiration or determination of the lease. If he does not wish to pay it, and if the tenant acquiesces, the tenant may continue in possession and require a new lease. That is merely an alternative, however, and it needs the concurrence of both parties in order to bring the alternative into operation. Neither party can force upon the other a renewed tenancy. To hold that the burden of the covenant which is here in question runs with the reversion would be to extend the operation of the rule, stated by the Court of Appeal to be anomalous, that a covenant to renew touches and concerns the thing demised. I hold, therefore, that the defendant in this case, the assignee of the reversion, is not personally responsible for the payment of the sum of £500.

No order as to costs.

Solicitors: *Gibson & Weldon*, agents for *Tucker & Jenkins*, Paignton (for the plaintiff); *Walter Crimp & Co.*, agents for *Kitsons, Hutchings, Easterbrook & Co.*, Torquay (for the defendant).

[*Reported by* Irene G. R. Moses, *Barrister-at-Law.*]

OWENS *v.* MINOPRIO.

[King's Bench Division (Viscount Caldecote, L.C.J., and Hilbery and Asquith, JJ.), **December 2, 1941.**]

Magistrates—Summons—Withdrawal of summons—Withdrawal on ground of informality—Whether bar to second summons.

Upon the hearing of an information preferred against the respondents under the Defence (General) Regulations, 1939, reg. 22 (8), for failing to comply with the requirements of a billeting notice, it appeared that there had been an informality in the service of the notice. With the permission of the magistrates, the prosecution withdrew the summons. A second information was then proceeded with. The respondent contended that the court had no power to hear the second information on the ground that the complaint on which it was founded was disposed of on the withdrawal of the first summons:—

Held: the magistrates should have heard the second information. The first having been withdrawn with the court's permission, the appellant had not been put in peril, and the withdrawal was, therefore, no bar to further proceedings.

[**EDITORIAL NOTE.** It would seem that the case of *Pickavance* v. *Pickavance* (1) has been cited in text-books for the proposition that an information withdrawn with the permission of the magistrates is a bar to subsequent proceedings. In the case of a summons withdrawn upon the ground of informality, the accused has not been put in peril and he could not, therefore, plead *antrefois acquit* to a second information based on the same facts. The withdrawal of the summons in such circumstances is not a bar to further proceedings and, in so far as the case has been cited for that proposition, it is here shown that it cannot upon examination support it.

As to Withdrawal of Summons, see HALSBURY, p. 606, para. 1052; and for Cases, see DIGEST, Vol. 33, pp. 331, 332, Nos. 438-442.]

Cases referred to:

(1) *Pickavance* v. *Pickavance*, [1901] P. 60; 33 Digest 331, *438*; 70 L.J.P. 14; 84 L.T. 62.

(2) *R.* (*McDonnell*) v. *Tyrone JJ.*, [1912] 2 I.R. 44; 33 Digest 331, case *440*.

(3) *Davis* v. *Morton*, [1913] 2 K.B. 479; 33 Digest 331, *441*; 82 L.J.K.B. 665; 108 L.T. 677.

Special Case Stated for the opinion of the King's Bench Division of the High Court of Justice. The facts are fully set out in the judgment, but it should be added that the informality in the first information was that a billeting notice had been served by a person who was not authorised to do so by the regulations.

Valentine Holmes for the appellant.

The respondent did not appear and was not represented.

Viscount Caldecote, L.C.J.: In this case, I think that the magistrates came to a wrong decision. Indeed, as the special case upon which the appeal arises says, if the magistrates' attention had been called to a decision which they mention, they would not have arrived at the result which they reached. The information which they dismissed was preferred against the respondent by the superintendent of police for the division of Pwllheli for having failed to comply with the requirements of a billeting notice. An earlier information had been preferred against the same man, but by a different person—namely, one Robert William Roberts—in respect of an alleged offence arising out of the same circumstances. It appeared that there was an informality in the first information before it was heard by the magistrates, and an application was made by the appellant in the present appeal, in the presence of the respondent, for the withdrawal of the summons. Thereupon the second information was proceeded with, and the respondent took the objection that he had already been put in peril—for that is what the objection amounted to—by the information which had been withdrawn. The magistrates acceded to that submission. They did so under the impression (which they seem now to agree was a mistaken one) that they were required to do so by the decision of the Divisional Court in *Pickavance* v. *Pickavance* (1). The headnote to that case is as follows:

> The withdrawal of a summons under the Summary Jurisdiction (Married Women) Act, 1895, has the effect of putting an end to the complaint in respect of which it is issued, and, after the withdrawal, no fresh summons can be issued upon the same cause of complaint.

In that case, an information alleging cruelty had been preferred by a wife against her husband, and a separation order was asked for. Before the information was laid, two similar informations had been sworn by the wife. The second of those informations, like the information which was actually before the court in the appeal in the Divisional Court, was out of time, not having been made, as the Summary Jurisdiction (Married Women) Act, 1895, requires, within six months from the time when the subject-matter of the complaint arose. Sir Francis Jeune, P., in giving judgment, referred to the principle [p. 63]:

> . . . whether the withdrawal of a summons amounted to a complete withdrawal of the complaint so that it could not be proceeded upon.

Having said that there was no express authority on the point, he stated that he was clearly of opinion [p. 63]:

> . . . that the effect of the withdrawal of the summons in this case was to put an end to the complaint . . .

However, he proceeded to say that it was not necessary to go as far as that, because in fact the complaint which was before them was out of time, and that was a sufficient ground upon which to dismiss it. It is quite true that Sir Francis Jeune, P., having expressed that opinion, proceeded to refer again to the point which he said it was not necessary to decide in the case—namely, that the withdrawal of the summons could take place only " by leave of the justices or the magistrate," and that, the complaint having been withdrawn, it was not possible to prefer another complaint arising out of the same circumstances or making the same case. In the view which I have formed, although those statements by Sir Francis Jeune, P., come from a judge of great authority, they are not an actual decision to the effect stated in the headnote. They are no more than an expression of the opinion of Sir Francis Jeune, P., upon a point which it was not really necessary to decide in that case. Therefore, that case is not an authority for the proposition stated in the headnote, and the effect of the decision seems to me to be not to the effect stated in the textbooks, particularly in the extract from Stone's Justices' Manual, to which reference wsa made in the course of the argument by Hilbery, J.

The case of *Pickavance* v. *Pickavance* (1), in so far as it is a decision to the effect stated in the headnote, seems to me to have been disapproved of in two cases, *R.* (*McDonnell*) v. *Tyrone JJ.* (2), a case before the Irish Divisional Court, over which PALLES, C.B., presided, and *Davis* v. *Morton* (3). Those two cases are actually decisions to the effect that, when a withdrawal of a summons is permitted by magistrates, not on the merits of the case, but on a preliminary point, the withdrawal is not equivalent to a dismissal or an acquittal. That last statement was made by PICKFORD, J., in his judgment in *Davis* v. *Morton* (3).

The basic principle of the plea *autrefois acquit* is that the person charged has already been put in peril, and no man is to be put in peril twice in respect of the A one charge. In this present case, there was no withdrawal of the summons upon the merits. There was a withdrawal, with the consent of the magistrates, in consequence of an informality in the proceedings. In my judgment, the magistrates should have proceeded to hear this summons, and should not have taken the course which they did, apparently on the authority of *Pickavance* v. *Pickavance* (1). I may add that I think that it is highly desirable that *Pickavance* v. *Pickavance* (1) should cease to appear in the books as an authority to the effect B stated by the magistrates in their first decision, and that it should be appreciated that the only decision in *Pickavance* v. *Pickavance* (1) was that the information was out of time. It certainly is not a decision, especially in view of subsequent cases, to the effect that the withdrawal of the summons in any circumstances is a bar to subsequent proceedings. I think that the magistrates arrived at a wrong decision in this case, and the matter should be remitted to them with an C expression of our opinion to that effect.

HILBERY, J.: I concur.

ASQUITH, J.: I concur.

Solicitors: *A. Evan Davies & Co.*, agents for *Evan R. Davies & Davies*, Pwllheli (for the appellant).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

D

Re SKINNER, MILBOURNE *v.* SKINNER.

[CHANCERY DIVISION (Morton, J.), **November 4, 7, 1941.**]

Rentcharges and Annuities—Annuities given free of all deductions—Right to deduct income tax. E

The testator gave his son an annuity of £500 and by a later clause of his will he gave his son a further gift of " such a sum not exceeding £500 per annum as will bring his income up to £1,000 per annum " :—

HELD: these annuities were subject to deduction of income tax before payment. Annuities given by a will are subject to deduction of income tax unless there is a sufficient direction to the contrary. Neither the words F " free of all deductions " nor the words " clear annual sum " are a sufficient direction. The position is the same where the annuity is paid out of funds which have already borne income tax.

[**EDITORIAL NOTE.** There have been several cases reported recently upon the question of the payment of annuities free of tax. In his judgment herein, MORTON, J., has stated the principles governing such cases with a reference to the authorities, and has given a very useful epitome of the law on the point. G

AS TO DIRECTION TO PAY WITHOUT DEDUCTION, see HALSBURY, Hailsham Edn., Vol. 28, pp. 214-216, paras. 386, 387; and FOR CASES, see DIGEST, Vol. 39, pp. 166, 168, Nos. 572-593.]

Cases referred to:

(1) *Re Sharp, Rickett* v. *Rickett*, [1906] 1 Ch. 793; 28 Digest 67, *348*; 75 L.J.Ch. 458; 95 L.T. 522.

(2) *Re Cain's Settlement, Cain* v. *Cain*, [1919] 2 Ch. 364; 28 Digest 67, *349*; 88 L.J.Ch. 513; 121 L.T. 496. H

(3) *Re Loveless, Farrer* v. *Loveless*, [1918] 2 Ch. 1; 39 Digest 167, *585*; 87 L.J.Ch. 461; 119 L.T. 24.

(4) *Re Wells' Will Trusts, Public Trustee* v. *Wells*, [1940] Ch. 411; [1940] 2 All E.R. 68; Digest Supp.; 109 L.J.Ch. 261; 162 L.T. 422.

(5) *Lethbridge* v. *Thurlow* (1851), 15 Beav. 334; 39 Digest 166, *575*; 21 L.J.Ch. 538.

(6) *Sadler* v. *Rickards* (1858), 4 K. & J. 302; 39 Digest 166, *576*; 31 L.T.O.S. 396.

(7) *Gleadow* v. *Leetham* (1882), 22 Ch.D. 269; 39 Digest 167, *581*; 52 L.J.Ch. 102; 48 L.T. 264.

(8) *Re Saillard, Pratt* v. *Gamble*, [1917] 2 Ch. 401; 39 Digest 167, *584*; 86 L.J.Ch. 749; 117 L.T. 545.

SUMMONS taken out by the trustees to determine questions of construction arising on the will of the testator, William Moore Skinner. The testator during his life made an agreement with his son, Charles Blackett Skinner, whereby he paid the latter the annual sum of £150 during the testator's life, to be increased to £500 after the testator's death, until the son should assign, charge or otherwise dispose of the same or some part thereof, with a gift over up to £300 per annum to the latter's wife, Ethel Mary Goldie Skinner, if she should survive him, on similar terms. The testator made his will on Oct. 11, 1916, and appointed his nephew, Robert John Milbourne, and his friends, R. W. Foster and E. A. Cotton, to be the executors and trustees thereof. The will recited the above agreement, and cll. 9, 13 and 16 are as follows:

> 9. I authorise my trustee in pursuance of the contract referred to in para. 3 hereof out of the income of my estate to pay to the said Charles Blackett Skinner the yearly sum of £500 and in the event of the said Ethel Mary Goldie Skinner surviving him to pay to her the yearly sum of £300 so long as she remains his widow. These being a debt I declare them to be a first charge on the whole of my estate beneficiaries under my will in the event of deficiency abating *pro rata*. I also direct my trustees out of the income of my estate to pay to my sister Rhoda Ann Herring an annuity of £100 and to the said Margaret Veitch an annuity of £150.
>
> 13. I direct all annuities and the said annual payments to run from the date of my death and to be paid quarterly half-yearly or otherwise as the ingatherings of income may render convenient.
>
> 16. Subject to the before-mentioned legacies annuities and payments I direct my trustees out of the surplus income of my estate to pay to my son Charles Blackett Skinner for his life such a sum not exceeding £500 per annum as will bring his income up to £1,000 per annum any deficiency in one year to be made up out of the surplus in succeeding years . . .

The testator died on Oct. 19, 1916, and his will was duly proved in the Durham Probate Registry on Dec. 1, 1916. On Mar. 6, 1941, the trustees of his will took out a summons, the first question of which asked, *inter alia*:

> (1) Whether on the true construction of the said will (*a*) the annual sum of £500 by cl. 9 thereof authorised to be paid to the defendant Charles Blackett Skinner is or is not subject to deduction of income tax . . . (*d*) the annual sums payable to him out of the surplus income pursuant to the provisions of the said last-mentioned clause are or are not subject to deduction of income tax.

A. H. Droop for the plaintiffs.
G. D. Johnston for the first defendant.
C. A. J. Bonner for the second and fourth defendants.
M. O'Connell Stranders for the third defendant.
C. D. Myles for the fifth, sixth, seventh and tenth defendants.
L. M. Jopling for the eighth and ninth defendants.

MORTON, J.: As I have frequently had occasion to deal with cases where trustees have misconstrued a will, I propose to state rules which I hope will be of assistance to trustees.

First, an annuity is not to be paid free of tax unless there is a direction to that effect in the will (*Re Sharpe, Rickett* v. *Rickett* (1)). Secondly, it makes no difference to the application of the above rule in fact even if the annuity is payable out of a source from which income tax has been deducted before it reaches the trustees (*Re Cain's Settlement, Cain* v. *Cain* (2), *per* WARRINGTON, L.J., at p. 370). Thirdly, it is not a sufficient direction to the contrary to use the words "clear annuity" (*Re Loveless, Farrer* v. *Loveless* (3)). Fourthly, it is not a sufficient direction to give an annuity "free of all deductions." It is, I am afraid, a fact that many trustees have regarded that as a sufficient direction that annuitants are not to bear income tax, but it is well-settled by authority that that is not "a sufficient direction": see, for example, the recent decision of SIMONDS, J., in *Re Wells' Will Trusts, Public Trustee* v. *Wells* (4), where the words were "free of all deductions." SIMONDS, J., said, at p. 413 ([1940] 2 All E.R., at p. 69):

> From a long line of authority, stretching from *Lethridge* v. *Thurlow* (5) and including *Sadler* v. *Rickards* (6), *Gleadow* v. *Leetham* (7), and the more recent cases in the Court of Appeal, *Re Saillard, Pratt* v. *Gamble* (8) and *Re Loveless, Farrer* v. *Loveless* (3), I should have no doubt whatever that on the terms of this will the annuity is not given

free of income tax. There is no case among those which have been cited to me where an annuity had been stated to be free of income tax unless there was clearly expressed on the face of the will an intention of the testator that, when he referred to freedom from deductions, he was including income tax.

In view of the line of authorities there referred to, it is to be hoped that in future testators desirous of freeing annuitants from income tax will refer either specifically to income tax or generally to taxes in such terms that there can be no doubt that freedom from income tax is intended.

[His Lordship referred to the facts and proceeded]. I cannot regard cl. 13 of the testator's will as a sufficient direction that the annual sum given by cl. 9 is free of tax. This is a purely administrative clause, dealing with all annual sums. If this clause had the effect for which counsel for the first defendant contends, it would free all the annuities. I cannot regard it as having any such effect. Clause 16 is quite colourless for the present purpose.

Declaration that annuities should be subject to deduction of tax. Costs of all parties as between solicitor and client to come out of the testator's estate.

Solicitors: *Hammond & Richards*, agents for *Simey, Iliff & Laing*, Sunderland (for the plaintiffs); *Maude & Tunnicliffe*, agents for *Simey, Iliff & Laing*, Sunderland (for the first defendant); *Pilley & Mitchell*, agents for *James Storey & Sons*, Sunderland (for the second, third and fourth defendants); *Peacock & Goddard* (for the fifth, sixth, seventh and tenth defendants); *Rowe & Maw* (for the eighth and ninth defendants).

[*Reported by* Irene G. R. Moses, *Barrister-at-Law.*]

BRACKENBOROUGH *v.* SPALDING URBAN DISTRICT COUNCIL.

[House of Lords (Viscount Simon, L.C., Lord Russell of Killowen, Lord Macmillan, Lord Wright and Lord Porter), **October 20, 24, 27, 28, December 15, 1941.**]

Animals—Escape on to highway—Escape from pen provided by local authority at cattle market for cattle waiting to be certified for subsidy—Liability of local authority as owner of market—Livestock Industry Act, 1937 (c. 50)—*Cattle Subsidy Scheme (Approval) Order,* 1937 (*S.R. & O.,* 1937, *No.* 659), *Schedule, para.* 1.

Markets—Liability of market owner—Injuries by animals brought to market—Injury to member of public on highway.

The S. Market, which was owned by the respondent council, was an approved certification centre for the purposes of the Cattle Subsidy Scheme, 1937. That scheme required, *inter alia*, that the place where animals were to be examined should be equipped with adequate penning accommodation for cattle. P., a local farmer, sent a number of steers in charge of employees to the market to be graded. The man in charge of the centre put them in a pen which was ordinarily used for the purpose on a normal market day. The pen consisted of permanent obstructions on three sides, while in front was a loose chain which could be hooked to the opposite side across the opening. Waiting at the market to meet the animals was B., who was the appellant's husband and P.'s foreman. One of the steers, while waiting to be graded, escaped under the chain, ran amok, and knocked down and killed B., whose widow sued the respondent council as the highway authority and the owners of the market, founding her action both in negligence and in nuisance:—

Held: the respondent council were not liable to the plaintiff. The only duty cast upon a market owner is to provide the requisite space and to permit those who so desire to attend and bring with them such things as are commonly sold there. He does not undertake the care of animals sent to the market, nor is he under any duty to keep under control beasts which are brought there.

Decision of the Court of Appeal ([1940] 1 All E.R. 384) *affirmed on different grounds.*

EDITORIAL NOTE. In the Court of Appeal this case was decided upon the footing that the drovers at all times remained in control of the animals and that the local authority had at no time assumed control over them. This conclusion, of course, negatived the liability of the local authority. The House of Lords have reached the same decision upon very different and wider grounds. They have held upon a review of the authorities—but, perhaps, on the absence of authority to the contrary—that a market owner owes no duty to the public at large to undertake the care and control of animals brought to the market. Lord Wright had prefaced his opinion by a short statement of the general law relating to liability for injuries by animals, which not only shows the precise class of case here dealt with, but also emphasises the distinction between cases where the liability is strict or absolute and cases where it must first be shown that the defendant has been negligent—a distinction which has on occasion been overlooked by the courts themselves. Despite this very useful digression, their Lordships have throughout been careful to limit their decision to the liability of a market owner in the circumstances of this case, and have expressed no final view on the many other points which are incidentally touched upon. The only question decided, therefore, is the duty of a market owner to an ordinary member of the public on the highway in respect of injuries inflicted by an animal *mansuetae naturae* brought to the market.

As to Liability of Market Owner, see HALSBURY, Hailsham Edn., Vol. 22, p. 46, para. 63; and for Cases, see DIGEST, Vol. 33, pp. 528, 529, Nos. 51-68].

Cases referred to:

(1) *A.-G.* v. *Horner* (1884), 14 Q.B.D. 245; 33 Digest 527, *45*; 54 L.J.Q.B. 227; *on appeal* (1885), 11 App. Cas. 66.

(2) *Swindon Central Market Co., Ltd.* v. *Panting* (1872), 27 L.T. 578; 33 Digest 545, *262*.

(3) *Draper* v. *Sperring* (1861), 10 C.B.N.S. 113; 33 Digest 534, *107*.

(4) *Lax* v. *Darlington Corpn.* (1879), 5 Ex.D. 28; 33 Digest 528, *52*; 49 L.J.Q.B. 105; 41 L.T. 489.

(5) *Knott* v. *London County Council*, [1934] 1 K.B. 126; Digest Supp.; 103 L.J.K.B. 100; 150 L.T. 91.

(6) *Heath's Garage, Ltd.* v. *Hodges*, [1916] 2 K.B. 370; 26 Digest 429, *1486*; 85 L.J.K.B. 1289; 115 L.T. 129.

(7) *Cox* v. *Burbidge* (1863), 13 C.B.N.S. 430; 2 Digest 233, *218*; 32 L.J.C.P. 89.

(8) *Deen* v. *Davies*, [1935] 2 K.B. 282; Digest Supp.; 104 L.J.K.B. 540; 153 L.T. 90.

(9) *Howard* v. *Bergin, O'Connor & Co.*, [1925] 2 I.R. 110; Digest Supp.

(10) *Ellis* v. *Banyard* (1911), 106 L.T. 51; 2 Digest 234, *225*.

(11) *Cunningham* v. *Whelan* (1917), 52 I.L.T. 67.

(12) *Indermaur* v. *Dames* (1866), L.R. 1 C.P. 274; 36 Digest 35, *208*; 35 L.J.C.P. 184; 14 L.T. 484; *affd.* (1867), L.R. 2 C.P. 311.

(13) *Re Islington Market Bill* (1835), 3 Cl. & Fin. 513; 33 Digest 552, *352*.

(14) *Mechanical & General Inventions Co., Ltd., and Lehwess* v. *Austin and Austin Motor Co., Ltd.*, [1935] A.C. 346; Digest Supp.; 104 L.J.K.B. 403; 153 L.T. 153.

(15) *Heddey* v. *Welhouse* (1598), as reported in Moore, K.B. 474; 33 Digest 542, *196*.

(16) *Yarmouth Corpn.* v. *Groom* (1862), 1 H. & C. 102; 33 Digest 545, *257*; 32 L.J.Ex. 74; 7 L.T. 161.

(17) *Northampton Corpn.* v. *Ward* (1745), 2 Stra. 1238; 33 Digest 544, *246*.

(18) *Newcastle (Duke)* v. *Worksop Urban Council*, [1902] 2 Ch. 145; 33 Digest 540, *176*; 71 L.J.Ch. 487; 86 L.T. 405.

(19) *Downshire (Marquis)* v. *O'Brien* (1887), 19 L.R.Ir. 380; 33 Digest 549, case *314 ii.*

(20) *Jones* v. *Lee* (1911), 106 L.T. 123; 2 Digest 234, *224*.

(21) *Rylands* v. *Fletcher* (1868), L.R. 3 H.L. 330; 36 Digest 187, *311*; 37 L.J.Ex. 161; 19 L.T. 220; *affg.* S.C. *sub nom. Fletcher* v. *Rylands* (1866), L.R. 1 Exch. 265; *revsg.* (1865), 3 H. & C. 774.

(22) *Kent* v. *East Suffolk Rivers Catchment Board*, [1940] 1 K.B. 319; [1939] 4 All E.R. 174; Digest Supp.; 109 L.J.K.B. 80; 161 L.T. 341; *revsd. sub nom. East Suffolk Rivers Catchment Board* v. *Kent*, [1940] 4 All E.R. 527.

(23) *Frazer* v. *Pate*, [1923] S.C. 748; Digest Supp.

(24) *Clelland* v. *Robb*, [1911] S.C. 253; 2 Digest 242, case *264 iii.*

Appeal by the plaintiff in the action from a judgment of the Court of Appeal (Slesser, MacKinnon and Goddard, L.JJ.), dated Jan. 25, 1940, and reported [1940] 1 All E.R. 384. The facts are fully set out in the opinion of Viscount Simon, L.C.

P. E. Sandlands, K.C., and *M. D. Van Oss* for the appellant.

H. J. Wallington, K.C., and *T. Norman Winning* for the respondents.

Viscount Simon, L.C.: My Lords, the Spalding Urban District Council, the respondents in this appeal, enjoy and exercise an ancient franchise in virtue of which they conduct a weekly cattle market on part of the highway in the borough of Spalding. Domesday Book, 1783 Edn., Vol. I, 351b, records that at Spalding (Spallinge) there was a market worth 40*s*., part of the possessions which William the Conqueror took from Earl Algar and gave to his henchman Ivo Taillebois, names which revive memories of Kingsley's HEREWARD THE WAKE. It is presumably a development of this same market which is the *locus* of the events giving rise to the present litigation.

In addition to the ordinary use of Spalding market for the sale and purchase of cattle, the market is also an approved certification centre for the purpose of A grading fat cattle, the owners of which desire to obtain certificates qualifying for the subsidy provided under the Live Stock Industry Act, 1937. Some cattle are brought to the market for this latter purpose only, and not for sale. The respondents receive certain tolls or payments in respect of both uses. It is unnecessary in the present case to discriminate between these two uses of the market, or to discuss the precise relations subsisting between the respondents and the certifying authority. On this point, it is enough to say that a successful B application to be appointed a certification centre does not remove from the market authority whatever responsibility properly attaches to it in respect of cattle sent to the market.

For the convenience of those resorting to the market, the respondents provide pens for the accommodation and segregation of cattle awaiting sale or grading. These pens are placed in the highway on both sides of New Road in the borough. The right of the respondents so to occupy the highway is to be presumed to be C an incident of their franchise. The pens are temporary structures, erected on market days and removed at the close of business. They are of various kinds. There are (i) four-sided enclosures consisting of wooden posts and rails, (ii) three-sided structures formed of iron uprights fixed in sockets in the ground with two taut chains across each of the three sides, the fourth side being entirely open, and (iii) structures identical on three sides with those last-mentioned, but D having affixed to one of the posts on the fourth side a loose chain which may be hooked to the opposite post across the opening. When so hooked, the chain is not taut, but sags to some extent. It is with a pen of this third type that the present case is concerned.

On Apr. 12, 1939, Proctor, a farmer and cattle breeder in the neighbourhood of Spalding, sent in 21 two-year-old steers to the market, 20 of them for grading and one for sale. They were driven to the market by two of his employees, a E farm labourer named Pentelow and a farm lad named Walton. The steers arrived at the market rather before noon, and were met there by Proctor's foreman, Frank Brackenborough. Certification was timed to begin at 2.30 p.m., at the conclusion of the sales. Meantime, the steers, by direction of an official, were placed in two pens of the third type above described, and, after they had entered, the loose chain was hooked across the open end of each pen. Pentelow and Walton stood by to look after their charges. One of the steers managed to F get its head under the slack chain, and, as Pentelow put it, "nipped out" into the street and got away, in spite of Pentelow's efforts to prevent it. The steer was pursued by Walton. Brackenborough, who had been standing not far away, joined in the pursuit. In the course of the animal's career through the town, Brackenborough endeavoured to stop it, but it charged him and knocked him down on the highway, causing him injuries so serious that he G died in hospital a few hours later.

The appellant, Brackenborough's widow, instituted proceedings against the respondents for damages under Lord Campbell's Act and also under the Law Reform (Miscellaneous Provisions) Act, 1934. The case came on for trial at Lincoln Assizes before CASSELS, J., and a jury. The judge did not put separate questions to the jury, but, after discussing various issues, directed them to consider generally whether the defendants were negligent in providing a pen H which was not reasonably secure. The jury returned a general verdict in favour of the plaintiff and awarded damages under both heads. The resultant total for damages has been adjusted, and is not in dispute. The verdict and judgment were set aside by the Court of Appeal (SLESSER, MACKINNON and GODDARD, L.JJ.), who ordered judgment to be entered in favour of the present respondents. The appellant now seeks to have the verdict and judgment in her favour restored by this House. It is of importance to make it clear from the outset that it was common ground at your Lordships' bar that the deceased should be regarded for the purposes of the case as an ordinary member of the public who happened to be on the highway when the steer encountered him. The fact that he was an employee of Proctor's, the owner of the steer, and was attending the market on his master's business, may, therefore, be left entirely out of account as having no bearing on the issue.

Markets have been conducted throughout the length and breadth of England from the earliest times. When, as here, an ancient market is held in a highway, the inference is, as in *A.-G.* v. *Horner* (1), that the road was dedicated to the public subject to the exercise of the market rights. Markets naturally vary widely in their character and importance, and some are no doubt very primitive in the matter of equipment and facilities. In *Swindon Central Market Co., Ltd.* v. *Panting* (2) there will be found an instance of a market held in a public street in which there were no stalls or pens at all.

In *Draper* v. *Sperring* (3), where the owner of a market held in the street placed hurdles for the purpose of penning sheep on market days, WILLES, J., observed, at p. 123 :

> It is clear that the proprietor of the market was under no legal obligation to provide such accommodation as this.

When, in 1934, the respondents applied for and obtained approval of their market as a certification centre under the Cattle Industry (Emergency Provisions) Act, 1934, they apparently satisfied the then cattle committee that they were "equipped with adequate penning or tying up accommodation for cattle." This approval has been continued by the Livestock Commission, which, under the Act of 1937, has superseded the previous cattle committee : Cattle Subsidy Scheme (Approval) Order, 1937 (S.R. & O., 1937, No. 659), Sched., para. 5. It is obvious, however, that this circumstance does not create any liability to third parties for ineffective penning accommodation if no such liability would exist without it.

The foundation of any liability in the respondents must be breach of duty, and this is the way in which the case is framed in the statement of claim. Moreover, in order to succeed, the appellant must establish that the respondents owed some relevant duty to members of the public (such as the deceased) using the highway outside the ambit of the market, and that Brackenborough met his death owing to a breach of this duty. Even if the circumstances in which the respondents directed, or permitted, the cattle to be put into the pens created some responsibility to their owner for the pens' condition—as might well be the case if there were anything in the structure which injured the cattle, as in *Lax* v. *Darlington Corpn.* (4)—this would be nothing to the point when the claim is for breach of duty to a member of the public using the ordinary highway. CASSELS, J., in a full and careful summing up, directed the jury that the respondents :

> . . . should provide accommodation that was reasonably safe for the purpose for which it was used, and that was a duty which they would owe to the person who brought his cattle there, to his servants who were engaged in bringing the cattle there, and looking after them when they were there, and to the public.

The last four words of this sentence are what would be applicable to the present case, and, if the proposition of law therein stated is wrong, the verdict cannot stand.

The Court of Appeal, in reversing the decision below, went in large measure upon the point that the two drovers, Pentelow and Walton, remained in custody and control of the animals after the latter were put in the pen (as they undoubtedly did), and appears to have taken the view that, in these circumstances, those who provided the pen could not possibly be liable. I doubt the validity of this reasoning, for, if there really was a duty resting on the market authority and owed to the public to see that animals which came to the market should not escape from the market and do damage to wayfarers outside, or a duty to take reasonable steps to prevent this, the fact that the drovers were not relieved of the duty of guarding them would not seem to be conclusive. With all respect to SLESSER, L.J., I do not appreciate the bearing of the decision in *Knott* v. *London County Council* (5) on the situation we have to consider. Was there, however, such a duty owed to the public ? I can see none, and no authority was cited to the House which supports such a proposition. A market for cattle and sheep cannot be treated like a menagerie of lions and tigers (though

in the latter case the duty to prevent escape would in any event be of a higher order). Cattle are animals *mansuetae naturae,* and as a rule are peaceable beasts. From the most ancient times, cattle such as these steers have ordinarily been met with on the roads, and there is nothing to suggest that the particular animal which caused this man's death was known to be ferocious or vicious, or was ferocious or vicious in fact. It has been laid down that the occupier of a field bordering the highway is not liable if one of his cattle which are depastured there escapes through a defective fence on to the highway and injury A
results to members of the public using the highway: *Heath's Garage, Ltd.* v. *Hodges* (6). Whatever view may be taken of the correctness of this decision, it is clear that the provision of pens in a market by the market authority is not a duty undertaken in discharge of obligations to the general public. Indeed, as above pointed out, it appears that there are markets on the highway without any pens, as in *Swindon Central Market Co., Ltd.* v. *Panting* (2). Such provision is a convenience for improving the management and organisation of the market, B
and the liabilities which may arise from such provision are liabilities to those who use the pens or resort to the market, and not to the public at large.

This view renders it unnecessary to consider a further difficulty in the way of the plaintiff as to remoteness of damage. The objection that injury to a wayfarer outside the area of the market, after the escaping animal has been chased by various people and has made quite a tour of the neighbourhood, C
may be in any case too remote to fix liability upon the market authority was not, I think, raised in the case, and I do not decide the point, but am content to mention it in order to avoid the possibility of being regarded hereafter as having in this appeal decided against such an objection. I therefore agree with the conclusion reached by the Court of Appeal, though for somewhat different reasons, and I move that this appeal be dismissed.

LORD RUSSELL OF KILLOWEN [read by LORD THANKERTON]: My Lords, D
with much of the argument presented on behalf of the district council I disagree. For instance, I can see no foundation for the suggestion that, for the purpose of grading cattle, the site of the market was handed over to the certifying authority, and that the certifying authority carried on the grading independently of the market authority. The council had no power to use, or to allow others to use, their weighing machine and pens, situate as they were on a public highway, except upon the footing that such user was an exercise of the council's market E
franchise. From this it must follow that, when the council applied for their "market" to be used as a grading centre, it was an application, not merely that the site on which they exercised their franchise should be so used, but that the user as a grading centre should take place while they were exercising their franchise. Further, I am of opinion that no complaint can be made of the judge's summing up on the score that he failed to put to the jury the council's F
contention that the true cause of the steer's escape from the pen was not any negligence on the part of the council, but was the fact that Pentelow and Walton did not keep a proper watch on the cattle while in the pen. I think the judge put the three possible views clearly to the jury—namely, (i) that the escape was solely due to the unsafe nature of the pen, (ii) that the escape was due partly to that and partly to the failure of the men to keep a proper watch on the cattle, and (iii) (here I quote his words): G

> . . . if you came to the conclusion that the sole reason it escaped was because the man and the boy were not properly looking after it, then there would be no negligence in the defendants which led to the damage.

If the fate of this appeal depended on questions of fact, I would have no hesitation in restoring the judgment entered at the trial. There is, however, a serious question of law which arises for determination. The foundation of this action is (as was admitted by the appellant) the negligence of the council H
vis-a-vis the dead man, not as a servant of the owner of the steer, but as a member of the public on the highway. The question directly raised is whether the owner of the franchise of a market held on a highway owes any duty to a member of the public using the highway. The judge told the jury that the council did owe a duty to the public to provide accommodation reasonably safe for the purpose for which it was used. We must take it that the jury found that the council were in breach of this duty and were negligent in providing an unsafe pen. If the duty exists, the judgment should be restored. If there is no such

duty, the appeal should be dismissed.

My Lords, I know of no authority directly in point, and it certainly is strange, if the duty exists, that, throughout the ages in which markets have been held on public highways (the markets in many, if not in most, cases being more ancient than the highways), no case has been recorded in which the duty has been alleged and established. It has been decided, however, that an owner of land adjoining a highway is under no duty to members of the public using the highway to keep his harmless domestic animals (such as sheep and cattle) from straying on it: *Heath's Garage, Ltd.* v. *Hodges* (6). In that case, the Court of Appeal, in holding that the duty did not exist, relied on the long-continued absence of authority to the contrary. LORD COZENS-HARDY, M.R., pointed out, at p. 377, that in the course of centuries the straying of sheep and other harmless domestic animals on the highway must have been common, yet there is no trace of any indictment for a nuisance by permitting cattle to stray. In the same case, NEVILLE, J., used the following language, at pp. 381, 382:

> We are now in the year 1916, and during the preceding centuries no such duty has ever been established against the occupier of land adjacent to a highway.
>
> No case has ever established liability in civil courts, and the strongest authority that can be produced is a *dictum* of a learned judge that such an action might possibly lie, while it seems to me there is a great body of judicial opinion against it including that of VAUGHAN WILLIAMS, L.J., BUCKLEY, L.J., KENNEDY, L.J., BANKES, L.J., FLETCHER MOULTON, L.J., and others.
>
> In my opinion the experience of centuries has shown that the presence of domestic animals upon the highway is not inconsistent with the reasonable safety of the public using the road.

Those views expressed in 1916 are reinforced by the experience of the subsequent 25 years.

The decision in *Lax* v. *Darlington Corpn.* (4) is not in point. It merely decides that there is a duty on the owner of a market franchise to the persons from whom he receives toll for a standing in the market to provide a place which is not dangerous for the purpose for which payment is made (*per* BRETT, L.J., at p. 33). There is no vicious or mischievous propensity in a steer. It is not an animal which, if unpenned, will be likely to cause damage in accordance with a known propensity. Indeed, the sight of cattle progressing along a highway and proceeding through villages and towns is a common incident of country life. To cast upon the owners of a market for domestic animals held on the highway the duty of preventing the animals from ever escaping on to the highway would be placing upon them a heavy burden indeed. It is a burden which, at this late day and in the absence of clear authority, I am not prepared to impose. If no such duty was cast upon the council, there was no negligence by them, and the action should have been dismissed. It follows that this appeal must fail.

LORD MACMILLAN [read by LORD THANKERTON]: My Lords, the respondents in the exercise of an ancient franchise, conduct for their own profit and for the benefit of the community a weekly cattle market in a street in the borough of Spalding. They provide temporary pens in the highway for cattle brought to the market. VISCOUNT SIMON, L.C., has described in detail the nature of the accommodation provided by the respondents, and has also narrated the circumstances of the fatal accident which befell the appellant's husband, so I may pass at once to the consideration of the question of law which is raised in the present proceedings.

The question for decision may be stated thus. Is the holder of a market franchise who provides in the highway pens for the accommodation of cattle brought to the market under a duty to members of the public using the highway to exercise reasonable care that the pens which he provides shall be such as securely to confine the cattle placed in them and prevent their escape? It is noteworthy that, although street markets are among our oldest institutions, no precedent has been brought to your Lordships' notice for the imposition upon the holder of a market—the lord of the market, as he is designated in legal parlance—of such a liability to the public as the appellant seeks to establish. This is by no means conclusive against the existence of such a liability, but it places upon the appellant the burden of showing that her case is justified in principle.

Having given the matter full consideration, I have been unable to find any

legal basis for the duty which it is sought to lay upon the respondents. There is not, so far as I am aware, any duty on the holder of a market to provide pens at all. If pens are provided, they are offered, such as they are, for the use of those who bring their cattle to the market, whom I may call the customers of the market. In a question with such customers, the market holder must not offer them pens or assign them standing places which are dangerous to animals placed there (*Lax* v. *Darlington Corpn.* (4)), but he makes no profession that such pens as he may provide will be proof against the escape of cattle. Some A
of the pens in the respondents' market are entirely open on one side and could not keep in untended cattle. The pen from which the steer in question escaped had across one of its sides only a single slack and detachable chain, and was plainly not designed effectively to prevent cattle placed in it from escaping.

If, then, there is no duty on a market holder to provide his customers with pens from which cattle cannot escape, still less does he owe any duty to the public at large so to construct the pens which he may provide that they shall be B
proof against the escape of cattle placed in them. The market holder does not take charge of the cattle which are brought to his market. They remain under the charge of their owners or their owners' representatives, and, if the owners of the animals avail themselves of pens provided in the market, that does not mean that responsibility for the restraint of animals placed in the pens passes to the market holder. The market holder has no previous knowledge of the C
animals brought to his market or of their propensities, and he has no duty to restrain them.

I accordingly find myself unable to agree with the direction given by the judge to the jury as to the law applicable to this case. He told them that it was the duty of the respondents to provide accommodation which was "reasonably safe for the purposes for which it was required." He did not in terms define these purposes, but I think that he sufficiently indicated to the jury D
that what he meant was that the pens provided must be reasonably safe for the purpose of confining cattle placed in them and preventing their escape. The use of the word "safe" was perhaps a little unfortunate, because of its implications. "Effective" would have been a better word. The jury, under this direction, returned a general verdict in favour of the appellant, from which it may be inferred that they were of opinion that the pen in question was not E
"reasonably safe" for the purpose of preventing the escape of cattle placed in it. However, as the respondents, for the reasons which I have stated, owed no duty to the appellant's husband to provide in their market only such pens as should be reasonably effective to prevent the escape of cattle from them, it follows that the verdict cannot stand. The case, in my opinion, should have been withdrawn from the jury, in respect that the evidence disclosed no ground of legal liability on the part of the respondents. I am therefore for dismissing F
the appeal.

Lord Wright: My Lords, claims by persons in respect of injuries caused to them by animals may be based on one or more of three distinct grounds of liability. The first is that known as cattle trespass. The second is based on the dangerous disposition of the animal, either because of its innate character, as in the case of lions, tigers, monkeys and others, or because, though it belongs G
to the tame or domestic class, it has shown a ferocious disposition, in which case proof of *scienter* or of knowledge of its disposition is necessary to establish liability. The liability under these two causes of action, which I need not here discuss, is strict or absolute, and does not involve proof of negligence. Outside these classes, however, lies the wide general action for negligence—that is, breach of a duty to take reasonable care for the safety either of particular individuals or of individuals regarded simply as ordinary members of the public H
exercising their ordinary rights either on the highway or elsewhere. This is the widest cause of action. A simple illustration is afforded by cases where animals have been negligently left unattended on the road or allowed to run loose and have done damage.

The present action is a claim for negligence. There was no cattle trespass, and the animal was not dangerous in any sense. The negligence relied on is strictly defined. The respondents are sued for breach of a duty which, it is claimed, they owe to members of the public to take due care to provide such pens in their cattle market as will prevent the cattle placed in them from escaping and running at large in the streets of the town. No reliance has been placed on the rule enunciated by the Court of Appeal in *Heath's Garage, Ltd.* v. *Hodges* (6) that there is no duty on the owner or occupier of land adjoining the highway to prevent animals upon it from escaping on to the highway. This rule, so far as I know, is modern. It was apparently unknown to the very eminent common lawyers, ERLE, C.J., and WILLIAMS, WILLES and KEATING, JJ., who formed the court in *Cox* v. *Burbidge* (7). Its limits are still uncertain. ROMER, L.J., in *Deen* v. *Davies* (8), regarded it as applying to animals depastured on land adjoining a highway. The Irish Court of Appeal in *Howard* v. *Bergin, O'Connor & Co.* (9) did not give effect to it where two bullocks were negligently allowed to escape to the streets of a town. It has also been questioned by eminent Lords Justices if it could apply to the escape of animals in such numbers as to cause an obstruction—for instance, by VAUGHAN WILLIAMS, L.J., in *Ellis* v. *Banyard* (10)— and it was held by MOLONEY, L.J., in *Cunningham* v. *Whelan* (11) not to apply to the circumstances of that case. The appellants, for whatever reason, have not relied upon it in this case. The existence, the meaning and the scope of the rule remain open to the consideration of this House, and I express no opinion upon it. Nor is it necessary here to consider another question which has been examined in other cases—namely, whether personal injury caused by an animal not of the savage class or known to be ferocious should be regarded as too remote a consequence of its being negligently allowed to escape at large by those in control of it. Counsel for the respondents expressly said that he did not rely on any plea of remoteness of damage. I apprehend that he meant to concede that the collision between the stupid and blundering but not mischievous steer and the deceased man, who, in the ordinary course of his duty as the foreman of the farmer who owned the cattle, tried to turn it back and recapture it, was a direct consequence of its being allowed to escape.

Thus the clean issue is raised whether, on the facts of this case, the respondents, as the keepers or lords of a cattle market, owe a duty to the members of the public to take care to provide pens which are reasonably sufficient to prevent the escape from the market of cattle brought there. My noble and learned friend VISCOUNT SIMON, L.C., in his statement of the facts, with which I agree, as, indeed, I agree with his opinion generally, has explained in what respects it was complained that the pens were insufficient for this purpose. The penning accommodation was clearly of a primitive character. The two pens in which the steers, of which the offending animal was one, had been placed had no fencing in front except a slack chain, which a steer seized with an impulse to escape could easily evade by putting his head under it. Some of the pens were completely open at the front. The whole arrangement was makeshift and temporary, removeable at the end of each market day and replaceable for the next market. It was typical, indeed, of a transition stage between the old system of a completely open market and the elaborate modern cattle market such as the evidence shows it was intended to construct and instal at Spalding. Presumably that has already been done.

It is clear that in earlier days cattle markets were held in the open market place or street without any pens at all. As recently as 1872 the report in *Swindon Central Market Co., Ltd.* v. *Panting* (2) shows that the cattle market there did not then have pens at all. This also appears from *Lax* v. *Darlington Corpn.* (4), where one of the plaintiff's cattle which he had brought to the defendants' market was injured by spiking itself on a dangerous railing in the market. The action was brought by the plaintiff on the principle of *Indermaur* v. *Dames* (12). It was successfully claimed that the spiked railings were in the nature of a trap endangering the cattle which the plaintiff had been invited to bring into the defendants' market. In *Draper* v. *Sperring* (3), the owner of a market held in a street at Crewkerne appealed against a conviction by magistrates for not removing accumulations of droppings of sheep caused because she had provided penning and standing for the sheep on the pavement of the street in the market. The conviction was upheld. One defence was that the appellant merely enjoyed her market right according to the grant by receiving tolls from persons having the right to bring sheep there for sale. WILLES, J., met that contention by pointing out that she not only received the tolls but also made enclosures by means of hurdles on the spot where the nuisance was created. It was in consequence of that restraint of the sheep that the nuisance arose. WILLES, J., said, at p. 132:

> It is clear that the proprietor of the market was under no legal obligation to provide such accommodation as this.

As a sidelight on historical aspects, I am indebted to Mr. C. T. Clay, the librarian to this House, for a reference to Vol. XXXIX of the publications of the Thoresby Society, on Yorkshire Fairs and Markets, at p. 151. The author refers to the advantages possessed by towns which owned rights of weekly markets and fortnightly fairs, and says: A

> They could provide a cattle market fitted with pens and so abate the nuisance of cattle and sheep standing in the widest street every market day. Wakefield, for example, equipped a cattle market in 1765 and for a century it continued to be used fortnightly.

Incidentally, the frontispiece to the same volume is a print of a painting made in 1804 of Masham Market, which shows small groups of cattle standing in the market place without there being any pens. B

In my opinion, the true conclusion is that there is no legal obligation at common law to provide any pens at all, and *a fortiori* no obligation to take reasonable care to provide pens for the purpose of keeping the cattle safe from escaping. Pens were, I think, introduced by market owners, where they were introduced at all, as a voluntary measure for the convenient conduct and management of the market, to keep different lots of cattle apart, to prevent confusion, to secure order and cleanliness, and to avoid the crowding, fouling and disorder of the public street or other place where the market was held which there must be if the cattle were free to stand unpenned anywhere in the market. However, penning did not in law involve an assumption by the market owner of the possession and control of the animals which their owner brought to the market. The responsibility for injuries inflicted by animals depends on their possession and control. It is sometimes stated rather loosely that the owner is responsible for the animals, but that is only *prima facie* true, because he has generally the possession and control of the animals by himself or his servant or agents. Indeed, at least in the case of dangerous animals, a transfer of actual possession and control would not necessarily terminate his responsibility. The general test has been said to be who "keeps" or "harbours" the animals. In the present case, I cannot understand how the mere fact of the respondents' erecting the pens and receiving the cattle in them would amount to an assumption by them of responsibility for the custody of the animals or make them keepers of them. The pens used for the steers were not merely not cattle-escape-proof. They could not even be taken to be so by any farmer. He would naturally, in his own interest, continue by his men to watch and control his animals, for all practical purposes, as much as if they were being driven along the highway, though no doubt to some extent the pens would facilitate control. This is even more obvious in the case of the pens which had no chains at all in front, but that is only a matter of degree. In fact, the man and boy who had driven the steers from the farm to the market stood outside the front of the pens "minding" the cattle. It is said that there was a joint responsibility for, and a sharing of, the custody of the cattle, on the facts of the case, accepted by the respondents as market owners and attaching also to the farmer. For the reasons which I have given, however, I do not think that the respondents ever assumed responsibility for these cattle, which still remained in the possession and control of the farmer. In short, if the respondents are at common law under no obligation to provide pens at all, they cannot be held responsible for not exercising due care to provide reasonably safe pens, and never assumed to do so. C D E F G

Reference was made in the evidence to the practice, now frequently adopted by farmers, of sending their cattle to market by cattle lorries instead of driving them along the roads. If in the course of this practice cattle are sent with no one to look after them at the market, other questions may arise as to the responsibility of the market owner. I merely notice the point without further discussing it. It was contended, however, that the common law which I have been examining has been changed by various statutory provisions, beginning with the Markets and Fairs (Weighing of Cattle) Act, 1887. This Act and later amending Acts require every market authority which takes tolls for cattle to provide and maintain sufficient and proper buildings or places for weighing cattle and for H weighing-machines. These Acts, it was admitted, applied to the Spalding market. The cattle subsidy was introduced by the Cattle Industry (Emergency Provisions) Act, 1934, which was amended and extended by the Livestock Industry Act, 1937. Under these Acts and the Cattle Subsidy Scheme (Approval) Order, 1937, Sched., para. 5, the respondents' market was approved as a certification centre, on the basis of their statement that they were equipped with sufficient and adequate penning and tying accommodation. It was contended that thereby they became under a new duty to provide reasonably sufficient pens to keep the cattle from escaping. It is true that, when the respondents applied to the Cattle Committee for the approval of their market as a certification centre under the Act, they had to answer a question as to the number of fat cattle for which there was penning or tying accommodation in the market, and answered: " 100 to 125," but I agree with Viscount Simon, L.C., that these circumstances did not change the position between the respondents and members of the public or create any new duty to the public unknown to the common law. Indeed, I think that what was being considered was merely the convenient and orderly conduct of the market, to which its special use as a certification centre was an accessory or additional function of the respondents as market owners. I regard the word " accommodation " as used in this connection as directed only to matters of the capacity of the pens provided, and not to their fitness to hinder cattle from straying. The word " accommodation " is regularly used in connection with markets in the sense of space or room, as in the answer of the judges in *Re Islington Market Bill* (13), at p. 519. Littledale, J., who gave the answer on behalf of Parke, B., Lord Commissioner Bosanquet and himself, said that they knew of no proceeding having been brought against the owner of a market for not providing proper accommodation. Such a breach of duty, he said, would be a misdemeanour, as well as enabling an action at the suit of any private individual who received special injury thereby. If before the Act of 1934 the market owner was under no duty of care adequately to fence, it cannot be supposed that the creation of a new duty of that nature involving both criminal and civil liability would be intended without clear and specific words.

The verdict of the jury was based on the assumption that there was such a duty. Whether or not the duty exists is a matter of law for the court, and not for the jury. The jury were directed that there was such a duty. If there was no duty, as I have held that there was not, the jury were misdirected, and their verdict cannot stand, but must be set aside on grounds of law. A new trial would serve no useful purpose, and, accordingly, in my opinion, the proper course to adopt here is to enter judgment for the defendants in the action, in accordance with the rule approved by this House in *Mechanical & General Inventions Co., Ltd., and Lehwess* v. *Austin and Austin Motor Co., Ltd.* (14). I agree with the conclusion of the Court of Appeal, though not with all their reasons. I concur in the motion proposed.

Lord Porter: My Lords, the facts have already been fully stated, and it is unnecessary that I should elaborate them, but there are one or two matters to which, I think, I must refer in order to make my views plain. In the first place, Spalding market is a certification centre. Before it was so recognised, the Cattle Committee had to be satisfied that the premises were equipped with adequate penning or tying accommodation for cattle. Indeed, it is a precondition of recognition under the Act that the Cattle Committee should be satisfied of this fact. This circumstance, however, was not relied upon either in the appellant's pleading or in her case before your Lordships' House, and was not pressed in the argument, and rightly so, I think, since neither the satisfaction of the committee nor the recognition of the market imposed any duty upon the market authority in reference to the public, or even to those who brought their cattle to be graded. There was no warranty or representation to the cattle owner that pens or tying-up places would be provided for his cattle if he sent them, or that, if provided, they would be reasonably safe to retain cattle. Nor, as a result of the Act and regulations made under it, did that authority owe any duty to him to provide such pens. If no duty was imposed by the Act and regulations *vis-a-vis* the owner, it is difficult to see how such a duty could be imposed in reference to the public. As, in my view, the Act and regulations do not impose any fresh obligations, the respondents, if they are to be liable at all, must be liable for the breach of some common law duty.

There is, however, no question here of a duty towards an invitee. Had the beast which killed the unfortunate bailiff itself been injured, some such question would have arisen and—*pace* Bates, who repeatedly asserted that the pens, though they looked safe, were in fact unsafe—would have been answered by the obvious retort that a sagging chain was patently incapable of retaining a two-year-old steer. Indeed, Pentelow, the one-armed farm hand, who drove the beast to the market, had no doubts on the matter. I quote from his evidence :

> Did you realise that these pens are not for cattle which are unattended, but are attended ?—Yes, but I knew that, when you do attend to them, if a bullock gets his head in the chains, they go up and down.
>
> In fact, you and Walton remained at that pen to see that the cattle did not get out ?—Yes, until that one went.
>
> You knew that any one of these steers could have jumped over the sagging chain in the middle, did not you ?—Yes.
>
> And could have got under the chain where it was at its highest ?—Yes.

Nor do I think that Bates meant to assert that the sagging chain looked as if it would retain the cattle but was really incapable of doing so. He intended, I think, to convey only that the double chains at the back and sides, or even the posts and rails, looked, but were not, satisfactory. Otherwise, he would not have asserted that every pen in the market was unsafe. Obviously the pens which had only three sides were incapable of retaining beasts unless the fourth side was adequately guarded, and a sagging chain was of little more use than an open end. This, at any rate, was the view of Pentelow, who was asked what he meant by saying that the pens were a bit tricky, and replied :

> The chains look tight when you stand and look at them, and, if the bullock got where there are two chains, they would lift up and down so that the bullock would be able to get out.

Even if, however, the double chain was deceptive, and even if a member of the public were, like the owner of the beast, entitled to complain of a concealed danger, the deception was not in that part of the pen from which the beast escaped. The sagging chain was obviously incapable of retaining it, and the concealed danger, if there was one, in the other part of the pen was immaterial, because the escape was not effected through it. In these circumstances, I do not stay to consider whether the evidence establishes that the deceased man himself knew of the inability of the pens to prevent cattle from escaping. I treat him as any other member of the public, entitled to no less and no more protection. Indeed, this is how the appellant asked that he should be regarded.

The appellant's case was stated to be that those who for profit provide appliances such as pens in a cattle market in which cattle attending that market are penned are liable to any member of the public injured by reason of an animal escaping therefrom in consequence of the unsafe condition of the pens. They had, it was said, a duty to control the animals in some way, or, at any rate, if they provided pens, they must provide safe ones. The argument is not, I think, very precise. It leaves open the question of what, if any, appliances the owner of a market is under a duty to provide, and what, if any, measure of control must be undertaken, and what are safe pens. Historically, I can find no warrant for the suggestion that the owner of a market is under a duty to provide pens, or, indeed, any amenities except space to hold the market within the allotted boundaries, and free ingress to, and egress from, the market itself for buyers and sellers with their wares. The owner may, indeed, provide pens and charge stallage on them, but I know of no authority which obliges the pens to afford any particular degree of safety, and, though the market owner may sometimes, as was done in this case, erect pens by inserting the uprights into slots provided to hold them, in many cases he could not do so even if he wished, e.g., in cases where the soil was not his and he had no right of picage, by which is meant the right of interfering with the soil on which the market is held. As early as 1598, in *Heddey* v. *Welhouse* (15), stallage and picage are mentioned in contradistinction to the right of toll, and no hint is given to suggest any obligation in the owner of the franchise to provide stallage or pens as incident to the holding of the market. In *Draper* v. *Sperring* (3), the owner of a market placed hurdles in the public street for the purpose of penning sheep on market days, for which she received tolls. The actual question for decision was whether the droppings of the sheep so penned created a nuisance, but WILLES, J., in the course of his judgment, said, at p. 123 :

> It is clear that the proprietor of the market was under no legal obligation to provide such accommodation as this.

A year later, in 1862, in *Yarmouth Corpn.* v. *Groom* (16), MARTIN, B., said, at p. 111 :

> If, indeed, a person carried commodities in a basket to the market for sale, merely using the basket to exhibit the commodities to customers, and making no other use of the A ground except, when tired, to place the basket upon it, intending when rested to go to another part of the market, such a use of the ground would not be stallage. It would be nothing more than using the market for hawking, and it might as well be said that cattle in a market, which it is impossible to keep stationary, have an exclusive occupation of one spot of ground . . .

At that date, obviously, unpenned cattle were a commonplace in a market, and even ten years later, in 1872, in *Swindon Central Market Co., Ltd.* v. *Panting* B (2), an example is to be found of a market which was held in a public street, yet neither pen nor stall was provided. Nor is it true to say that the holder of a market is in all cases entitled to charge tolls. Tolls are no necessary incident to a market franchise : *Northampton Corpn.* v. *Ward* (17) and *Newcastle* (*Duke*) v. *Worksop Urban Council* (18), at p. 152. A market is, as CHATTERTON, V.-C., said in *Downshire* (*Marquis*) v. *O'Brien* (19) :

> C A franchise conferring a right to hold a concourse of buyers and sellers.

At common law, therefore, the only duty cast upon the owner of a market is to provide the requisite space and permit those who so desire to attend and bring with them such things as are commonly sold there. I can see no more reason for supposing that he undertakes the care of animals sent there than for supposing that he undertakes the care of any other thing brought for sale. D Moreover, I see less ground for assuming that the market owner should keep under control beasts brought to the market than for making this assumption as of general application in the case of a landowner whose land abuts on a highway, and as yet there is no authority justifying the general imposition of such an obligation : *Jones* v. *Lee* (20), *Ellis* v. *Banyard* (10) and *Heath's Garage, Ltd.* v. *Hodges* (6). As was said by BLACKBURN, J., in *Fletcher* v. *Rylands* (21), at p. 284, in a judgment afterwards approved in *Rylands* v. *Fletcher* (21) :

> E Traffic on the highways, whether by land or sea, cannot be conducted without exposing those whose persons or property are near it to some inevitable risk ; and that being so, those who go on the highway, or have their property adjacent to it, may well be held to do so subject to their taking upon themselves the risk of injury from that inevitable danger . . .

So, too, I think persons going to a market or its vicinity must take the ordinary F risks of escaping beasts.

Nor do I think that the appellant's case is assisted by the argument that, if the respondents provided pens, they must provide safe ones. How this would impose a duty towards the public I find it difficult to see, unless it could be said that the owner of the cattle, who would normally keep them under his own control, had been deceived, to his own prejudice and the danger of the public, into leaving them unguarded and so letting them escape. In any case, what is G meant by safe pens ? " A pen," said the judge, " fit for the purpose for which it is required." What was that purpose ? If there was no obligation to provide pens at all, and if those in charge of the animals could plainly see how much or how little assistance they could gain in controlling their beasts from the pens actually provided, then, however primitive or inadequate those pens were, they were at least better than nothing, and to that extent furnished protection for the owner and the public beyond what they had the right to require. The market H owner must indeed avoid erecting something in itself an object of danger to beasts brought into the market (*Lax* v. *Darlington Corpn.* (4)), but, as your Lordships decided in *East Suffolk Rivers Catchment Board* v. *Kent* (22), where no duty is imposed, a defendant who takes inadequate steps to attain a particular result which he is under no legal obligation to bring about is under no legal liability if those steps do not effect the desired result, provided they do not increase the danger. The plaintiff is no worse off by reason of the steps taken, and, unless he is, the defendant has incurred no liability. If there is no duty, there can be no liability. In *Frazer* v. *Pate* (23), at p. 756, LORD

Ashmore quoted the words of Lord Dunedin in *Clelland* v. *Robb* (24), at p. 256:

> Negligence *per se* will not make liability unless there is first of all a duty which there has been failure to perform through that neglect.

Frazer v. *Pate* (23) was an action against a landowner for allowing his sheep to stray on the highway whereby a motorist using it with due care was injured. Lord Ashmore continued as follows, at p. 756:

> Pursuer's counsel were unable to cite any precedent for the pursuer's claim or any authority to the effect (*a*) that the defender was under a duty to the pursuer, as a member of the public using the road, to keep his sheep from straying on the road or (*b*) that the accident can be held to be the natural or probable consequence of the presence of sheep on the road. A

The first authority which Lord Ashmore declared to be wanting might, if it existed, have some bearing upon, but would be far from decisive of, the question at issue in the present case. In its absence, and in the absence of any other principle on which she can rely, the appellant must fail. The second question B was not argued, and, indeed, the appellant expressly declined to argue it. Its accuracy or applicability to the matter now under discussion is, therefore, not in question, and I leave it for further discussion when it is raised in your Lordships' House.

In coming to the conclusion which I have reached, I am expressing no opinion as to the liability or non-liability of the owner of the cattle. In his case, it is possible that there would in general be no liability if the plaintiff had been C injured by a beast which had escaped from his field on to the highroad. Whether there would be a higher duty upon an owner who brings beasts into a crowded market, where the press of people and animals may terrify them to an extent to which beasts escaping on to the highway would not be exposed, need not be determined. In the present case, the ability of the drovers to control the steer which escaped was increased, not lessened, by having a pen of the kind provided put at their disposal, and the respondents, who were under no duty to supply D any pen, diminished rather than magnified the danger to the public from straying cattle by furnishing such an erection. Of that action the appellant cannot in law complain. Nor do I think your Lordships can, in conformity with established principles, hold them liable on that or any of the grounds suggested. I would dismiss the appeal.

Appeal dismissed.

Solicitors: *Lee, Bolton & Lee*, agents for *Edmund W. Roythorne*, Spalding E (for the appellant); *J. D. Langton & Passmore*, agents for *Mellows & Sons*, Peterborough (for the respondents).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

Re HEARTS OF OAK PERMANENT BUILDING SOCIETY'S APPLICATION. F

[Chancery Division (Morton, J.), **November 25, December 2, 17, 1941.**]

Emergency Legislation—Mortgage—Application for leave to proceed—No person liable under covenant to pay mortgage debt—Owner of equity of redemption to be made respondent to summons—Courts (Emergency Powers) Act, 1939 (*c.* 67), *s.* 1 (4). G

B. mortgaged registered land to the applicant society in order to secure the repayment by her of a loan. The property was afterwards transferred to W., who became its registered proprietor, and who continued to make the payments due under the mortgage. On the occasion of the transfer, the applicants did not release B. from her covenant to pay, nor did they take any covenant from W. In October, 1940, W. made default in the payments H under the mortgage, and was later adjudicated bankrupt. The respondent to the present application was appointed his trustee in bankruptcy. On the applicants taking out an originating summons for leave to proceed under the Courts (Emergency Powers) Acts, 1939 and 1940, the master took the view that, as B. was the only person liable to pay the debt secured by the mortgage, she was the proper person to be made respondent. Subsequently, the applicants executed a deed releasing B. from all liability under the mortgage:—

Held: the proper person to be made respondent to the application was the person in whom the equity of redemption of the mortgaged property had become vested, namely, the trustee in bankruptcy of W. As, however, he was not a "person liable to pay the debt or to perform the obligation" within the meaning of the Courts (Emergency Powers) Act, 1939, s. 1 (4), he was not in a position to oppose the granting of leave to proceed.

Re Abbey Road Building Society (*Pomeroy's Trustee*) (1) *explained.*

[**EDITORIAL NOTE.** There are a number of reported cases in which it has been held that a person in whom the equity of redemption of mortgaged property is vested and who is not liable to pay the mortgage debt is not entitled to any protection under the Courts (Emergency Powers) Acts. Despite that fact, the mortgagee has to take out a summons for leave to proceed, and, a summons not being an *ex parte* application, a respondent must be named. In the case of a mortgage where no person is liable upon a covenant to pay the mortgage debt, there is no one who can effectively oppose the summons, but, in order to satisfy procedural requirements, the owner of the equity of redemption is made respondent to the summons. The Courts (Emergency Powers) Consolidation Rules, 1940, r. 14 (4) provides that a respondent to such a summons shall not be required to enter an appearance, so that there is no real hardship in an owner of the equity of redemption being made a respondent when he has no possible answer to the application. The Courts (Emergency Powers) Consolidation Rules, 1940, r. 15B should also be noted. That rule provides for certain applications of this nature being made *ex parte*. Morton, J., has taken the opportunity of explaining his decision in *Re Abbey Road Building Society* (*Pomeroy's Trustee*) (1), a decision given before these matter had been fully explored.

For the Courts (Emergency Powers) Act, 1939, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 32, p. 946. See also BUTTERWORTH'S EMERGENCY LEGISLATION, Statutes Volume, p. 206.]

Cases referred to:

(1) *Re Abbey Road Building Society* (*Pomeroy's Trustee*), [1940] Ch. 239; Digest Supp.; 109 L.J.Ch. 123; 162 L.T. 324.

(2) *Re Midland Bank, Ltd.'s, Application*, [1941] 3 All E.R. 299; Digest Supp.

(3) *National Provincial Bank, Ltd.* v. *Liddiard*, [1941] 1 Ch. 158; Digest Supp.; *sub nom. Re National Provincial Bank, Ltd.*, [1941] 1 All E.R. 97.

(4) *Re Midland Bank, Ltd.*, [1941] 1 Ch. 350; Digest Supp.; *sub nom. Franklin* v. *Midland Bank, Ltd.*, [1941] 2 All E.R. 135.

Application by the Hearts of Oak Permanent Building Society under the Courts (Emergency Powers) Acts, 1939 and 1940, for leave to proceed to exercise any remedy which may be available to them. The facts are fully set out in the judgment.

G. F. Kingham for the applicants, the building society.

H. G. Garland for the respondent, the trustee in bankruptcy.

Morton, J.: This is an application by the Hearts of Oak Permanent Building Society under the Courts (Emergency Powers) Acts, 1939 and 1940. The summons is headed:

In the matter of a mortgage dated Mar. 4, 1935, made between Clara Amelia Budd of the one part and the Hearts of Oak Permanent Building Society of the other part.

That portion of the heading is in fact inaccurate. The mortgage in question was in fact made between Clara Amelia Budd of the first part, Robert Smiles of the second part, and the Hearts of Oak Permanent Building Society of the third part. The respondent to the summons is Rudkin, the trustee of the property of Arthur Bertram Waters, a bankrupt. The relief asked is as follows. The society asked for leave under the Act that they might be at liberty to proceed to exercise any remedy which might be available to them by way of (i) the taking of possession of the property comprised in the mortgage, (ii) the realisation of their security comprised in the mortgage, or (iii) the appointment of a receiver of rents and profits of the property. The property in question is the leasehold premises known as Nos. 38 and 40, Saltoun Road, Lambeth, in the county of London.

As to Robert Smiles, the party of the second part to the mortgage, it appears from the affidavit of Walter William Warren, sworn on Nov. 28, 1941, that Robert Smiles formerly had a charge upon the property, but that no moneys are now secured by that charge. The person now registered as proprietor of that charge, Mrs. Catherine Lucy Smiles, has executed a formal discharge thereof, and the solicitors for the applicant society have stated that this discharge will be lodged forthwith at the Land Registry, so that the entry relating to the charge will be removed from the register. In these circumstances, I need say nothing further about the charge which formerly existed in favour of Robert Smiles.

The facts leading up to the issue of this summons are these. On Aug. 8, 1930, Clara Amelia Budd was registered at the Land Registry as the proprietor of the property in question, which is taken to be evidence of actual title. The mortgage which is now sought to be enforced was a mortgage to secure the repayment to the society by Miss Budd of a sum of £965 and interest by certain monthly instalments, and the mortgage was duly registered at the Land Registry on A Mar. 18, 1935. On July 6, 1936, the society received written notice that the mortgaged property had been transferred to Arthur Bertram Waters. On July 20, 1936, Arthur Bertram Waters was registered as the proprietor of the property subject to the mortgage of March 4, 1935. The applicant society gave no release to Miss Budd on the occasion of this transfer, and took no covenants from Arthur Bertram Waters. Waters, however, continued to make the payments due under the mortgage until Oct., 1940, when default was made B in these payments. On Nov. 6, 1940, Arthur Bertram Waters was adjudicated bankrupt, and the respondent to the present summons, Stafford Basil Ritchie Rudkin, was appointed his trustee in bankruptcy.

The originating summons which is now before me was issued on May 22, 1941, and the only person made a respondent to the summons was the trustee in bankruptcy of Arthur Bertram Waters. When the summons first came before C the master, he took the view that the proper respondent to the summons was not the trustee in bankruptcy, but was Miss Budd, who was, at that time, the only person liable to pay the debt secured by the mortgage. He says in his note :

> Whilst it has been laid down that a trustee in bankruptcy of a mortgagor is a proper party in order to satisfy the requirements that there must be a respondent (except as provided by r. 15B (3)), it does not appear to be necessary to join him where there is another person who can properly be made a party, in this case, Clara Amelia Budd, D the original mortgagor.

The position which arose before the master illustrates once again certain difficulties occasioned by the language of the Courts (Emergency Powers) Act, 1939, s. 1 (4). Section 1 (2) of the Act, has been of great value in enabling the court to give relief to a mortgagor unable to make the payments due under the mortgage by reason of circumstances directly or indirectly attributable to the present war. In most cases, the person liable to pay the debt secured by the mortgage is the E owner (subject to the mortgage) of the mortgaged property, or, in other words, the owner of the equity of redemption. In such cases, the language of the subsection fits the facts, and relief has been given to mortgagors in many hundreds of such cases. It frequently happens, however, that the owner of the equity of redemption is a person who is not personally liable to pay the debt secured by the mortgage. I shall give three illustrations of such cases. (1) The original F mortgagor may have sold the equity of redemption to a person who enters into no covenant to pay the debt secured by the mortgage. In such a case, the original mortgagor is still the person liable to pay the debt, although it is charged upon property in which he has ceased to have any beneficial interest. (2) The original mortgagor may have become bankrupt. In such a case, the equity of redemption becomes vested in the trustee in bankruptcy, although neither the trustee nor the bankrupt is personally liable to pay the debt. That was the G position in *Re Abbey Road Building Society* (*Pomeroy's Trustee*) (1) and *Re Midland Bank, Ltd.'s, Application* (2). (3) The mortgage may have been a mortgage to secure the debt of a third party, the only parties to the mortgage being the mortgagor and the mortgagee, and the mortgage containing no covenant by the mortgagor to pay the debt secured by the mortgage. That was the position in *National Provincial Bank, Ltd.* v. *Liddiard* (3) and *Re Midland Bank, Ltd.* (4). It seems to me that the legislature has failed to envisage such cases as these, and H unfortunate consequences have followed. Apart from the fact that it is often difficult in such cases to determine what person or persons should be served with the summons, real hardship has resulted to persons who own the equity of redemption but are unable to get any protection under subsect. (4) because they are not liable to pay the debt or to perform the obligations in question within the meaning of the subsection. Instances of such hardship are provided by *National Provincial Bank, Ltd.* v. *Liddiard* (3) and *Re Midland Bank, Ltd.* (4). However, in the case now before me, the position has been simplified by the events which I shall now narrate. After the master had expressed his view on the matter, the applicant society filed evidence stating that the present whereabouts of Miss Budd were unknown. Further, they produced a deed, dated Sept. 29, 1941, purporting to be made between the society of the one part and Miss Budd of the other part. Clause 1 of that deed is as follows :

> The society hereby covenants with the mortgagor [Miss Budd] that the society will not at any time hereafter bring or take any action or proceeding or make any claim whatsoever against the mortgagor in respect of the said principal sum interest premium and other moneys or any covenant on the part of the mortgagor contained or implied in the mortgage [dated Mar. 4, 1935] Provided always that nothing herein contained shall release or in any manner prejudice or affect any right (whether of sale or to possession or to appoint a receiver or otherwise whatsoever) which the society may have against the said leasehold premises comprised in the mortgage by reason of any default in the performance or observance of any of the said covenants.

The case again came before the master after this deed had been executed, but he still felt some doubt as to whether Miss Budd should not have been made a respondent to this summons, and, at the request of the applicant society, he adjourned the case to me.

At the hearing before me, counsel for the applicant society offered (i) an undertaking in the terms of cl. 1 of the deed of Sept. 29, 1941, which I have already read, and (ii) an undertaking that the society would forthwith take steps to register the deed of Sept. 29, 1941, at the Land Registry. I take the view that, on the execution by the society of the deed of Sept. 29, 1941, Miss Budd was validly released from all her liability under the mortgage dated Mar. 4, 1935. I think that the former deed operates as an effective release under seal of those obligations, although it was never executed by Miss Budd. Having regard to this fact, and to the facts as to Robert Smiles' charge, which I have already stated, I think that the present case is really indistinguishable from *Re Abbey Road Building Society* (*Pomeroy's Trustee*) (1). There is no " person liable to pay the debt or to perform the obligation in question " within the meaning of sect. 1 (4) of the Act. In these circumstances, I think in the present case, as I thought in the *Abbey Road* case (1), that the proper person to be made respondent to the application is the person in whom the equity of redemption is vested—namely, the trustee in bankruptcy of A. B. Waters. The trustee in bankruptcy raises no objection to an order being made in the terms asked by the summons. Indeed, it is clear, having regard to the decisions in *National Provincial Bank, Ltd.* v. *Liddiard* (3) and *Re Midland Bank, Ltd.* (4), that he could not effectively ask the court to refuse leave or to impose restrictions or conditions, since he is unable to bring himself within the terms of subsect. (4).

I give leave to the applicant society, on its giving the undertakings which I have mentioned, to proceed to exercise any remedy which may be available to them by way of taking possession of the property comprised in the mortgage dated Mar. 4, 1935, the realisation of the security comprised in the mortgage, or the appointment of a receiver of the rents and profits of the property. The applicant society will be at liberty to add its costs of this application to its security.

I desire to add a few words in regard to my own decision in the *Abbey Road* case (1). In that case, I began my judgment by saying, at pp. 241, 242 :

> It seems apparent from that subsection [sect. 1 (4)] that the person to be made respondent to the application for leave under the Act is the person described in the words " the person liable to satisfy the judgment or order, or to pay the rent or other debt, or to perform the obligation in question."

If the trustee in bankruptcy had appeared in that case and had sought relief on the ground that he answered that description, I should have had to decide in substance the point which was afterwards decided by FARWELL, J., in *Liddiard's* case (3)—namely, whether a person in whom the equity of redemption is vested, who is not liable to pay the mortgage debt, answers the description of " the person liable to pay the debt or to perform the obligation in question." As matters stood, however, in the *Abbey Road* case (1) all I had to decide was whether the proper party had been made a respondent. I said, at p. 242 :

> The position in the present case is a curious one, and it is a little difficult to see how either the bankrupt, having regard to the bankruptcy, and the effect of bankruptcy, or the trustee in bankruptcy, exactly answers this description.

Then I continued as follows, at p. 242 :

I think, however, that the intention of the section is that, on an application by a mortgagee, such as the present application, the person to be made the respondent to the application should be the person in whom the equity of redemption in the property is vested. It is quite clear under the provisions of the Bankruptcy Act, 1914, that the person in whom the equity of redemption in the property is vested is the trustee in bankruptcy. He is, I think, the person who is really interested in making up his mind whether or not he should oppose the application, and I cannot think that the legislature intended that the bankrupt, who had ceased to be the owner of the equity of redemption, should be made a party to an application such as this. A
Although this construction of the Act is not free from difficulty, as the wording of the subsection does not appear to fit very aptly a case in which a mortgagor has become bankrupt, I have arrived at the conclusion that I ought, on a fair reading of the Act, to give the subsection this construction. Accordingly the trustee in bankruptcy having been, in my view, properly made a respondent to this summons, having raised no objection before the learned master and not having appeared before me to oppose the application, I think that I ought to grant this application.

The actual decision came to no more that that, in the circumstances of the case, B
there being no person liable to pay the debt or perform the obligation within the meaning of subsect. (4), the proper person to be made respondent was the person in whom the equity of redemption was vested. That decision is in no way in conflict with the decision of Farwell, J., in *National Provincial Bank, Ltd.* v. *Liddiard* (3) or with my own decision in *Re Midland Bank, Ltd.* (4). I realise, however, that certain passages in my judgment in the *Abbey Road* case (1) C
might be read as indicating that I thought that the trustee in bankruptcy was the person liable to pay the debt or to perform the obligation within the meaning of subsect. (4). For this reason, I thought it right to say that I did not, and do not, take that view.

Application granted. Costs to be added to security.

Solicitors: *Dixon & Co.* (for the applicants); *Langton, Passmore & Co.* (for the respondent). D

[*Reported by* Irene G. R. Moses, *Barrister-at-Law.*]

WARE *v.* WARE.

[Probate, Divorce and Admiralty Division (Bucknill, J.), **November 7, 1941.**] E

Divorce—Desertion—Continuance of desertion—Letter by deserting spouse suggesting reconsideration of position—No reply by other spouse—Whether period of desertion interrupted.

The petitioner's wife deserted him in March, 1938. The petitioner made genuine efforts to induce his wife to return to him, but without success. In October, 1939, she wrote to him, suggesting that they should wipe out the past and consider the future together again. The letter F
contained no definite offer to return and the petitioner did not answer it. In June, 1941, he presented his petition for dissolution of the marriage on the grounds of desertion for three years immediately preceding the presentation of the petition:—

Held: the wife's letter did not constitute a genuine offer to return and to terminate the desertion so as to interrupt the running of the statutory G
period of three years. The petitioner was, therefore, entitled to a decree *nisi* of divorce.

[**EDITORIAL NOTE.** The decision in *Pratt* v. *Pratt* (1) makes it necessary for the petitioner to show that the desertion has continued throughout the statutory period of three years. In order to stop the running of time against the petitioner, it is here shown that there must be a genuine offer to return and to reconstitute the married life under proper conditions. If an isolated suggestion for reconciliation were sufficient, H
an insincere offer to return might be used as a device to defeat a petition.

As to Offer to Return, see HALSBURY, Hailsham Edn., Vol. 10, pp. 657, 658, para. 967; and for Cases, see DIGEST, Vol. 27, pp. 312-315, Nos. 2901-2929.]

Case referred to:

(1) *Pratt* v. *Pratt*, [1939] A.C. 417; [1939] 3 All E.R. 437; Digest Supp.; 108 L.J.P. 97; 161 L.T. 49.

Undefended Petition by the husband for dissolution of marriage on the ground of desertion for 3 years immediately preceding the presentation of the petition. The facts are fully set out in the judgment.

G. F. Stringer for the petitioner.

BUCKNILL, J.: In this case, the petitioner stated in evidence that in Mar., 1938, his wife told him that she was in love with another man and wanted him to divorce her so that she could marry again. On Mar. 13, 1938, she left and told her husband that she intended to take a room in town to think things over, and has never returned. The petitioner properly produced to the court two letters which the wife had written to him. The first, dated June 7, 1938, is A as follows:

> Leonard darling. After having had a week's meditation on the matter I have come to the conclusion that I don't really think it would work if we started all over again. You see it might be all right for a few months, but after that I am sure all the same old disputes and differences of opinion, etc., would arise again and we should both be unhappy, so in your interests I do not think it would be wise to try and close the breach. I very much appreciate your generous offer to have me back, and had it B been made a month ago I would have come back like a shot. Perhaps it is just as well that you didn't make it before, as I now think we would both regret it later. This has been a very difficult letter to write—and in reaching this decision I have put your interests before my own. My earnest hope is that you may one day find someone who will make up to you for all the suffering I have caused.

That letter, at any rate, shows that the husband had made very genuine efforts to get his wife back, notwithstanding the way in which she had treated him. C Then on Oct. 14, 1939, less than two years before the petition was filed, she wrote again from "Sisters' Quarters," at Aberdeen:

> Darling Leonard. The war has changed a lot of things—couldn't you let it wipe out the past, and consider the future together again?

The husband did not reply to that letter.

The difficulty which has arisen in the case is due to the decision of the House of Lords in *Pratt* v. *Pratt* (1), which in effect says that, before a husband can D get a divorce on the ground of desertion, he must show that the desertion has continued right up to the time when he files his petition, and, if at any time during the three years preceding the filing of the petition the wife has made a genuine offer to come back and to terminate the desertion and the husband has refused to accept that offer, he cannot any longer say that the wife is a deserting wife.

E I have had an opportunity of considering that case and considering the facts in this case. It seems to me that the decision in *Pratt* v. *Pratt* (1) must not be used as a device to interrupt the running of the statutory three years, to adopt the phrase used by LORD MACMILLAN in his opinion. Otherwise, a great injustice might be done to a spouse who had been deserted for nearly three years and who might then, at the eleventh hour, when he was about to file a petition, be defeated by the offending spouse offering to return, not being really contrite F and anxious to resume married life, but merely using a device to defeat the petition. I think, therefore, that the principle laid down in *Pratt* v. *Pratt* (1) can be applied only if the court is satisfied that there is a genuine offer to resume cohabitation and to behave properly as husband or wife, as the case may be.

In this case, I am not satisfied that there was any such offer. In the first place, I bear in mind the reason why the wife left—namely, that she wished to be divorced by her husband in order that she might marry another man. G Secondly, when, a little time after she left, the husband made genuine efforts to effect a reconciliation, she refused. Thirdly, the letter of Oct., 1939, which the husband has produced, does not contain any definite offer to return or any definite expression of contrition, or even any definite desire to meet her husband and talk things over. The respondent has never attempted to meet her husband. He could hardly be expected to go up to Aberdeen to H see her, and, although he did not reply to the letter, the wife took no further steps in the matter, and has not appeared to the petition or taken any other action to prove her desire to cease to be in a state of desertion. For these reasons, I think that the petitioner is entitled to a decree, and there will be a decree *nisi*.

Decree nisi granted.

Solicitors: *Hewitt, Woollacott & Chown* (for the petitioner).

[*Reported by* D. ARMSTEAD FAIRWEATHER, ESQ., *Barrister-at-Law.*]

ROADWAYS TRANSPORT DEVELOPMENT, LTD., *v.* ATTORNEY-GENERAL

[Court of Appeal (Lord Greene, M.R., and Clauson and du Parcq, L.JJ.), **November 6, 7, December 4, 18, 1941.**]

Royal Forces—Army—Impressment—Vehicles—Motor vehicle subject to hire-purchase agreement—Payment to owner—Payment to person in possession of vehicle—Army Act, s. 113 (4).

The respondents owned a vehicle which they had let on a hire-purchase agreement, under the terms of which they had become entitled to retake possession. On Oct. 24, 1939, whilst the vehicle remained out of their possession, it was impressed, pursuant to an emergency requisition under the Army Act, s. 115. Payment was made by the Army Council to the company from whose possession they had requisitioned the vehicle. No evidence was given as to how the vehicle came into the possession of this company. The respondents claimed payment for impressment of the vehicle. The Army Council contended that the payment had been effected, since payment made to the possessor was payment "to the owner" within the meaning of the Army Act, s. 113 (4) :—

Held : on the true construction of the Army Act, s. 113 (4), a payment made to the possessor of any carriages or animals furnished in pursuance of sect. 115 protects the Army Council from liability to any other person having rights in the property furnished.

Decision of Farwell, J. ([1941] 2 All E.R. 313) *reversed.*

[**EDITORIAL NOTE.** This is purely a question of the construction of the relevant section of the Army Act. The matter is one of great public importance, and, for this reason, it is to be regretted that the whole difficulty lies in the faulty drafting of the section. It seems possible that the matter will be taken to the House of Lords.

As to Payment for Impressed Vehicles, see HALSBURY, Hailsham Edn., Vol. 28, pp. 603, 604, para. 1235.]

Appeal by the defendant from an order of Farwell, J., dated May 13, 1941, and reported [1941] 2 All E.R. 313, where the facts are fully set out.

The Solicitor-General (*Rt. Hon. Sir William Jowitt, K.C.*) and *H. O. Danckwerts* for the appellant.

G. G. Honeyman for the respondents.

Lord Greene, M.R. : Clauson and du Parcq, L.JJ., will deliver their judgments first.

Clauson, L.J. : The problem to be solved on this appeal turns upon the true construction of the Army Act, ss. 112-118, as that Act now stands. The Act was enacted in 1881 as the Army Act, 1881, but has since been amended from time to time. By sects. 112 and 113, provision is made for the compulsory furnishing, by persons having suitable carriages or animals, of carriages, animals and drivers required for the purpose of moving the regimental baggage and regimental stores of the forces mentioned in a particular route in accordance with the route, and for payment in respect of the carriages and animals so furnished at the rates of payment commonly recognised or generally prevailing in the district at the time. Any difference respecting the amount payable is to be fixed by the certificate of a county court judge. Certain ancillary provisions dealing with the matter are set out in Sched. VI. If a sum is tendered or paid by or on behalf of the Army Council (who seem impliedly to be the persons liable to pay), that sum is to be deemed to be the amount due, unless it is questioned within a stated period. Sect. 113 (4) provides as follows :

> The possessor of any carriage or animal at the time of impressment shall be deemed to be the owner for the purposes of the procedure of impressment where it is not otherwise declared at the time, and payment made to the possessor shall be deemed to be payment to the owner. In the event of the property being vested in another person or persons, the possessor shall notify all others interested in the property and adjust the amount received in due proportion. In the event of any difference arising, the amounts shall be apportioned on a certificate of a county court judge as aforesaid . . .

Subsects. (5) and (6) make it the duty of the officer who demands carriages or animals to pay the sums due to the owners or drivers of the carriages or animals, and one-third of the payment is, if required, to be made before the carriage is loaded. If, however, the officer is from any cause unable to pay the amount due to the owner or driver, he is to make up with the owner or driver, sign an account of the amount due to him, and forthwith transmit the account so signed to the Army Council, who are forthwith to cause the amount named therein to be paid to such owner or driver.

It is necessary, as a preliminary to the consideration of the subsequent provisions of the Act, to form a clear view of the operation of sect. 113 (4). The opening provision of the subsection gives the possessor of the carriage or animal in question the right to be treated for all relevant purposes, as between himself on the one side and the officer or the Army Council on the other, as the owner of the carriage or animal, unless at the time it is otherwise declared. I confess that I have not been able to come to any final conclusion as to the meaning of those last words. It is not clear who is contemplated by the legislature as making the declaration. Do the words mean unless the possessor disclaims ownership, or do they mean unless the requisitioning officer specifically refuses to recognise the possessor as a person whom he can properly regard as being the owner or in the place of the owner? The answer to this question may prove to be material if a question should arise as to whether a person in possession of a carriage or animal may, in any particular case, fall within the description of a person " having " the carriage or animal within the meaning of sect. 112 (1), and thus under a legal obligation, if ordered, to furnish the same. For the purposes of the present case, however, the words which have to be construed are the subsequent words " payment made to the possessor shall be deemed to be payment to the owner." It was suggested in argument that these words must be read as being subject to the restrictive words " where it is not otherwise declared at the time." From the point of view of language, I am satisfied that this argument is not well-founded. Had I thought otherwise, I should have found it necessary to form and express a final view as to the meaning of the restrictive words. I feel myself bound to construe the words as to payment as having a general application to the transactions covered by the section, whether or not the declaration referred to in subsect. (4) has been made. The result, in my judgment, is that, where carriages and animals have been furnished in pursuance of the provisions of sect. 112—namely, for the purpose of moving the regimental baggage and regimental stores of forces mentioned in a route in accordance with the route—payment for the accommodation provided made to the possessor will protect the Army Council from liability to any other person having rights in the articles furnished. Any such person is left by the legislature to pursue such claims as he may have against the possessor, upon whom, by subsequent provisions of subsect. (4), a duty is laid to adjust the amount received by him in due proportion as between himself and all others interested in the property.

I turn now to sect. 115, under which, in circumstances which admittedly exist in the present case, a requisition of emergency may be issued. Such a requisition may require the provision of a number of things in addition to carriages and horses, including such perishables as food and forage, not merely for the limited purpose of conveyance on a particular route, but " for the purpose mentioned in the requisition." By sect. 115 (3), all the provisions of the Act as to the provision and furnishing of carriages and animals, including those respecting fines, are to apply in like manner as in the case of the issue in pursuance of the foregoing provisions of the Act—namely, sect. 112—of a warrant for the provision for the purpose of moving the regimental baggage and regimental stores of the forces mentioned in the route in accordance with the route of carriages and animals, and shall apply to vessels, food, forage and stores in like manner in all respects as they apply to carriages. In my judgment, among provisions of the Act " as to the provision or furnishing of carriages and animals," one of the most important—certainly from the point of view of the owner—is that which, as I have indicated above, provides in effect that the owner is to look for payment, in respect of the articles provided or furnished, not necessarily to the Army Council, but to the possessor of the articles if the Army Council has paid the possessor, and, accordingly, I can see no escape from the conclusion that this provision is applicable to the case of a requisition of emergency.

I turn next to sect. 115 (7), which provides that, whenever a proclamation ordering the Army Reserve to be called out on permanent service is in force (a state of affairs which admittedly prevailed at all times material to the case now before us), a requisition may extend to the provision of carriages, animals, vessels, food, forage and stores for the purpose of being purchased as well as for that of being hired. Reading sect. 113 (4) with sect. 115, and in particular subsects. (3) and (7), I can see no escape from the conclusion that, although the sums which may become payable in respect of articles—as, for example, a motor car taken for purchase under sect. 115—may be very large indeed as compared with the sum payable for a temporary user under sect. 112 of a carriage or horse for a limited purpose, nevertheless the legislature has thought fit to make the same provisions in the one case as in the other as regards the person to whom payment is to be made, and, accordingly, in either case, payment to the possessor is, by virtue of the provisions of sect. 113 (4) in the one case and by virtue of that subsection as extended by sect. 115 (3) and again by sect. 115 (7) in other cases, to protect the Army Council from any further claim, the true owner being left to his remedy against the payee (in case the latter fails in his duty imposed on him by sect. 113 (4) of adjusting the amount received by him in due proportion among all those interested in the property).

In the court below, FARWELL, J., took a crucially different view of the operation of those sections. He pointed out that sect. 113 (4) deals with a form of impressment which is distinct from that covered by sect. 115. That is perfectly true, but, in my judgment, FARWELL, J., in construing the sections, fails to give due effect to the words in sect. 115 (3), which apply the provisions of the Act as to provision or furnishing of carriages or animals under other sections of the Act to such provision under sect. 115. The language is not happily chosen, but the court is, in my judgment, free—and, indeed, bound—to construe the Act *ut res magis valeat quam pereat*, and I feel bound to come to the conclusion that the intention of the legislature to assimilate the incidents of a requisition for purchase to those of a requisition for hiring sufficiently appears. FARWELL, J., found support for his view in sect. 115 (4), which seemed to him to be inconsistent with the importation of sect. 113 (4) into sect. 115. I must confess that, for myself, I am unable to appreciate the inconsistency, though I agree that, where payment is made to a possessor who is not the owner, the earlier part of sect. 115 (4) would seem to have no application.

I can deal with the facts very shortly. A company called A. Hutchin (Haulage), Ltd., was in possession, in unexplained circumstances, of a lorry which was duly seized under a requisition for purchase by a duly authorised requisitioning officer. It did not appear clearly whether it was declared at the time of requisition that the lorry belonged (as it was assumed for the purposes of this case that it did belong) to Roadways Transport Development, Ltd. The Army Council, relying, as it would seem, on a view of the construction of the Army Act which accords with that which I have expressed above, paid £380 for the lorry to A. Hutchin (Haulage), Ltd. Roadways Transport Development, Ltd., sought from FARWELL, J., a determination whether, on the true construction of the Act, the payment made to the possessor was to be deemed a payment to the owners, and FARWELL, J., determined this question in the negative. For the reasons which I have stated, I find myself in disagreement with his view. In my judgment, the appeal should be allowed, and in lieu of the declaration made by FARWELL, J., there should be substituted a declaration that, as between the Army Council and the plaintiffs, the payment made on Oct. 26, 1939, by or on behalf of the Army Council to A. Hutchin (Haulage), Ltd., is to be deemed to be payment to the owners, subject and without prejudice to such right as the plaintiffs may have to enforce against A. Hutchin (Haulage), Ltd., the duty of adjusting the amount in due proportion among all others interested in the article in respect of which the payment was made.

DU PARCQ, L.J.: I have had the advantage of reading the judgment of CLAUSON, L.J., with whose conclusions and reasoning I agree, and have little to add. Although sect. 113, read by itself, appears to deal only with impressment for the temporary purposes of a route, it is necessary as a matter of construction to read into it the provisions of Sched. VI, which it incorporates. Sched. VI introduces a reference to requisitions for purchase. This somewhat surprising interpolation is explained when the reader of the Act is apprised by sect. 115 (3) that all the provisions of the Act which relate to impressment for hire are also to apply to requisitions of emergency. Unless sects. 113 and 115 are to be read together in the sense contended for on behalf of the Crown, it is impossible to account for the presence in Sched. VI of the words to which I have referred.

When once it is seen that sect. 113 (4) must be read as referring to requisitions of emergency, it is, I think, reasonably plain that, whatever meaning is to be attached to the words " where it is not otherwise declared at the time," they do not qualify the later words which immediately follow the interposed conjunction " and." In my opinion, any doubt which there might be about the construction is removed by the next sentence. A duty is imposed on the possessor, if he is not the owner or if he is only a part owner, to pay the owner the whole purchase price, or to pay a due proportion of the purchase price to the other part-owner or part-owners. This provision seems to me clearly to contemplate that, in the ordinary course of events, payment will be made to the possessor, even though it may be known to the Army Council's representative that the possessor is not the owner. In any but a very exceptional case, the owner is adequately protected (i) by the right which the statute impliedly confers on him to recover the purchase price from the possessor who has received it, as money had and received to the owner's use, and (ii) by the fact that, if the possessor fraudulently converts the money which he receives to his own use, he will be guilty of an offence under the Larceny Act, 1916, s. 20. The documents in this case show that it is the practice to call the attention of the payee to his duty in clear language, and, when this has been done, it is not likely that a possessor who has used the money for his own purposes will find it easy to escape a conviction. I must add that nothing I say is intended to refer to those who received the money in this case. They are not before the court, and may, for all I know, have a complete defence to any charge which may be brought against them.

Although I feel reasonably satisfied with the solution of the immediate problem at which this court has arrived, I share the view, in which counsel on each side concurred, that the sections which we have had to consider are unnecessarily obscure, and, indeed, in some particulars unintelligible. For instance, I feel some doubt, which has been expressed, as to the meaning of the words " where it is not otherwise declared at the time." It is obviously regrettable that the relations of the Crown and its subjects should be regulated by an enactment drafted in language which neither lawyers nor laymen can understand, and it is to be hoped that future amendments will give simpler expression to the intentions of the legislature. I agree that the appeal should be allowed.

Lord Greene, M.R.: I have had the advantage of reading the judgments just delivered by Clauson and du Parcq, L.JJ. I agree with them, and only find it necessary to refer to one or two points by way of supplement to what they have said. The Army Act, s. 113 (4), which is the subsection under consideration, made its first appearance in 1925, when it was inserted by the Army and Air Force (Annual) Act, 1925. In that Act, an attempt was made to improve the existing legislation both in form and in substance, an attempt which, so far as clarity is concerned, fell lamentably short of success. I share the hope expressed by du Parcq, L.J., that the legislature will direct its attention to the matter. The subsection was obviously added in order to get over what must have been a serious practical difficulty in operating the machinery of impressment. Before 1925, it is open to doubt whether dealings in connection with impressment could take place with anyone but an owner or his authorised representative. In the matter of payment, it seems as though it were to the owner that payment had to be made in all cases. Be that as it may, however, it is clear that, as impressment might in many cases be a matter requiring immediate and effective action, it was highly inconvenient to have to deal with an owner who might be at the other end of England, or even abroad, at the time. In these circumstances, it would not have been surprising to find a provision to the effect that the possessor should, for all purposes connected with impressment (including payment), be deemed to be the owner, leaving the apportionment of the sum received to be adjusted by the possessor as between himself and the owner, subject to the appropriate sanctions. The whole difficulty in the present case arises by reason of the insertion of the words "where it is not otherwise declared at the time." I share the views of Clauson and du Parcq, L.JJ., as to the obscurity of these words. I may point out one further obscurity. What is meant by the words " at the time " ? The process of impressment goes through many stages. By way of preliminaries, there are the furnishing of lists of horses under sect. 114 (1) (*a*) and the preparation of lists of persons liable to furnish carriages and animals under sect. 114 (2). There is the justices' warrant, followed by the constable's order, and so forth. To what stage do the words refer ? Sect. 115 (8) may be referred to in this connection. That subsection gives a power of seizure where " any person ordered " to furnish an article refuses or neglects to do so, but " the said person " is nevertheless A entitled to payment. If the order is directed to the possessor, no declaration as to ownership having been made, and if the goods are seized and it is subsequently declared that someone else is the owner, is payment to be made to " the said person " or to the owner ? If it were necessary to hold that the words " where it is not otherwise declared at the time " applied to payment, I should be disposed to say that the declaration must be made at any rate at the time when the constable's order is made out or served, that being the first effective step in B the impressment of an article. In the present case, the declaration was made at a much later stage. The appeal will be allowed, and the declaration will be in the form stated by Clauson, L.J.

Appeal allowed with costs. Leave to appeal to the House of Lords.

Solicitors : *Treasury Solicitor* (for the appellant) ; *Kimber, Bull & Co.* (for the respondents).

[*Reported by* W. K. Scrivener, Esq., *Barrister-at-Law.*] C

R. *v.* WANDSWORTH JJ., *Ex parte* READ.

[King's Bench Division (Viscount Caldecote, L.C.J., and Humphreys and D Wrottesley, JJ.), **November 25, 1941.**]

Crown Practice—Certiorari—When order granted—Alternative remedy—Denial of natural justice.

The applicant was charged before the justices with misrepresentations made on certain tickets as to the weight of articles of food. The tickets were not produced at the hearing, and the justices retired to consider whether their non-production was sufficiently explained. On returning E into court, they at once convicted the applicant on one of the summonses, without giving him an opportunity of answering the charge. The justices admitted that they had thereby committed an error amounting to a denial of justice. On an application for an order of *certiorari* to quash the conviction, it was contended that the court had no power to make such an order, as there was no want of jurisdiction :— F

Held : since the facts showed that there had been a denial of natural justice, an order of *certiorari* quashing the conviction should be made.

[**EDITORIAL NOTE.** The court does not make an order of *mandamus* or *certiorari* where there is an alternative remedy which is equally convenient. It was here suggested that the applicant had a remedy by way of appeal to quarter sessions, but the court has held that, where there has been a denial of natural justice, the applicant is entitled to an order of *certiorari*, even though another remedy may be available to him. G

As to Right to Order of Certiorari, see HALSBURY, Hailsham Edn., Vol. 9, pp. 876-880, paras. 1479-1483 ; and for Cases, see DIGEST, Vol. 16, pp. 402-404, Nos. 2467-2498.]

Case referred to :

(1) *R.* v. *Nat Bell Liquors, Ltd.*, [1922] 2 A.C. 128 ; 16 Digest 419, *2795* ; 91 L.J.P.C. 146 ; 127 L.T. 437.

Application for an order of *certiorari* to quash a conviction by justices in the H following circumstances. The applicant was charged with misrepresentation by means of tickets of the weight of meat offered by him for sale. At the hearing, the tickets complained of were not produced, and objection was taken to the admission of evidence of their contents. The magistrates retired to consider the question whether the non-production of these tickets had been satisfactorily explained. Upon returning into court, they inadvertently not only gave their decision upon this evidence point, but at once proceeded to acquit the applicant on one summons and convict him upon the other. The applicant was not heard, and he contended that he had a good answer to the summons on which he was convicted.

D. Tolstoy for the applicant.

H. Malone for the justices.

B. E. Dutton Briant for the London County Council.

Viscount Caldecote, L.C.J.: The magistrates in this case admit that they have made a mistake. They have not made an affidavit in which they make that admission, but they appear here by counsel, who has informed the court that they do not dispute the applicant's submission to the court that they made an error, which must be taken to amount to an admission that there was a denial of justice to the applicant. Having made that admission of a mistake, however, they say that the court now has no power to correct it. As I understand the argument, it is based first of all upon the submission that the court will not look at what is called extrinsic matter which comes before the court upon affidavit. Secondly, it is said that an order of *certiorari* should not issue, because the applicant's remedy was by way of appeal to the court of quarter sessions or by way of case stated, and that the applicant has lost his opportunity of appealing because he is out of time, and he did not ask for a case to be stated upon a point of law, which would have given him his remedy in this court.

The case which has been most relied upon is *R.* v. *Nat Bell Liquors, Ltd.* (1), which is relied upon as authority for the proposition—it must be put as high as this by counsel—that, where the court has not given a person charged an opportunity of giving evidence on his own behalf, an order of *certiorari* will not be granted by the court to quash the conviction, on the ground that the position is analogous to the position in a case where there has been full opportunity to everybody to produce their evidence but in the end there is an insufficiency of evidence. The passage to which we were referred is in the opinion of Lord Sumner in *R.* v. *Nat Bell Liquors, Ltd.* (1), at p. 151:

> It has been said that the matter may be regarded as a question of jurisdiction, and that a justice who convicts without evidence is acting without jurisdiction to do so. Accordingly, want of essential evidence, if ascertained somehow, is on the same footing as want of qualification in the magistrate, and goes to the question of his right to enter on the case at all. Want of evidence on which to convict is the same as want of jurisdiction to take evidence at all. This, clearly, is erroneous. A justice who convicts without evidence is doing something that he ought not to do, but he is doing it as a judge, and if his jurisdiction to entertain the charge is not open to impeachment, his subsequent error, however grave, is a wrong exercise of a jurisdiction which he has, and not a usurpation of a jurisdiction which he has not.

That passage, as I understand it, has nothing to say about a case such as this, where there has been a denial of natural justice to a party who has been convicted.

We have listened to some argument as to the proper procedure or the proper remedy in the case of an exercise of jurisdiction by the court when the court has no such jurisdiction, but it is not necessary, in my opinion, to consider whether or not, in the present case, there has been a usurpation of jurisdiction. I take the view that there has been here a denial of natural justice, and the only way in which that denial of justice could come before the court in these proceedings is by way of affidavit, and the court for that reason is entitled—and, indeed, is bound, if justice is to be done—to look at the affidavit, just as it would look at an affidavit if it were an ordinary case of excess of jurisdiction. Notwithstanding the argument of counsel for the respondents, which I understood to be that an affidavit is not necessary even in a case of want of jurisdiction, I am clearly of opinion that in such a case an affidavit can be looked at, and also in this case, which is not a case of want of jurisdiction but is analogous to it, the court will look at the affidavit to see what the facts are, and, if there has been a denial of natural justice, then I think that the court is in a position to interfere and say that the conviction, in those circumstances, is not to stand.

Then it is said, as I have already stated, that the applicant has not this remedy open to him, because he had another remedy which I have mentioned. First of all, let me consider the case stated. It would be ludicrous to suggest that the applicant's request for a case to be stated on any such point as has been suggested could be the right course for him to pursue. To ask this court to consider as a question of law whether the justices were right in convicting a man without hearing his evidence is so extravagant a statement as not to merit, in my judgment, a moment's consideration. As to the right of appeal to quarter sessions, it may be that the applicant could have had his remedy if he had pursued that course, but I am not aware of any reason why, in such circumstances as these, if the applicant prefers to ask for an order of *certiorari* to quash the conviction obtained in the manner I have described, the court should be debarred from making an order. In this case, it has been admitted by the justices that a A mistake was made. This court is in a position to remedy that mistake by making an order of *certiorari* to quash the conviction, and that is the proper order which I think this court should make.

Humphreys, J.: I am entirely of the same opinion, and I would add only a word of my own upon the question of the alternative remedies which may be open to the applicant. In my judgment, if a person can satisfy this court that B he has been convicted of a criminal offence as the result of a complete disregard by the tribunal of the laws of natural justice, he is entitled to the protection of this court. I entirely agree with the description by Viscount Caldecote, L.C.J., of the proceedings of the justices in this case as being a denial of justice to the accused person, who was prevented from taking any part in any discussion, if there was any, as to the rights or wrongs of the matter, and was never heard or called upon in his own defence. C That being so, the only other question is whether or not there is some other remedy which, in the language of Short and Mellor's Crown Office Practice, is equally convenient, because there is no doubt ample authority for saying that this court will not grant orders of *certiorari* or *mandamus* where there is some other course equally open to the applicant. For the reasons which Viscount Caldecote, L.C.J., has stated, it must be apparent to anybody knowing the facts of this case that the remedy by way of D case stated did not exist in this case. It would be ridiculous to state a case upon the only question of law which arose. I take the view that this was not a case which was ever intended to be the subject of appeal to quarter sessions either. Quarter sessions, it is true, may hear appeals on questions of law, but primarily quarter sessions exist in their appellate jurisdiction for the purpose of dealing with disputed questions of fact. The appellant in this case would have gone to quarter sessions and said: "I appeal against my conviction. I do not know E why I was convicted. I cannot tell you what it was that actuated the justices. I cannot say that any wrong evidence was heard, because no evidence was given on the subject, and my real complaint is that I do not know any of these things. My complaint is that I was never heard." That would be the one matter which would come before quarter sessions. One can understand the London County Council, who were the prosecutors, saying: "If only you had gone to quarter F sessions, we should have had the opportunity of putting our house in order and of giving there the evidence against you which we never attempted to put before the justices." There is no reason why a person who has been wrongly convicted without evidence should assist the prosecution to go to some other tribunal, at which, it may be, the necessary evidence will be adduced. I think that the appellant is perfectly entitled to come to this court and say, upon precedent and authority: "I was convicted as the result of a denial of justice, and I ask for G justice, which can be done only by the quashing of that order." I agree with the judgment of Viscount Caldecote, L.C.J.

Wrottesley, J.: I too agree with the judgment of Viscount Caldecote, L.C.J., and the observations which have fallen from Humphreys, J.

Order of certiorari granted.

Solicitors: *W. T. Ricketts & Son* (for the applicant); *Wetherfield, Baines & Baines* (for the respondents); *J. R. Howard Roberts*, Solicitor to the London H County Council (for the London County Council).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

Re GORDON, PUBLIC TRUSTEE *v.* BLAND AND OTHERS.

[CHANCERY DIVISION (Uthwatt, J.), **December 4, 1941.**]

Wills—Hotchpot clause—Extent of interest to be brought into hotchpot—Life interest followed by gift to children of life tenant with general power of appointment by will in default of children.

The testator gave each of his children a life interest in a share of his residuary estate and a power of appointment amongst issue, and, in default of any such appointment, he gave the share of each child to the child or children of that child. He also provided that any grandchild who, or whose issue, took any interest in default of such appointment must bring into hotchpot and account accordingly for any share or interest appointed to him under the above power. One child appointed a third share of his share to each of his two daughters for life, with remainder to their children who should attain 21 or being female marry under that age, and, in default of any such children, for such persons as the daughters might by will appoint. The remaining third share passed in default of appointment. It had to be determined what was the extent of the interest which the daughters had to bring into hotchpot:—

HELD: although it was unlikely, commercially speaking, that the daughters' shares would not go on their death either to their issue or to the persons to whom they appointed by will, such a possibility could not, however, be excluded, and the daughters had to bring into hotchpot only their life interests in their third shares, and not the whole of those third shares.

[**EDITORIAL NOTE.** The matter considered here has not previously been the subject of direct authority. It has always been considered to be the rule that, where a beneficiary is given a life interest and further contingent interests, for the purposes of fixing the amount to be brought into hotchpot regard is to be had to the facts and contingencies as they exist at the time when the interest has to be brought into hotchpot. In the present case, the daughter not only had a life interest in the share of residue but was also given a general power of appointment by will in respect of that share. This general power of appointment, however, did not arise unless there were no children who attained full age. In these circumstances, it is held that all which has to be brought into hotchpot is the life interest, the general power of appointment by will not being sufficient in these circumstances to give the daughter the totality of the fund.

AS TO APPLICATION OF HOTCHPOT CLAUSE, see HALSBURY, Hailsham Edn., Vol. 29, p. 603, para. 876; and FOR CASES, see DIGEST, Vol. 40, pp. 566-568, Nos. 1042-1055.]

Cases referred to:

(1) *Slark* v. *Dakyns* (1874), 10 Ch. App. 35; 37 Digest 488, *835*; 44 L.J.Ch. 205; 31 L.T. 712.

(2) *Phipson* v. *Turner* (1838), 9 Sim. 227; 37 Digest 488, *833*.

(3) *Re West, Denton* v. *West*, [1921] 1 Ch. 533; 40 Digest 566, *1045*; 90 L.J.Ch. 342; 125 L.T. 117.

(4) *Eales* v. *Drake* (1875), 1 Ch.D. 217; 40 Digest 566, *1044*; 45 L.J.Ch. 51.

(5) *Re Heathcote, Trench* v. *Heathcote*, [1891] W. N. 10; 40 Digest 566, *1043*.

(6) *Wheeler* v. *Humphreys*, [1898] A.C. 506; 44 Digest 1241, *10719*; 67 L.J.Ch. 499; 78 L.T. 799.

SUMMONS to determine what interests given under a power of appointment had to be brought into hotchpot. The facts are fully set out in the judgment.

E. Ackroyd for the plaintiff.

W. L. Blease for the first two defendants, Isabel Gladys Bland and Margaret Selby Lane.

William Geddes for the third, fourth and fifth defendants, the infant children of Margaret Selby Lane.

Henderson McMaster for the sixth defendant, Richard Edmund Roberts.

B. B. Benas for the seventh defendant, Robert George Selby.

UTHWATT, J.: By his will, made in 1903, Alexander Gordon the elder disposed of the residue of his property upon trust for sale and conversion and for division among his children. After giving to a child a life interest in his share and a power to appoint a life interest to a surviving spouse, he gave the child a power of appointment amongst issue, and then made a provision that, in default of appointment, the share should be held in trust for the child or children of that child who, being male, should attain the age of 21, or, being female, should attain that age or marry, in equal shares, and, if there should be only one such child, the whole was to be in trust for that one child. Then the will contains a hotchpot clause as follows :

> Provided always that no child of such child of mine who or whose issue shall take any part of such trust fund under any appointment by virtue of the power hereinbefore contained shall in default of appointment to the contrary be entitled to any share of the unappointed part thereof without bringing the share or interest appointed to him or her or his or her issue into hotchpot and accounting for the same accordingly. A

I have to deal in this case with the share of one child, Alexander Gordon the younger. He died on Apr. 24, 1938, having appointed a life interest to his widow, who died on Aug. 3, 1940. As a result of certain other appointments made by him, to which I need not refer in particular, and the failure of certain appointments, one-third of his share passes in default of appointment, one-third is appointed to his daughter Isabel Gladys Bland, and another one-third is appointed to his daughter Margaret Selby Lane, in each case upon identical B trusts, those trusts being for the daughter for life, and after her death for such of her children as shall attain 21 years of age, or, being female, shall marry under that age, and, in default of there being any such children, for such persons as the daughter shall by will appoint.

The question which I have to decide is the extent of the property which is to be brought into account for the purposes of the hotchpot clause. There is C no doubt that a power to appoint among a specified class is well exercised by giving a member of that class an interest with a power to appoint by will. That was decided in, among other cases, *Slark* v. *Dakyns* (1), which follows the decision in *Phipson* v. *Turner* (2), so that there can be no question here of the validity in all respects of the appointments which have been made in favour of the daughters and their children. No one disputes that Isabel Gladys Bland has to bring in her life interest or that Margaret Selby Lane has to bring in her life D interest. The question is whether anything more has to be brought in. Isabel Gladys Bland was married on Sept. 24, 1940, and she has no children. Margaret Selby Lane was married on Aug. 10, 1929, and she has three children, all of whom are infants, the eldest being 10 years of age. It has been argued very vigorously that, when one looks at the substance of what Isabel Gladys Bland and Margaret Selby Lane and their children took under the appointments in their favour, one reaches the position that for all commercial purposes they took the whole share, E and that one can safely disregard as negligible the possibility of any interest becoming vested in other parties by reason of the fact that no child of these two daughters might obtain a vested interest and a daughter might not exercise the power in her will. As a commercial fact, I think that that may be true, but that does not conclude the matter. The various interests appointed are not, when taken together, equal to, or commercially the same as, an absolute interest. F One must take the interests separately, and one must consider whether, under the hotchpot clause, anything other than vested interests has to be brought into account.

Upon the question of what has to be brought into hotchpot under a clause somewhat like this, there is the authority of ASTBURY, J., in *Re West, Denton* v. *West* (3). In that case, the donee of a limited power, who died in 1886, appointed a fund to T. for life, and after her death on trust to her issue or children, and, G in default of issue or children, in trust as to one moiety to G. for life, and after that upon certain other trusts. In the deed creating the power, there was a hotchpot clause, which provided that no one of the children

> . . . who or whose issue shall take any part of the said trust premises under any appointment in pursuance of either of the powers lastly hereinbefore contained shall, in default of appointment to the contrary, have or be entitled to any share in, or to any sum of money raiseable out of, the unappointed part of the said trust premises H under the said trust in default of appointment without bringing the share or shares appointed to him or her or to his or her issue into hotchpot and accounting for the same accordingly.

That clause is very much the same as the clause which I have to consider in this case, subject only to the fact that the asset which a person taking part of the trust fund was to bring into hotchpot is described as "the share or shares appointed to him or her or to his or her issue." In *Re West, Denton* v. *West* (3), G. died in 1915 without any issue and T. died in 1920 without any issue, and the fund became distributable. The question arose as to what ought to be brought into hotchpot. ASTBURY, J., decided that the life interest of T. must be brought into hotchpot, but that the life interest of G. need not be brought into hotchpot, for two reasons. First, G. took only a defeasible life interest, and, therefore, it could not be said as regards her that she took any appointed part or share within the meaning of the hotchpot clause. Secondly, ASTBURY, J., based himself upon the fact that the matter arose after G. had died in 1886, and it would be unfair at that stage to assess a retrospective actuarial value of G.'s life interest without regard to the actual fact that her defeasible life interest had never come into being. In the course of the judgment, ASTBURY, J., referred to some remarks made by SIR GEORGE JESSEL, M.R., in *Eales* v. *Drake* (4), at p. 219 :

> It is quite clear that both life interests and reversionary interests must be brought into hotchpot. The value of them must be ascertained in the best way you can ; and if you cannot agree, there must be an inquiry.

Then ASTBURY, J., refers to the report of *Eales* v. *Drake* (4), and it would appear from his remarks that the point did not actually arise for decision in that case. Of course, the statement of SIR GEORGE JESSEL, M.R., is a *dictum*, but, as ASTBURY, J., stated, at p. 540, it is a *dictum* which must, on the facts, be confined to absolute and indefeasibly vested reversionary interests. After stating his view, at p. 541, he quotes from JARMAN ON WILLS, 6th Edn., p. 1180 :

> When life and reversionary interests have to be brought into hotchpot . . . it is difficult to say how they should be valued. In *Eales* v. *Drake* (4), SIR GEORGE JESSEL, M.R., said that their value " must be ascertained in the best way you can." In *Re Heathcote, Trench* v. *Heathcote* (5), a case on a settlement, KEKEWICH, J., held that the value of certain life interests, which were to be brought into hotchpot, must be calculated not by reference to the duration of the interests, but by an actuarial valuation of them at the time when they first took effect. In *Wheeler* v. *Humphreys* (6), the House of Lords do not seem to have considered the point, but their decision appears to involve the view that actual, and not actuarial values are to be taken. With great diffidence it is submitted that the correct method is that stated above in the case of annuities, namely, that you consider the state of facts and contingencies at the time when the life interest or reversion is to be brought into hotchpot.

In this particular case, the point of time at which the matter has to be considered is Aug. 3, 1940, when it became necessary to consider how the unappointed funds ought to be divided. Under the will, the persons who are bound to bring assets into hotchpot are described as the children who, or whose issue, shall take any part of such trust fund under any appointment by virtue of the reversionary power. The clause continues as follows :

> . . . no child of such child of mine who or whose issue shall take any part of such trust fund under any appointment by virtue of the power hereinbefore contained shall in default of appointment to the contrary be entitled to any share of the unappointed part thereof without bringing the share or shares or interest appointed to him or her or his or her issue into hotchpot.

It certainly is the case that a child—in this case, a daughter—has taken an interest in the fund. What that child has to bring in is " the share or shares or interest appointed to him or her or his or her issue." I agree with the view expressed by ASTBURY, J., and I do not think that one can really say that the contingent interests of the daughter's children are shares or interests appointed to them when the matter in relation to which the point is to be considered is a division to be made at the present time.

The next point is the effect to be given to the fact that the daughter, in default of issue who would take a vested interest, is given a general power of appointment by the will. That power of appointment, of course, arises only upon failure of any children of the daughter to take a vested interest. In any real sense, is the power of appointment, exercisable only by will, and exercisable only in those circumstances, a share of interest appointed by the instrument of appointment for the purpose in relation to which it has to be considered ? In my opinion, it is not. To say that the daughter has a share or interest capable of valuation by virtue of that contingent power is not, I think, an apt use of words.

One point has given me considerable trouble, and that is that the right way to look at this matter is to treat it as a matter of substance, and say that the daughter and her issue between them have, in the totality, got the whole fund. Commercially, that is possibly true, but, as a matter of law, it is not true. In order to complete the title, the effective exercise by the will of the daughter of the power, which is contained in the appointment made in her favour, is necessary. That may or may not happen, but in law one cannot say that the daughter and the children between them have shares or interests which exhaust the totality of the fund. I accordingly hold that the only interests which need be brought into account under this hotchpot clause are the two life interests appointed to the daughters, Isabel Gladys Bland, and Margaret Selby Lane.

Costs as between solicitor and client to come out of the particular share of the trust fund.

Solicitors: *Ayrton & Alderson Smith*, Liverpool (for all parties).

[*Reported by* Irene G. R. Moses, *Barrister-at-Law.*]

PRICE *v.* MANN.

[King's Bench Division (Wrottesley, J.), **December 11, 1941.**]

Landlord and Tenant—War damage—Notice to avoid disclaimer—Form of notice—Reference to wrong section—Landlord and Tenant (War Damage) Act, 1939 (*c.* 72), *s.* 4.

Premises having been rendered unfit by enemy action, the tenant served a notice of disclaimer under the Landlord and Tenant (War Damage) Act, 1939, s. 4. The landlord then served what was intended to be a notice to avoid disclaimer, but inadvertently referred therein to the Landlord and Tenant (War Damage) Act, 1939, s. 10, instead of referring to sect. 11 of the Act. A notice of retention by the tenant and a notice to avoid disclaimer by the landlord are in much the same terms except that the former should refer to sect. 10 and the latter to sect. 11 of the Act:—

Held: the reference to the wrong section made the notice so ambiguous that it could not be construed as a sufficient notice to avoid disclaimer.

[**EDITORIAL NOTE.** The decision in *Black* v. *Mileham* (1) decided that notices under the Landlord and Tenant (War Damage) Act, 1939, were not required to be in any precise form so long as they showed clearly which provisions of the Act were intended to be invoked. Unfortunately, the wording of the Act has led to notices of retention and notices to avoid disclaimer being drawn in rather similar terms. A notice of retention is given by the tenant and states that he *elects to retain* his lease. A notice to avoid disclaimer, on the other hand, is given by the landlord and *requires the tenant to retain* his lease. In the former case the lease will be retained on the terms stated in sect. 10 of the Act, and in the latter case on the terms of sect. 11. The notice here considered was in the correct form except that it referred to sect. 10 instead of sect. 11. It might be thought that the fact that it was given by the landlord would sufficiently show that it was a notice to avoid disclaimer and not a notice of retention, since the latter could only be given by a tenant. It is held, however, that the reference to the wrong section is fatal to the notice, since under one section the burden of repairing the premises is placed upon the tenant and under the other it is placed upon the landlord. It will be noticed that the Act does not require the section to be mentioned in the notice, but it is sufficient to say " on the terms specified in the Act. "

As to Notices under the Landlord and Tenant (War Damage) Act, 1939, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 32, pp. 987, 990, 991. See also BUTTERWORTH'S EMERGENCY LEGISLATION, Statutes Volume, pp. 325, 332, 333.]

Case referred to:

(1) *Black and Black* v. *Mileham*, [1941] 3 All E.R. 269; Digest Supp.

Action for rent due under a lease, the defence being that the lease had been effectively disclaimed. The facts are fully set out in the judgment.

F. C. Wynn Werninck for the plaintiff.

A. C. Longland for the defendant.

Wrottesley, J.: In Oct., 1940, a flat at 8, Connaught Place and a nearby garage, of which Mrs. Mann, the defendant, was the tenant of the plaintiff, were so damaged by enemy action as to be rendered unfit within the meaning of the Landlord and Tenant (War Damage) Act, 1939, which means, really, unfit to be lived in or used. The garage was totally destroyed. In those circumstances, Mrs. Mann and her landlord had certain rights under the Act of 1939, and on Nov. 5, 1940, the defendant's solicitors wrote to the landlord as follows:

> 8, Connaught Place.
>
> On the instructions of our client, Mrs. Mann, we write to inform you that it is her intention to disclaim the lease of her flat at the above address, which she holds from you, under lease dated Mar. 10, 1926. This notice is given in pursuance of the Landlord and Tenant (War Damage) Act, 1939, and we shall be obliged if you will be good enough to acknowledge the receipt.

That was a notice of disclaimer purporting to be given under sect. 4 of the A Act. If nothing more had been done, that notice would have operated under sect. 8 (2) of the Act as a surrender of the tenancy.

On Nov. 9, 1940, four days later, the landlord replied as follows :

> I have to acknowledge receipt of your disclaimer of Mrs. Mann's lease of the flat, I think I had better take your notice to include the garage as well, as it does not exist, that part of the property having been blown away completely, not a brick remaining in its original position.

B That was acknowledged on Nov. 12, 1940, in the following terms :

> We have to acknowledge the receipt of your letter of Nov. 9, and we thank you for accepting it as being also notice of disclaimer of the lease of the garage . . .

I think that the result of those letters at that date, if nothing else had occurred, would have been that, by arrangement between the parties, there was a notice of disclaimer given and accepted as such of the whole premises.

C On Nov. 29, 1940, however, the plaintiff's solicitors wrote to the defendant's solicitors as follows :

> On the instructions of our client Mr. A. A. Price, we enclose herewith notice to avoid disclaimer by your client Mrs. Mann of her lease of the above flat. We also enclose a duplicate of such notice and shall be obliged by your kindly obtaining your client's signature of the receipt at the foot hereof and then returning the same to us.

The notice enclosed in that letter is in the following terms, and it is upon the D terms of this notice that the matter has to be decided :

> Landlord and Tenant (War Damage) Act, 1939. To : Mrs. Mann, of 8, Connaught Place, Marble Arch, London, W.2. Pursuant to the Landlord and Tenant (War Damage) Act 1939 and pursuant to the notice of disclaimer under the said Act served upon your landlord Alfred Allen Price of 22 Harborne Road Edgbaston Birmingham we hereby give you notice on behalf of the said Alfred Allen Price that he requires you to retain your lease of all that messuage tenement or flat situate on the fourth floor E in the block of flats known as No. 8 Connaught Place Paddington in the county of London on the terms specified in sect. 10 of the said Act.

That was signed by the plaintiff's solicitors.

Under the Act in question, a notice of disclaimer having been served by the tenant, the landlord was given the right under sect. 4 (5) to serve what is called a notice to avoid disclaimer. Sect. 4 (5) provides as follows :

> Where a notice of disclaimer is served . . . the landlord may, within the period F allowed under this Act, serve upon the tenant a notice (hereafter in this Act referred to as a " notice to avoid disclaimer ") requiring the tenant to retain the lease on the terms hereafter specified in this Act.

Hence the words appearing in the notice :

> . . . we hereby give you notice on behalf of the said Alfred Allen Price that he requires you to retain your lease of [the premises in question].

G Sect. 4 (5), however, provides that the terms upon which such a notice may be given are that it shall require the tenant " to retain the lease on the terms hereafter specified in this Act," and, as is common ground between the parties, the terms applicable to such a notice to avoid disclaimer are not the terms specified in sect. 10 of the Act but those specified in sect. 11 of the Act. Nor is the difference between those two sets of terms unimportant. Under sect. 10 (1) of the Act, which applies, not to notices to avoid disclaimer, but to those cases H where the tenant decides to give a notice to retain, the terms upon which the tenancy is to be retained include, amongst others, these new terms :

> (a) There shall be implied in the lease, notwithstanding anything in Part I of this Act, a covenant by the tenant with the landlord that the land comprised in the lease shall be rendered fit as soon as is reasonably practicable after the date when the notice was served or is deemed to have been served.

That is the notice to retain. In other words, if a tenant chooses to retain the premises, and gives the appropriate notice, he becomes liable to render the premises fit. On the other hand, sect. 11 is the section wherein are set out terms appropriate to the case where the landlord gives a notice to avoid disclaimer. He says in it, as it were, to the tenant: "You do not want to go on, but I insist on your stopping on as my tenant." In that case, the Act reconstitutes what would otherwise be a surrendered tenancy or lease, on condition that there is a covenant by the landlord with the tenant that the land comprised in the lease shall be rendered fit as soon as reasonably practicable.

The question here is whether or not the plaintiff, by serving that notice, has brought into existence the condition which is undoubtedly brought into existence by the serving of a proper notice to avoid disclaimer.

At the moment, I am not going to say more on the correspondence than that, within the period laid down in sect. 5 (1) (*b*) for the service of a notice to avoid disclaimer, a period of one month from the date of the notice of disclaimer, no further correspondence or exchange took place between the parties or their solicitors. Therefore, I am bound, first of all, to look at this matter as it stood at that date. The legislature here is dealing with a set of circumstances which are not to be expected in peace time, and, in order to cure other mischiefs, has chosen to settle the rights of the parties and how those rights are to be regulated and created by appropriate steps being taken.

I must now see how the parties stood at the expiration of that month. First, I look on this notice as being received by Mrs. Mann herself in person. It cannot, I think, make any difference to the validity or otherwise of a notice delivered under an Act of Parliament whether it reaches a solicitor or a person who is not a trained lawyer. I look upon that notice as being received, first of all, by Mrs. Mann. Could she be expected to assent to it? If she did accept it, or assent to it, could she be said to have entered on a tenancy by which the landlord was going to do the repairs? That is what is contended for here. I should have thought that, if she took the trouble to turn to the section in the Act of Parliament to which her attention had been drawn by the notice, she would obviously have come to the conclusion that it was she, and not the landlord, who had to repair the premises. Suppose, however, that she had signed it. Suppose that she must be taken, therefore, as being a person of common sense, and that she said, upon a careful study of the Act, "I knew all the time really that sect. 10 did not apply, and that what the landlord really told me was that the tenancy was to be reconstituted and the landlord was to do any repairs necessary to make the premises fit again for habitation." Suppose that she were to say that, because that is what it is suggested she ought to do, and suppose that she came forward, the work having been done unsatisfactorily or not at all, and that she thought that she had got into a position where she was entitled to occupy these premises. How could she, in view of this notice, claim for a moment that on that notice there was an obvious liability and an election, so to speak, on the part of the landlord, to do the repairs? The landlord could say: "Look at the notice. The notice says nothing of the kind. Look at sect. 10, which says that the tenant is to do the work." Thus, it seems to me that, if I look at it from the point of view of a layman or anyone receiving such a notice, it is, to say the least, ambiguous, and I doubt very much whether it can be said to give notice—certainly it cannot be said to give notice to a person of average intelligence—of that which was intended to be given by a notice under this Act.

In fact, however, this notice reached a firm of solicitors. I look at it as reaching them, and I ask myself whether they could be even excused if they accepted it in the form in which it was framed and advised their client to sign it. As I have said, it purports to reconstitute the relationship of landlord and tenant between Price and Mrs. Mann with regard to premises which are partly non-existent and partly unfit for habitation. On what terms? That is the difficulty. If, later, the landlord had said, "The tenancy is in existence. It is clear from the notice, because it calls on you to retain the lease, and I made it quite clear to you, by citing sect. 10, that it was you who were to do the repairs or the mending," what answer could be made? I do not know, but I can see none. Thus, whether I look at this as being a notice which has come to a layman or one which has come to a firm of solicitors, it seems to me that it is ambiguous and thoroughly dangerous.

My attention has been called to *Black and Black* v. *Mileham* (1), a case where the tenant sent his landlord's agents the keys, an act which has been regarded, ever since one can remember, as some evidence of an intention to effect a surrender—not merely of intending to surrender, but of effecting a surrender. He sent them the last lot of keys, the others having already been given up, and wrote a letter which is summarised by MACKINNON, L.J., as follows, at p. 271 :

> I have given up possession of this flat. It is uninhabitable by reason of enemy action. I have given some of the keys to your porter. I enclose the rest of them. I have given A up occupation.

To that the agents said [p. 271] :

> We are instructed to send the keys back, as our clients are not prepared to accept the surrender of the tenancy.

From this, as MACKINNON, L.J., pointed out, it is clear that a person well-qualified to express an opinion thought that it was a surrender, and intended it to be a B surrender. There was no ambiguity there. Nothing was lacking in that case but formality, and the court very naturally said that they had decided in such a case that it was a mere formality. In this case, however, it appears to me to be, not formality, but ambiguity. There is a real doubt as to what rights would really be created by acting on the notice.

I go further now at this stage, and turn to the rest of the letters. No other letter passes until it is too late for the landlord to take advantage of the oppor- C tunity given to him by the Act, which is confined to a period of one month. Then comes a letter of Dec. 11, 1940, in which the tenant's solicitors say :

> We have to acknowledge the receipt of your letter of Nov. 29, enclosing in duplicate, a notice under the Landlord and Tenant (War Damage) Act, 1939, but if we may be allowed to say so with all respect, have you not given this notice under the wrong section ? Your notice is in form a notice of retention, which it is only competent for a tenant to serve on a landlord, not *vice versa*, and we think that you intended to serve a D notice to avoid disclaimer. We think also that you probably intended to refer to sect. 11 of the Act instead of sect. 10, and we therefore return the notice in case you should think fit to amend it and serve it afresh.

How much ambiguity had been created in the mind of those solicitors by the notice is evidenced by that letter. All sorts of possibilities occurred to them. Their first criticism, which, now that we know more of the facts, was, I think, E ill-grounded, was that the notice was in form a notice of retention. It would have been a perfectly good notice if it had not been drawn with reference to the wrong section. The reality was, we now know, that it was intended to be a notice to avoid disclaimer, and intended to refer to sect. 11, whereas, unfortunately, it referred to sect. 10. That was answered by a letter of Dec. 18, 1940, as follows :

> We thank you for your letter of the 11th with which you returned the notices herein F which accompanied our letter to you of Nov. 29 last. With great respect we think you will find that the notice we have served is in the correct form and is clearly a notice to avoid disclaimer by requiring your client to retain her lease of her flat at the above premises.

I think that that is quite right. The form of the notice was quite right. The letter continues as follows :

> We agree, however, that the notice to avoid disclaimer should specify that the tenant G is required to retain the lease in accordance with the provisions of sect. 11 of the Act, and not sect. 10. We regret that this error arose. Under these circumstances we return herewith the original notice together with duplicate, and would ask you to kindly obtain your client's acknowledgment thereon. We feel that the notice clearly states the intention of the landlord and we think you will agree with us that no point arises by virtue of a reference to sect. 10 of the Act instead of sect. 11.

I have read that letter because it was not until Dec. 18 that the plaintiff's H solicitors made it clear that the plaintiff meant to serve a notice to avoid disclaimer under the Act. It was only then, many days after the period had expired, that they made it clear to the tenant's solicitors that the landlord really did mean a notice to avoid disclaimer, carrying with it the obligations of the landlord under sect. 11. It was not until then, in my judgment, that the tenant's solicitors could possibly have even given their client any advice, one way or the other, upon the facts.

In those circumstances, it does not seem to me that the other letters can really bear very closely on the matter, except that the difficulty confronting the defendant's solicitors is illustrated by the paragraph at the end of the letter of Dec. 31, 1940, as follows :

> If, therefore, we accept your notice, on behalf of Mrs. Mann, by reference to sect. 10, it appears to us that she will be placed under covenant to repair your client's property, and we certainly do not see our way to advise her to undertake such a liability. Unless, therefore, you are prepared to amend your notice, we shall have to advise Mrs. Mann to have the question determined by the court, but we have no wish to incur this expense if it can be avoided.

Nobody could say that that was an unreasonable attitude to take up. There was another step which could have been taken perhaps under the Act, and that was for the parties to avail themselves of the section enabling the court to extend the time. That is sect. 5 (4), which provides as follows :

> Any period mentioned in this section may be extended . . . by the court, on such terms as it thinks fit, on the application of any person affected by the extension . . .

It might be taken either by Mrs. Mann or by Price. That step was not taken. It might possibly have been the remedy, but I am far from saying that the court would necessarily, in those circumstances, have extended the time. In all the circumstances of the case, therefore, it seems to me that there must be judgment for the defendant.

Judgment for the defendant with costs.

Solicitors : *W. F. Foster, Hedge & Clare* (for the plaintiff) ; *Peacock & Goddard* (for the defendant).

[*Reported by* D. K. BELCHER, *Barrister-at-Law.*]

Re AN ARBITRATION BETWEEN SHARPLEY AND MANBY.

[COURT OF APPEAL (MacKinnon and Goddard, L.JJ., and Asquith, J.), **November 27, 1941.**]

Agriculture—Agricultural holding—Notice to quit—Notice served by ordinary post—Agricultural Holdings Act, 1923 (*c.* 9), *s.* 53.

A landlord served a notice to quit on the tenant of an agricultural holding. The notice was sent to the tenant by ordinary post, and, in the course of proceedings for compensation for disturbance, the question arose as to whether it had been properly served in accordance with the requirements of the Agricultural Holdings Act, 1923. Sect. 53 of that Act provides that any notice under the Act " may be served on the person to whom it is to be given either personally or by leaving it for him at his last known place of abode in England, or by sending it through the post in a registered letter addressed to him there " :—

HELD : the notice had been properly served. The terms of sect. 53 do not exclude service by unregistered post.

[**EDITORIAL NOTE.** The decision in this appeal is based upon the construction of the Agricultural Holdings Act, 1923, s. 53, and strictly applies to that section only. It would, no doubt, apply to another section in precisely similar terms, and it would be convenient if it could be extended to private deeds and documents in similar terms. Clauses dealing with the service of notices have recently become rather lengthy and involved, and a standard clause giving reasonable facilities to all parties would be very welcome to conveyancers. It will be noticed that a rather similar question to that discussed in this case arises under the Law of Property Act, 1925, s. 196, and it is unfortunate that there may be a sufficient difference in the wording, when that section is considered as a whole, to give rise to a doubt whether this decision is applicable to subsect. (3) of that section.

AS TO SERVICE OF NOTICES, see HALSBURY, Hailsham Edn., Vol. 1, p. 376, para. 627 ; and FOR CASE, see DIGEST, Vol. 2, p. 46, No. 250.]

Case referred to :

(1) *Department of Agriculture for Scotland* v. *Goodfellow*, [1931] S.C. 556 ; Digest Supp.

APPEAL by the landlord from an order of His Honour JUDGE LANGMAN, dated Sept. 4, 1941, sitting at the Great Grimsby County Court. The facts are fully set out in the judgment of MACKINNON, L.J.

W. Hanbury Aggs for the appellant, the tenant.

C. L. Henderson for the respondent, the landlord.

MacKinnon, L.J.: This is an appeal from a decision of the county court judge at Great Grimsby, Lincolnshire, upon a special case remitted to him by an arbitrator under the Agricultural Holdings Act, 1923. By sect. 12 of that Act, it is provided that, where a landlord gives a tenant notice to quit and the tenant quits the holding, the tenant shall have a certain right to compensation unless one or more of certain conditions are fulfilled, that is to say:

> . . . unless the tenant (*a*) was not at the date of the notice cultivating the holding according to the rules of good husbandry; or (*b*) had, at the date of the notice, failed to comply within a reasonable time with any notice in writing by the landlord served on him requiring him to pay any rent due in respect of the holding or to remedy any breach being a breach which was capable of being remedied of any term or condition of the tenancy consistent with good husbandry.

The matter began on Jan. 19, 1940, when Sharpley, the landlord, served on Manby, the tenant, a notice to quit in these terms:

> I hereby give you notice to quit and deliver up possession of the farm land and premises situate at Riby in the county of Lincoln . . . the reason for my giving this notice to quit being that (1) you have failed to pay upon demand the rent due from you; (2) you have failed (*a*) to destroy noxious weeds complained of in our letter of July 6, 1939, being a breach of good husbandry, (*b*) to cut thistles on the grassland referred to in our letter of Aug. 31, 1939, being a breach of cl. 5 (*f*) in your tenancy agreement, and (*c*) to maintain the exterior of the farmhouse and premises in good order and condition, being a breach of cl. 5 (*b*) in your tenancy agreement.

The tenant then made a claim under sect. 12 for compensation. That claim went before an arbitrator. I should imagine that, when the parties came before the arbitrator, the representative of the tenant told the arbitrator that he was going to raise certain questions of law and that the arbitrator did not go into the facts of the case. The arbitrator then stated a case upon these questions of law for the opinion of the county court judge, and the present appeal arises out of the opinion expressed by the county court judge and the answers given by him to the questions submitted to him by the arbitrator. The first question was whether the terms of sect. 12 (1) (*b*) of the Act had been complied with, in that the landlord had not served a notice upon the tenant requiring him within a reasonable time to pay his rent. That raised the highly technical question whether such a notice had been properly served when it was in the form of a letter sent by ordinary post, and not delivered personally to the tenant or sent by registered post. Other questions arose as to the form and contents of the letters which had been sent to the tenant—namely, (i) whether the letter about the rent was, within the meaning of the section, a notice requiring him to pay the rent within a reasonable time, and (ii) whether the letters about the weeds and the repairs to the farmhouse were, within the terms of the section, a requirement to him to carry out his obligations. The county court judge answered those questions by saying that in form the letter demanding the rent was a good notice requiring him to pay within a reasonable time, and that the letters about the weeds and the repairs were not in form a sufficient notice requiring him to remedy the breaches of his tenancy agreement.

It will be sufficient for the landlord if he can establish that one of the six conditions specified in sect. 12 (1) of the Act of 1923 is complied with—for instance, that the tenant had failed within a reasonable time to comply with the notice calling upon him to pay his rent. The landlord, therefore, by his notice of appeal appeals against the holding by the county court judge that the notice, in its terms a good notice requiring him to pay the rent, was yet not served within the meaning of sect. 12, because of the manner in which it came into the possession of the tenant. That depends upon sect. 53, which provides as follows:

> Any notice . . . under this Act may be served on the person to whom it is to be given either personally or by leaving it for him at his last known place of abode in England, or by sending it through the post in a registered letter addressed to him there.

It is manifest that, if this letter had been left by the landlord, or by any servant or agent of his, at the farm of the tenant, or had been given to the tenant personally, the requirements of that section would have been complied with. It is said, however, that, if the landlord uses the Post Office as a medium of communication, he is not serving a valid notice unless he serves it by registered letter. The county court judge assented to that argument, and, therefore, held that there was no notice requiring him to pay his rent. Whether the facts were ever gone into I do not know. The statement of the case by the arbitrator puts this question :

> Are any, and, if so, which, of the letters set forth in para. 9 of this special case and which were delivered to the tenant in the manner specified in para. 10 hereof " a notice in writing by the landlord served on him (the tenant) " ?

Para. 10 is as follows :

> The letters set forth in the last paragraph were sent by ordinary letter post. A

That seems to assume that the letters were duly delivered by ordinary post and received by the tenant. The whole argument must depend upon that assumption. Whether it was admitted originally that it was so or whether the fact is or can be established before the arbitrator is not, I think, a matter with which we are concerned. The sole question is whether the tenant can argue that, because the ordinary post was used, and not registered post, the notice was not B properly served. Some assistance seems to have been provided for the county court judge by reference to a case in Scotland under a totally different Act, *Department of Agriculture for Scotland* v. *Goodfellow* (1). There a notice had been served by ordinary post, but what was there concerned was a special provision of the Agricultural Holdings (Scotland) Act, 1923, which required written notice to be given either in the same manner as a notice under the Removal Terms (Scotland) Act, 1886, or in the form and manner prescribed in the Sheriff C Courts (Scotland) Act, 1907. Rule 113 of the first schedule to the latter Act provides that removal notices " may be given " by any of three specified methods—namely, (i) by a messenger at arms, (ii) by a sheriff officer, or (iii) by registered letter. It is quite clear that the provisions of that Act required a certain ceremonial service, by a messenger at arms (who I suppose is somewhat similar to a county court bailiff) or by a sheriff officer or by a registered letter. If that ceremony was D not complied with, then there had not been service within the requirements of the Act. However, sect. 53 of this Act does not require any ceremonial at all. It provides that the notice shall be served upon the person to whom it is to be given personally or by leaving it for him at his last known place of abode. It adds as an alternative that the person who has to serve the notice may do so by sending it through the post in a registered letter. If he did that, no doubt he would get the additional advantage of being able easily to prove that he had E served the notice by producing the receipt given to the postman. However, he can serve the notice personally or by leaving it at the tenant's last known place of abode. It seems to me impossible to say that under that section, if one uses the post at all, one can use it only to send a registered letter, and that, if one uses the ordinary post, one has not complied with the ceremonial requirements of the Act. In the result, I think that the county court judge was wrong in that part of his decision, which is the only matter now raised by way of appeal. I think F that the appeal should be allowed

By way of cross-appeal, counsel for the appellant raises the suggestion that the county court judge was wrong in answering in the affirmative the question whether the letter about the rent was in its terms a sufficient compliance with the Act. That depends solely, as I gather, upon the point that the question put is whether it was a proper notice within sect. 12 (1) (*b*). It would have been a G perfectly proper question, and properly answered, if it had been asked " within the terms of sect. 12 " or " sect. 12 (1)." The addition of that " (*b*) " is said to import considerations which make the answer an incorrect one. I think that there is nothing in that contention, and that it fails, and, therefore, that the cross-appeal fails and must be dismissed.

Goddard, L.J. : I agree. I do not think that it is necessary to add anything. H

Asquith, J. : I also agree.

Solicitors : *Gibson & Weldon*, agents for *Hopkins & Goodwin*, Great Grimsby (for the appellant) ; *Sharpe, Pritchard & Co.*, agents for *William Baines*, Brigg and Scunthorpe (for the respondent).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law*.]

CHURCHER *v.* REEVES

[KING'S BENCH DIVISION (Viscount Caldecote, L.C.J., and Humphreys and Lewis, JJ.), **November 5, 6, 1941.**]

Food and Drugs—Milk—Standard of quality—Milk solids—Evidence that deficiency due to natural causes—Evidence excluding possibility of interference with milk.

The respondent was charged with selling milk deficient in milk solids, contrary to the Food and Drugs Act, 1938, s. 3 (1). Regulations made under the Act provided that, where a sample of milk contained less than 8.5 per cent. of milk solids other than milk fat, it was to be presumed, until the contrary was proved, that the milk was not genuine, by reason of the abstraction of the solids or the addition of water. The milk sold by the respondent had only 7.99 per cent. of the solids, and it had been left in his dairy for a period of 13 hours, during which time it was not constantly under supervision. The respondent gave evidence to show that the milk he sold was genuine milk, and that the deterioration in quality was due to a reduction in the feeding stuffs available since the outbreak of war. Upon this evidence the magistrates came to the conclusion that the respondent sold the milk in the same condition as when it was drawn from the cow and dismissed the information against him. The appellant contended that the magistrates were not entitled to come to this conclusion, as the evidence produced by the respondent did not exclude every possibility of the milk being tampered with :—

HELD : there was evidence to support the conclusion at which the magistrates had arrived. As the respondent's defence was that the deficiency of solids was accounted for by natural causes, it was unnecessary for him to prove in addition that there had been no possibility of anyone tampering with the milk.

[**EDITORIAL NOTE.** It has been a common defence to a charge of selling milk deficient in milk solids that the milk was sold as it came from the cow. If this is the sole defence relied upon, it is no doubt necessary for the person charged to prove his defence up to the hilt and show that there has been no possibility of the milk being tampered with. If, however, a further defence is set up—for example, that the deficiency in milk solids is due to poor feeding—then it is open to the justices to find on all the evidence that the deficiency is sufficiently explained, although every possibility of interference with the milk is not excluded by the evidence.

AS TO QUALITY OF MILK, see HALSBURY, Hailsham Edn., Vol. 15, pp. 208, 209, paras. 383-385 ; and FOR CASES, see DIGEST, pp. 127-131, Nos. 490-509.]

Cases referred to :

(1) *Hunt* v. *Richardson*, [1916] 2 K.B. 446 ; 25 Digest 128, *492* ; 85 L.J.K.B. 1360 ; 115 L.T. 114.

(2) *Bowen* v. *Jones* (1917), 86 L.J.K.B. 802 ; 25 Digest 130, *505* ; 117 L.T. 125.

(3) *Kings* v. *Merris*, [1920] 3 K.B. 566 ; 25 Digest 130, *506* ; 90 L.J.K.B. 161 ; 124 L.T. 150.

(4) *Jenkins* v. *Williams* (1939), 160 L.T. 507 ; Digest Supp.

INFORMATION preferred against the respondent under the Food and Drugs Act, 1938, s. 3. The facts are fully set out in the judgment of VISCOUNT CALDECOTE, L.C.J.

Geoffrey Lawrence for the appellant.

B. E. Dutton Briant for the respondent.

VISCOUNT CALDECOTE, L.C.J. : In this case, an information was preferred against the respondent in that he had committed an offence which is created by the Food and Drugs Act, 1938, s. 3 (1), which provides as follows :

> If a person sells to the prejudice of the purchaser any food or drug which is not of the nature, or not of the substance, or not of the quality, of the food or drug demanded by the purchaser, he shall, subject to the provisions of the next succeeding section, be guilty of an offence.

The offence here alleged was in respect of milk. Sect. 23 (1) of the same Act empowers the Minister of Agriculture and Fisheries to make regulations :

> . . . for determining what deficiency in any of the normal constituents of milk, or what proportion of water, in a sample shall for the purposes of this Act raise a

presumption, until the contrary is proved, that the article sampled is not genuine milk.

In pursuance of that power, the Minister of Agriculture has made regulations, one of which provides as follows :

> Where a sample of milk . . . contains less than 8.5 per cent. of milk solids other than milk fat, it shall be presumed for the purposes of the Food and Drugs Act, 1938, until the contrary is proved, that the milk is not genuine, by reason of the abstraction therefrom of milk solids other than milk fat or the addition thereto of water.

In this case, the respondent delivered in pursuance of a contract, the terms of which it is not material to state, 36½ gallons of milk which had only 7.99 per cent. of milk solids other than milk fat, instead of 8.5 per cent., as the regulation requires. The evidence of this fact was not in dispute, but, in addition to the statement of that fact, the special case, upon which this appeal arises, contained a statement of additional evidence in these terms :

> It is almost impracticable to abstract from milk milk solids other than milk fat and by a calculation made on the basis of the said presumption, approximately 2⅕ gallons of water had been added to the milk drawn from the cows.

Then the paragraph went on to say :

> Milk has a sensibly constant freezing point lower than that of water and freezing point tests of the samples were made and confirmed the excess of water therein and on the basis of these tests the actual amount of added water in the mixture of 36½ gallons was a little over 4 gallons.

There was evidence as to the way in which the milk was dealt with after the cows had been milked, and, although it is not necessary for me to read the evidence as found in the case in detail, it must be stated that there was a considerable period of time—namely, from 5 p.m. until 6 a.m. the following day—during which the afternoon's milk was left in the dairy not constantly under observation. The respondent and his male servant gave evidence, and part of their evidence was that there was a deficiency of food available at the time when this milk was delivered, and that, the normal quantity of dairy cake purchased by him in the year preceding the outbreak of war being 100 per cent., at the time of this offence he was able to obtain only 66 per cent. The evidence also was that lack of dairy cake, which is the chief concentrated food for cows, will tend to reduce the quantity of milk and lead to deterioration in its quality.

Upon all this evidence, the magistrates came to the conclusion that the milk was sold to the purchaser by the respondent in the same condition as it was when it was drawn from the cows, and they accordingly dismissed the information. It is to be observed, as I have already indicated, that milk which is, as this was, deficient in milk solids other than milk fat is to be presumed not to be genuine milk until the contrary is proved. In other words, the question which the magistrates had to consider before they could find that an offence had been committed was whether the respondent had discharged the onus resting upon him of proving that the milk was genuine milk. If the milk was genuine milk, it is quite plain, even apart from authority, that the respondent is entitled to succeed in a charge brought against him under the Food and Drugs Act, 1938, s. 3. *Hunt* v. *Richardson* (1) established that position, and the effect of *Hunt* v. *Richardson* (1) is quite aptly and conveniently stated in *Bowen* v. *Jones* (2), where Ridley, J., said, at p. 127 :

> In the case of *Hunt* v. *Richardson* (1) it was held that the milk was genuine milk as it came from the cows, and that, although it was proved on analysis that there was a deficiency in milk fat, the deficiency was due to the manner in which the cows had been fed. This court held, under the circumstances, that there had been no offence committed under the Sale of Food and Drugs Act, 1875, s. 6.

I read that passage merely as a convenient, and, as I think, an accurate, statement of the effect of *Hunt* v. *Richardson* (1).

Another case to which our attention has been called is *Kings* v. *Merris* (3). In that case, Lord Reading, L.C.J., gave a judgment in which he made this statement as to the proper way in which the magistrates' duty should be discharged. He said, at p. 569 :

> The Sale of Milk Regulations merely create a presumption that the milk in those cases is not genuine, and it is open to the respondent to rebut it and to show that notwithstanding the deficiency in non-fatty solids, he has added nothing to or abstracted nothing from the milk but has sold it in the same condition as it was when it came from

the cow. If evidence were given to that effect and the justices believed it, they would be justified in finding that no offence had been committed.

I cannot fail to observe that in that passage there is no statement by Lord Reading, L.C.J., that the only evidence which would discharge the onus would be evidence that it was impossible for any person to have access to the place where the milk was kept, and I suppose also a finding that any person who had access to it did not adulterate it. Lord Reading, L.C.J., continues as follows, at pp. 569, 570:

> Here the difficulty is that as the case stands there is no evidence to rebut the presumption created by the regulations. The statement in para. (*j*) of the case is relied upon as some evidence upon which the justices were entitled to come to the conclusion that no offence had been committed. I agree that if there was some evidence it is not for us to judge of its weight, that being for the justices.

I approach the matter, therefore, with that statement in my mind as to the nature of the part to be played by the magistrates and the part to be played by this court. In other words, if there was evidence upon which the magistrates could come to the conclusion that the milk was genuine and they did come to that conclusion, then it was proved that the milk was genuine milk. The question in this case is whether there was evidence upon which the magistrates could come to the conclusion expressed in the finding which I have read, that the milk was sold to the purchaser by the respondent in the same condition as it was when it was drawn from the cows. What is said in this case by counsel for the appellant, who has put his argument perfectly clearly and effectively, if I may say so, is that the magistrates were not entitled to arrive at that finding, having regard to the evidence, which they set out as evidence and which they accepted, to the effect that, according to one test, 2⅕ gallons had been added to the milk, and, according to another, a little over 4 gallons had been added. I am bound to say that I am not sure that I fully appreciate the evidence, or the scientific basis of the evidence, in para. 6, but the important point for this court to consider, I think, is what the actual conclusion of the magistrates was. We must confine our attention to that and see whether there was any evidence upon which they could arrive at their conclusion. Having considered the whole of the evidence, and having listened to the arguments, I cannot say without wavering that I have come to the conclusion that there was evidence upon which the magistrates could find as they do in the passage I have read. They must be taken to accept the evidence that dairy cake was the normal feed on which milking cows are fed, that lack of dairy cake produced deterioration in the quality of the milk, and that the respondent had been allowed to purchase only 66 per cent. of the quantity of dairy cake purchased by him in the period before the war, although he had a smaller herd in that pre-war period. When it is submitted to us that there is only one possible way in which the contrary, to use the words of the section, can be proved—namely, by proving an impossibility of access of any evil-minded persons—I can only say that there is no authority for the proposition, and, looking at the argument, and considering the argument apart from any possible authority, I think that it is not one which appeals to me. It lays down a standard of proof which seems to me to go a great deal further than necessary. The section requires that the contrary should be proved—in other words, that the milk is genuine—and, if the magistrates hear evidence that there has been inadequate food and accept the evidence to that effect, and also to the effect that lack of dairy food leads to a deficiency in milk solids other than fat, I see no reason why, apart from any evidence at all as to non-access, they should not come to the conclusion that the milk was genuine milk.

The difficulty which has been so much present to my mind in this case is the decision in *Jenkins* v. *Williams* (4). Counsel for the appellant puts the effect of that decision so high as to say, as I have already stated, that the only possible way in which the contrary can be proved is by such evidence as was tendered in *Jenkins* v. *Williams* (4). In fact, in *Jenkins* v. *Williams* (4) that was the method of establishing the defence which was there relied on, and the court held that it failed. The defence there was not that the deficiency of food had led to deterioration in the quality of the milk. Lord Hewart, L.C.J., expressed in his own emphatic way the opinion of the court in that case that, if that defence was relied upon, it must be proved up to the hilt, and no doubt that case will be considered and followed by the court when the only defence raised is one of the character which I have stated —namely, that nobody could have access to the milk. In this case, however, one of the defences raised—indeed, it seems to me that it was the substantial defence by the respondent—was that the lack of food prevented the milk from reaching the required standard. The magistrates accepted that, and I cannot say that there was no evidence upon which they could come to that conclusion.

I must not be supposed for one moment to underrate the importance of this regulation, which is intended to provide against the sale of milk lacking in the proper qualities of milk, and I have no doubt that the court will, and should, view and sift with the greatest possible care any evidence which is given by a respondent to excuse deficiency of fats, whether the defence is that the food was inadequate or not available or that nobody could possibly have had access to the milk so as to put water into it. However, in this present case, in view of the decision of the magistrates, and in view of the fact that their finding is based upon evidence which was given in the case, I think that this appeal must fail, and should be dismissed.

HUMPHREYS, J.: I agree with the result of this appeal as stated by VISCOUNT CALDECOTE, L.C.J. I desire first of all to look at this matter quite apart from any authority. It appears to me that the onus is clearly upon the defendant, in such a case as the present, to disprove the presumption that the milk sold was not genuine milk, that presumption arising from the facts and conclusions stated in the analyst's certificate. If the defendant is to succeed, he must disprove that presumption by proving the contrary, and that must be done by evidence to the satisfaction of the tribunal of fact, which is the court of summary jurisdiction. So far as I am aware, there is nothing either in this statute or in these regulations to indicate that this question of fact is to be approached from any standpoint different from any other of the many questions of fact which fall to be decided by courts of summary jurisdiction. The defendant has to satisfy the justices by evidence that the milk in question was in the same state when sold as it was when it came from the cow. It is the duty of the justices, I think, to decide that question. This court can interfere only where it appears that the finding of fact by the justices, whatever it may be, is not justified by the evidence before them, and cannot be justified. I think it right to say that I have no doubt, and my view is, that cogent and complete evidence must be before the justices to justify a finding in favour of the defendant where there is, as there is in the present case, a serious unexplained, and perhaps unexplainable, deficiency in solids other than fat in the milk, pointing to a considerable excess of water in the milk. The defendant in such a case must first prove to the satisfaction of the justices that the milk has not in fact been tampered with by himself or by any other person for whose acts he is responsible. However, that is not enough. He must further show that no one else has tampered with the milk, and the only way of proving that fact is to show that no one else had an opportunity of doing so between the time when the milk was taken from the cow and the time when it was sold by the defendant. The reason why it must be remembered in these cases that the issue is not whether or not the defendant has tampered with the milk, but is whether or not the milk has been tampered with, is that guilty knowledge is not an ingredient in the offence charged against the defendant. The offence consists in the sale of a liquid which is not genuine milk. It may be that the failure on the part of some courts of summary jurisdiction to realise the importance of this latter consideration has been the cause of the numerous, though apparently unreported, cases referred to by LORD HEWART, L.C.J., as having been decided by this court in the course of his judgment in *Jenkins* v. *Williams* (4).

In my opinion, if the evidence called for the defence fails to account for a proved excess of water in the milk, the justices, although accepting that evidence as exculpating the defendant, and, it may be, those persons for whom he is directly responsible, may nevertheless find themselves compelled to hold that the milk was not genuine, and, in that event, it would be the duty of the justices to hold that the offence had been proved, since it is to be emphasised, I think, that what the defendant has to prove is, not merely that he is not personally responsible, but that the milk which he sold was genuine milk as it came from the cow. All those matters, I think, should be present to the minds of the justices forming a bench which is considering one of these cases. However, when all that has been said and emphasised, it remains a question for the justices, as the tribunal of fact, to decide whether, to their minds, the evidence in the case is so strong as to leave them in no doubt that the genuineness of the milk has been established, and, for my part, I think that this court should not be astute to interfere with such a finding where it is clear that the justices have applied their minds to the real question and the true question in the case. So much for the law.

Upon the facts of the present case, I entirely agree with the conclusion arrived at by VISCOUNT CALDECOTE, L.C.J., and stated in his judgment, and I concur in the result proposed by him, for the reasons stated in that judgment. As I was a member of the court which decided *Jenkins* v. *Williams* (4), I may perhaps be permitted to make an observation with regard to that case. I was myself undoubtedly impressed with the information conveyed to me that there were a number of cases which had been decided by this court in the direction indicated by LORD HEWART, L.C.J., in the course of his judgment in that case—namely, deciding that in such a case there must be a perfectly clear, continuous and exhaustive tracing of the history of the milk from the time of milking up to the moment of sale. The good sense of that statement cannot be disputed. It must be obvious that, if the defendant chooses to base his defence as to the genuineness of the milk upon the evidence of what was done to the milk, or could have been done to the milk, from the time it came from the cow, his evidence must show that throughout there was no opportunity for anyone else to interfere with it. Otherwise, the evidence does not prove that which it sets out to prove. In that case, as VISCOUNT CALDECOTE, L.C.J., has observed, that was the issue raised and there was no other issue. In my opinion, that case never could have been cited, and cannot be now cited, as an authority for the proposition that, where the defence is that there are natural causes which account for the apparent excess of water in the milk, nevertheless, after that has been proved, there must in addition be given evidence excluding every possibility, however remote, that someone other than the defendant or his servants may have tampered with the milk. That case was not argued on the part of the respondent. If it had been, it may be that counsel might have satisfied me, as counsel for the respondent has satisfied me in this case, that there is no such line of cases to be found anywhere in the books. If there have been such cases, and there must have been, or the information which he stated as a fact in the course of his judgment would not have been given to LORD HEWART, L.C.J., those cases decided in that way must have been cases where the justices had not really applied their minds to the true question : " Is the milk proved to be genuine ? " but had decided, as experience shows justices do sometimes decide, what they think is the more important question : " Is it proved that the defendant has done something wrong which he ought not to have done ? "

I would only say further about that case that I think that it should be treated as a decision upon the particular facts of the case, and, in any future cases where the same defence is raised as was raised in that case, it would be relevant. Whether, in the light of the argument which I have heard in this case, I should have arrived at the same conclusion as I did in that case is a matter of no interest to anyone, and perhaps not even to myself, but I think the decision is one which, it may properly be said, should be confined to the facts of the particular occasion.

LEWIS, J. : I agree. Before this court can upset the decision of the magistrates, I am satisfied that we must find that there was no evidence upon which the magistrates could find as they did. Having read the case and listened to the arguments, I am satisfied that it is impossible to say that there was no evidence upon which they could so find. There was some evidence, and, therefore, this court cannot upset the decision of the magistrates. Speaking for myself, I do not think that *Jenkins* v. *Williams* (4) decided, or was intended to decide, the general principle which counsel for the appellant has so effectively argued. I think that it is a decision on the facts of that particular case, bearing in mind the method which the defendant in that case sought to adopt in order to prove his defence. I have nothing further to add, and I agree with the result stated by Viscount Caldecote, L.C.J.

Appeal dismissed with costs.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *W. Jermyn Harrison*, Town Clerk, Hove (for the appellant); *Blyth, Dutton, Hartley & Blyth*, agents for *Graham Hooper & Betteridge*, Brighton (for the respondent).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

HUME PIPE AND CONCRETE CONSTRUCTION CO., LTD., *v.* MORACRETE, LTD.

[Court of Appeal (MacKinnon and Goddard, L.JJ., and Hallett, J.), **November 17, 1941.**]

Practice—Service out of the jurisdiction—Defendant resident in Eire—Whether resident in Ireland—R.S.C., Ord. 11, *rr.* 1, 2—*Irish Free State* (*Consequential Adaptation of Enactments*) *Order*, 1923 (*S.R. & O.*, 1923, *No.* 405).

A contract made between the plaintiffs and the defendants provided that its terms should be construed according to the law of England and that its place of performance should be deemed to be England. The defendants were incorporated and carried on business in Dublin, and, in an action arising out of the contract, the plaintiffs applied for leave under R.S.C., Ord. 11, r. 1, to serve the writ on them in Dublin. The defendants objected, on the grounds (i) that, under r. 6, as they were "neither a British subject nor in British dominions, notice of the writ, and not the writ itself," was to be served upon them, and (ii) that they were entitled to the benefit of r. 2, since the place of residence of the defendants was in Ireland:—

Held: (i) the defendants were a British company and resident in a British dominion, and the writ itself was required to be served upon them.

(ii) r. 2 did not apply to the case, as, since the establishment of the Irish Free State, the term "Ireland" as used in the rule must be construed as meaning Northern Ireland only.

[**EDITORIAL NOTE.** The substantial question here is whether the term "Ireland" in the Rules of the Supreme Court must now be taken as referring to Northern Ireland only, and excluding, therefore, the southern part of the country, now known as Eire. In considering this, Goddard, L.J., has shown that these rules are really part of the Judicature Acts and fall to be construed as a statute, save that, in certain circumstances, the court has power to inquire into the validity of a rule.

As to Service Out of the Jurisdiction, see HALSBURY, Hailsham Edn., Vol. 26, pp. 31-33, para. 44; and for Cases, see DIGEST, Practice, pp. 341, 342, Nos. 592-598. See also YEARLY PRACTICE OF THE SUPREME COURT, pp. 87-101.]

Case referred to:

(1) *Logan* v. *Bank of Scotland*, [1904] 2 K.B. 495; Digest, Practice, 318, *426*; 73 L.J.K.B. 794; 91 L.T. 252.

Appeal by the defendants from an order of Lewis, J., dated Oct. 24, 1941. The facts are fully set out in the judgment of MacKinnon, L.J.

Robert Fortune for the appellants.

H. V. Lloyd-Jones for the respondents.

MacKinnon, L.J.: The plaintiffs are an English company incorporated in England, and the defendants are a company incorporated and carrying on business in Dublin. The plaintiffs and the defendants had made a contract, one clause of which provided that it should be construed in accordance with the law of England and that the place of performance thereof should be deemed to be England. The defendants at some date said that they were no longer bound by the contract, and thereupon the plaintiffs issued a writ against the defendants, and, as the defendants were domiciled in Dublin, they applied to Master Simner for leave to serve the writ upon the defendants in Dublin. The master gave that leave, and the defendants then applied to Master Jelf to set aside that order on the ground of irregularity and on the ground that the writ did not comply with the requirements of R.S.C., Ord. 11, rr. 1 (*e*), 2, 6. R.S.C., Ord. 11, r. 1 (*e*), provides as follows:

> Service out of the jurisdiction of a writ of summons, or notice of a writ of summons, may be allowed by the court or a judge whenever . . . (*e*) The action is one brought against a defendant not domiciled or ordinarily resident in Scotland to enforce, rescind, dissolve, annul or otherwise affect a contract or to recover damages or other relief for or in respect of the breach of a contract (i) made within the jurisdiction, or (ii) made by or through an agent trading or residing within the jurisdiction on behalf of a principal trading or residing out of the jurisdiction, or (iii) by its terms or by implication to be governed by English law . . .

A Clearly, the defendants here were not ordinarily resident in Scotland, and the claim here was to recover damages for the breach of a contract which quite clearly by its terms was to be governed by English law. Therefore, *prima facie*, the master was quite right in giving leave to serve. Then it is provided by R.S.C., Ord. 11, r. 6, as follows:

> When the defendant is neither a British subject, nor in British dominions, notice of B the writ, and not the writ itself, is to be served upon him.

The original point taken before Master JELF was that this service was irregular because it ought to be service of a notice of the writ, and not of the writ itself. That is a bad point. The defendants are a British company and they are in a British dominion—namely, Eire—and, therefore, the writ itself, and not notice of the writ, was required to be served upon them. Master JELF was, therefore, C quite rightly and obviously held to be wrong by LEWIS, J., in setting aside the leave given by Master SIMNER on the ground of that alleged irregularity.

Quite apart from that point, counsel for the defendants raises another point. He says that it will be very inconvenient to the defendants to have to submit to be sued in England, and in regard to that he relies upon R.S.C., Ord. 11, r. 2, which provides as follows:

> Where leave is asked from a court or a judge to serve a writ, under the last preceding D rule, in Scotland and in Ireland, if it shall appear to the court or judge that there may be a concurrent remedy in Scotland or Ireland (as the case may be) the court or judge shall have regard to the comparative cost and convenience of proceedings in England, or in the place of residence of the defendant . . .

Counsel for the defendants says that, under that rule, we ought to have regard to the convenience of the parties and hold that it would be more convenient to both parties to have this litigation in Dublin rather than in England. The E first thing about that is that, in my view, r. 2 now does not apply to this case at all, because I am satisfied that, as the defendant company are incorporated and carry on business in Dublin, that is not in Ireland within the meaning of that rule. GODDARD, L.J., has drawn our attention to an order in council, passed under the provisions of the Irish Free State (Consequential Provisions) Act, 1922, which provides as follows:

> F Any reference to Ireland shall exclude the Irish Free State.

Therefore, I do not think that the question arises at all under r. 2, because I do not think that that applies. I do not think that the word "Ireland" in that rule applies to Dublin, and I think that it has not done so since the establishment of the Irish Free State. Quite apart from that, there is inherent jurisdiction here, which, *inter alia*, is recognised in r. 4, where it says:

> G . . . no such leave shall be granted unless it may be made sufficiently to appear to the court or judge that the case is a proper one for service out of the jurisdiction under this order.

There is power to correct an abuse of the process of the court by the parties where it is quite clear that they ought to have litigated elsewhere. The leading case upon that is *Logan* v. *Bank of Scotland* (1), under which it is necessary to establish that it is an abuse of the process of the court to bring the particular H defendant before an English court. Nothing of that sort can possibly be alleged in this case. All that can be said is that, though it would be highly convenient for the plaintiffs to have their action tried in England, there may be some inconvenience to these defendants, but far short of anything like a vexatious proceeding, and still less an abuse of the process of the court. For these reasons, I think that the decision of the judge overruling the decision of Master JELF was perfectly correct, and that this appeal should be dismissed with costs.

GODDARD, L.J.: I agree. I should like to deal with some of the points which have been argued, because it seems to me that there is some little confusion with regard to the rules dealing with the service out of the jurisdiction of writs for breaches of contract. R.S.C., Ord. 11, r. 1 (*e*), by its plain terms excludes a defendant living in Scotland, because, if the defendant is domiciled or is ordinarily resident in Scotland, leave cannot be given. This subrule, however, applied to a defendant living in Ireland until the establishment of the Irish Free State, but since that time must be read as modified by the new reference to Ireland. In one case under R.S.C., Ord. 11, r. 1 (*e*)—namely, where the breach A is committed within the jurisdiction although the contract may not have been made within the jurisdiction, or the contract is not by its terms or by implication to be governed by English law—the rule prohibits leave being given in the case of a person domiciled or ordinarily resident in Scotland or Ireland. We are not primarily concerned with that in this case, because, as MACKINNON, L.J., has pointed out, the foundation of the plaintiffs' case here is that the contract is governed by English law. Then r. 2 deals with the service of writs in Scotland B or Ireland, not necessarily upon a person domiciled or ordinarily resident in Scotland or Ireland, but simply where leave is asked to serve the writ in Scotland or Ireland. For instance, it may be that a Frenchman is living in Edinburgh. He cannot be sued in England because Scotland is excluded by the rule, unless it can be shown that the balance of convenience is that he should be sued in England.

C We have to consider, when reliance is placed upon that rule, the meaning of the word "Ireland." Apart from the legislation, I should be inclined to hold that "Ireland" must now be construed as meaning Northern Ireland alone, because of the reason which lies at the root of this matter. As long as Ireland was a part of the United Kingdom, there was a very good reason for treating the courts in Ireland in the same way as we are treating the courts in Scotland. In His Majesty's courts in the United Kingdom, it was considered that, if an D action were brought against a person in the jurisdiction of those courts, the action should be brought where the defendant was resident. However, now that Eire is no longer a part of the United Kingdom, the same reason does not apply, and it is difficult to see why different considerations should apply to Eire and to the case of a British subject resident in Canada, Australia or South Africa. However, I think that the matter was put beyond controversy by the Irish Free State (Consequential Provisions) Act, 1922, s. 6, which provided as E follows:

> His Majesty may, by order in council, (*a*) make such adaptations to any enactments, so far as they relate to any of His Majesty's dominions other than the Irish Free State, as may appear to him necessary or proper as a consequence of the establishment of the Irish Free State.

Counsel for the respondents has called our attention to a statement in THE YEARLY PRACTICE OF THE SUPREME COURT, p. 2, with regard to the Irish Free F State (Consequential Adaptation of Enactments) Order. 1923, made in pursuance of the power given by that statute. Under that order in council, it is provided that, wherever the word "Ireland" occurs in an enactment, it shall be construed as exclusive of the Irish Free State. The Rules of Court, which are passed under the provisions of the Judicature Acts, and which have to be laid before Parliament, have the force of statutes, and, I think, can properly G be described as enactments. It is said that the court can inquire into the validity of a rule, but, subject to that, the rules made are part of the Judicature Acts. I think that this order clearly applies to the Rules of Court, and, therefore, for the future it must be recognised. Again, in DICEY ON THE CONFLICT OF LAWS it is suggested that, where the word "Ireland" appears in a Rule of Court, it must be construed as referring only to Northern Ireland, exclusive of the Irish Free State. H

As to whether or not any case is made out here that the court in its discretion should refuse leave on the balance of convenience, I have nothing to add to what MACKINNON, L.J., has said. It seems to me that, if we acceded to the argument of counsel for the appellants, we should have to do so in every similar case. This is an *a fortiori* case, in my opinion, in which the parties agreed, at the time when they made the contract, that English law should apply and that performance should be regarded as taking place in England, obviously with the idea, in my opinion, that, if any litigation arose, the action should be litigated in England. Therefore, I agree that this appeal should be dismissed.

HALLETT, J.: I agree, and have nothing to add.

Appeal dismissed with costs.

Solicitors: *Crossman, Block & Co.* (for the appellants); *Last, Riches & Fitton* (for the respondents).

A [*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

B. MORRIS, LTD. *v.* LUNZER

[COURT OF APPEAL (Lord Greene, M.R., and Clauson and Goddard, L.JJ.), **December 16, 17, 19, 1941.**]

B *Revenue—Purchase tax—Sale by manufacturer to private person—Date of appropriation of goods to contract—" Appropriates or applies "—Finance (No. 2) Act,* 1940 (*c.* 48), *s.* 25.

In or about Jan., 1940, the appellant, a private person, obtained from the respondents, wholesale manufacturers of furniture, a contract for the sale by them to her of certain furniture which was to be specially made. C The price was to be paid before delivery. The goods were ready for delivery on Mar. 18, 1940, but the appellant was unable to take delivery at that time, as she had difficulty in getting living accommodation. The respondents kept the goods, without there being any contract of bailment. On Sept. 11, 1940, the appellant, at the request of the respondents, agreed to pay for the fire and war risk insurance of the goods. On Nov. 4, 1940, the goods were despatched to the appellant, the whole of the purchase price D then having been paid. On July 26, 1941, the respondents paid £47 10*s.* 7*d.* purchase tax on the goods, which sum they sought to recover from the appellant in these proceedings. It was contended for the appellant that, upon the true construction of the relevant provisions of the Finance (No. 2) Act, 1940, no purchase tax became payable on the goods, as they were appropriated to the contract before the tax became operative, and that, E accordingly, the respondents were not entitled to be reimbursed by her:—

HELD: (i) the words " appropriates or applies " in the Finance (No. 2) Act, 1940, s. 25, point to some final and unconditional act.

(ii) in the present case, the date of the appropriation or application of the goods for the purposes of the contract was Nov. 4, 1940, the date of delivery, since the respondents were not bound and had no intention of delivering the goods until they received payment. Purchase tax was, therefore, F payable in respect of the sale, and the respondents were entitled to be reimbursed by the appellant.

[**EDITORIAL NOTE.** Appropriation of goods to a contract is a familiar term in the law of the sale of goods. In the statute imposing the purchase tax the legislature has used a slightly dfferent phrase and speaks of the appropriation or application of goods to a contract of sale. The Court of Appeal, in considering these words, have given them a different meaning from that usually adopted in cases under the Sale of Goods G Act, 1893, and have decided that there is no appropriation and application until the hands of the manufacturer have been finally removed from the goods. So long as it is open to the manufacturer to say that he will not perform the contract, there has been no appropriation and application to the purposes of the contract.

FOR THE FINANCE (No. 2) ACT, 1940, s. 25, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 33, p. 416.]

Case referred to:

H (1) *Wait* v. *Baker* (1848), 2 Exch. 1; 39 Digest 488, *1075*; 17 L.J.Ex. 307.

APPEAL by the defendant from an order of His Honour JUDGE ENGELBACH at Shoreditch County Court, dated Oct. 3, 1941. The facts are fully set out in the judgment.

H. V. Lloyd-Jones and *G. Willett* for the appellant.

Bernard Lewis (*Constantine Gallop* with him) for the respondents.

Lloyd-Jones: In the present case, there was an appropriation of goods to the contract on Mar. 18, 1940. The county court judge found that there was an appropriation of the goods on that date. The Act does not contain a definition of the word "appropriation." Sect. 22 (2) provides that tax chargeable in respect of any goods shall become due on the delivery of the goods under the purchase. That applies to transactions which are within sect. 18, but not to the type of transaction provided for by sect. 25. From the moment the manufacturers put the goods aside for the appellant, they appropriated them to the contract. The manufacturers held the goods for the appellant, and contemplated that they should become her property on her paying for them. It is difficult to say that the manufacturers had not applied the goods in question to the purchase, because they continued to accept payments which were made to them on account. Owing to fortuitous circumstances, delivery of the goods had not been taken as arranged. That was a circumstance not contemplated by the appellant when she entered into the contract. [Counsel referred to *Wait* v. *Baker* (1).]

Lewis : The respondents had no intention of passing the property in the goods until the purchase price had been paid in full. In order that tax may be attracted under sect. 25, something must be done which finally allocates the goods to some particular use. The county court judge has found that the respondents did not allocate the goods to the appellant until they were paid. In order to attract tax, there must be an appropriation which is unconditional and final. There was no such allocation on Mar. 18, 1940. Neither was there such an allocation on Sept. 11, when the respondents imposed a further condition, owing to their having incurred extra costs. The word "appropriation" in the Finance (No. 2) Act, 1940, must have a wider meaning than it has in the Sale of Goods Act, 1893. In the present case, there was no completion of the transaction within the meaning of sect. 25 of the Act of 1940 until the price had been paid.

LORD GREENE, M.R. [delivering the judgment of the court]: This appeal raises a question of some difficulty upon the construction of the Finance (No. 2) Act, 1940, Part V, by which purchase tax was imposed. The facts may be summarised in this way. On the introduction of a friend, the appellant in or about Jan., 1940, obtained from the respondents, who are wholesale manufacturers of furniture, a contract for the sale by them to her of certain furniture, which they were to manufacture to an agreed design. The price was to be £135, the whole of which was to be paid before the goods were delivered. The goods were to be completed and ready for delivery to the appellant on Mar. 18, 1940, or Mar. 19, 1940, and the appellant was to pay carriage charges. The goods were ready for delivery on Mar. 18. 1940, but, although the appellant was requested by the respondents on several occasions to take delivery, she did not do so, as she was finding difficulty in obtaining living accommodation. The respondents meanwhile kept the goods, but without there being any contract of bailment. On Sept. 11, 1940, the appellant, in compliance with a request or demand by the respondents, agreed to pay for the fire and war risk insurance of the goods. On Nov. 4, 1940, the goods were despatched. By that time, the appellant had paid the respondents the whole of the purchase price, insurance costs and carriage charges due, with the exception of the sum of £23 13*s.* 2*d.*, for which the respondents accepted her post-dated cheque. This cheque was duly honoured.

On July 26, 1941, the respondents paid a sum of £47 10*s.* 7*d.* to His Majesty's Customs for purchase tax demanded in respect of the transaction, and this sum they sought to recover from the appellant by these proceedings. His Honour JUDGE ENGELBACH found that the appellant was liable to pay the sum of £46 10*s.*, the difference between the two figures being due to an agreed adjustment, and he gave judgment for that amount and costs. The appellant appeals from this judgment, and claims that, upon the true construction of the relevant provisions of the Finance (No. 2) Act, 1940, no purchase tax became payable by the respondents, and that, accordingly, they are not entitled to claim reimbursement by her of the amount which they paid or any part thereof.

Before I turn to the Act, it is convenient to state the contractual position between the parties as we see it. Under the terms of the original contract, the property in the goods was not intended to pass until payment in full of the amount due. On Mar. 18, 1940, the goods were ready for delivery in accordance with the contract, and the appellant was bound to pay for them and take delivery on that date. However, although the respondents had ready for delivery goods earmarked for the contract, there was no consensual identification of those goods as the contract goods, and we think that it would have been open to the respondents to deliver any goods of their manufacture of the kind specified in the contract. On Sept. 11, 1940, however, the goods which the respondents had earmarked became, I think, consensually allocated to the contract, and thereafter the respondents could perform their contract only by delivering those specific goods. Nevertheless, although the contract goods thus became ascertained, this did not operate to pass the property, and did not affect the original contract, under which the property was only intended to pass on payment.

It is to a transaction involving these four stages—namely, (i) the original contract in Jan., 1940, (ii) the completion of the goods ready for delivery on Mar. 18, 1940, (iii) the allocation by agreement of ascertained goods to the contract on Sept. 11, and (iv) payment and delivery on Nov. 4, 1940—that the provisions of the Act have to be applied. The date prescribed for the coming into operation of the purchase tax was Oct. 21, 1940, and the sole question in the case is whether or not the event, which under the Act causes purchase tax to become due, took place before that date. It is the application of the language used to describe that event to the facts of the case which gives rise to the difficulty. The appellant argued that the event in question was the completion of goods ready for delivery under the contract on Mar. 18, 1940, or, alternatively, the consensual ascertainment of the contractual goods on Sept. 11, 1940. The respondents, on the other hand, say that the event was the delivery of the goods on Nov. 4, 1940. As will appear, the question is a nice one.

The scheme adopted by the legislature for the imposition and collection of purchase tax is (so far as relevant) in its main outlines as follows. The tax is charged in respect of specified classes of goods which are bought under what are called "chargeable purchases" (sect. 18 (2)) from a registered wholesaler or manufacturer, who is chargeable with the tax (sect. 22 (1) (*a*)), but passes it on to the buyer (sect. 27). The tax is charged on the wholesale value. A chargeable purchase is a purchase from a wholesale merchant or manufacturer selling by wholesale (sect. 18 (2) (*a*))—namely, selling to a retailer (sect. 41 (1)). The tax is chargeable on all purchases of the kind described, whether made before or after the passing of the Act, but, save in certain cases mentioned in sect. 37, it is not chargeable when the goods have been delivered before the date to be specified for the coming into operation of the Act (sect. 18 (3)), which was Oct. 21, 1940. Where tax is chargeable, it becomes due on delivery of the goods under the purchase (sect. 22 (2)).

So far the provisions of the Act may be summarised by saying that the wholesaler is accountable for the tax to the Revenue, but the tax does not become payable until the completion of the transaction between the wholesaler and the retailer by delivery of the goods, the fact that the property may have passed at an earlier date being treated as irrelevant. In other words, the tax becomes payable at the end of what may be called the wholesale stage and not before. If, however, the incidence of the tax had been limited to the ordinary case of a sale by a wholesaler to a retailer, many transactions which did not fall within that description would have escaped taxation. The problem was, therefore, to make the tax applicable to those transactions while preserving the machinery by which the wholesaler is accountable for the tax and the tax becomes due from him at a defined and appropriate time. Sect. 25 is designed to meet such cases. So far as relevant, it provides as follows:

> (1) Where a wholesale merchant or manufacturer . . . appropriates or applies any chargeable goods in his ownership . . . or in the case of a manufacturer, any chargeable goods which have been made by him . . . either (*a*) to the purposes of any business carried on by him of selling chargeable goods by retail . . . or (*b*) to the purposes of any business carried on by him of letting out chargeable goods on hire or (*c*) to any other purpose not being a sale of the goods under a purchase which is a chargeable purchase . . . the appropriation or application shall be treated for the purposes of this Part of this Act as if it were a chargeable purchase, he shall be accountable for the tax chargeable in respect of the goods, and the tax shall become due at the time of the appropriation or application.

By these provisions, the machinery of the tax is adapted to these special classes of transaction. The wholesaler is accountable for the tax, and the point of time selected for the tax to become due as comparable to the date of delivery in the case of a sale to a retailer is the time of the appropriation or application to the particular purpose in question in any individual case.

In the present case, the appellant was not a retailer. Accordingly, the purchase by her was not a chargeable purchase under sect. 18, and the due date for payment of the tax was not the date of the delivery of the goods under sect. 22 (2) (*a*). Her case falls under the words "to any other purpose not being a sale of the goods under a purchase which is a chargeable purchase" already quoted from sect. 25 (1) (*c*), and the tax became due at the time when the respondents appropriated or applied the goods to the purpose of the contract. The question is, therefore, what, having regard to the facts of the case, was the time of such appropriation or allocation.

Some general observations may be made with regard to sect. 25. First, the time when the tax becomes due is not fixed by reference to the date when the property passes, and the word "appropriation" is not used in reference to any rule for ascertaining the intention of parties to a contract for the sale of goods as to when the property shall pass. This appears clearly from the circumstance that the section applies to cases (which probably form the majority of the cases to which it applies) where there is no question of property passing at all. In cases falling under the section where property does pass, the date of the passing of the property does not fix the date when the tax becomes due, any more than it does in the case of a sale to a retailer where the date fixed is the date of delivery of the goods. Secondly, the words "appropriates or applies" are words of quite general import, chosen as suitable to describe a variety of transactions. In the case of any particular transaction, the problem is to find the particular stage in the transaction to which they most sensibly apply, having regard to the facts of the case. Thirdly, the scheme of the section is, as it appears to us, to fix a point of time comparable or analogous to that at which, in the normal case of a sale to a retailer, the goods are to be regarded as passing out of the wholesale stage. In the typical case of a wholesaler who has a retail business, the point of time selected is that at which he does some act in relation to his goods which indicates that he has ceased to be a wholesaler and has become a retailer in regard to them. Such a case would be where he places the goods in his retail shop, or despatches them for the purpose of being so placed. Lastly, whatever the words "appropriates or applies" may mean in relation to the facts of any individual case, they point to some final and unconditional act.

We think that, having regard to these considerations, it is legitimate, in a case under sect. 25 (1) (*c*) which happens to be a sale, to expect to find that the date chosen for the tax to become due will be truly comparable to the date of delivery chosen for the case of chargeable purchases on retail sales—that is, that it will be the date of delivery itself. It would be strange to find that the tax in such a case as the present should be payable at an earlier date than it would have been if the purchaser had been a retailer instead of a private individual. If the word which refers to such a case as the present is the word "applies," as we think it is, the word "appropriates" being more suitable for the transactions mentioned in paras. (*a*) and (*b*), it seems to us to be clear that, upon the facts, there was no "application" of the goods to the purposes of the contract until they were actually delivered. Down to that date, they were earmarked for the contract and identified as being the contractual goods, but they had not been "applied" to the purposes of the contract. If, however, the word is "appropriation," we do not find sufficient finality in what was done down to the date of delivery to satisfy that requirement. The respondents were not going to deliver the goods until they received payment. Down to the date of actual payment, it was not certain whether or not the contract would be performed. The appellant might have repudiated it and the goods might have been left on the respondents' hands. The respondents were still keeping their hands on the goods, as they were entitled to do, and, although the goods were "appropriated" to the contract in the general sense that the contract became a contract relating to specific goods, they were not, in our opinion, in the particular sense of the section, "appropriated to the purpose of the contract," a state of affairs which could only come about when the hands of the respondents were finally removed from the goods. For these reasons, we are of opinion that the date of appropriation or application of the goods to the purpose of the contract was Nov. 4, 1940, the date of delivery, that the tax charged became due on that date, that the respondents were bound to pay it, and that, accordingly, they are entitled to recover it from the appellant. The appeal is dismissed with costs.

Appeal dismissed with costs.

Solicitors: *Bassadine & Brewer* (for the appellant); *Alexander Fine, Hawkins & Co.* (for the respondents).

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

R. *v.* MINISTER OF HEALTH, *Ex parte* STAFFORDSHIRE MENTAL HOSPITALS BOARD

[KING'S BENCH DIVISION (Viscount Caldecote, L.C.J., and Hilbery and Asquith, JJ.), **December 10, 11, 1941.**]

Lunatics—Asylum officer—Superannuation—Disputes to be settled by Minister of Health—Jurisdiction of Minister to determine whether employee "established"—Asylums Officers' Superannuation Act, 1909 (*c.* 48), *ss.* 1, 15, 17.

A. was employed by the Staffordshire Mental Hospitals Board in a permanent capacity as a plumber over a period of 44 years, leaving finally on account of ill health. In the course of his work, he very often had the assistance of patients who were able to help him. When he left the service of the Board A. claimed a superannuation allowance under the Asylums Officers' Superannuation Act, 1909, and, on his claim being rejected by the Board, obtained an order from the Minister of Health under sect. 15 of the Act determining that he was entitled to such an allowance. The Act gives the right to superannuation allowances to "established" officers and servants only, and defines "established officer or servant" as such officer or servant employed in a permanent capacity as has the care or charge of the patients, or whom the visiting committee has determined to be an established officer or servant. By a resolution of the Board passed several years before he left its service, A. was classed as a non-established servant of the artisan class. The Board applied for an order of *certiorari* to quash the order of the Minister, contending that he had no jurisdiction to determine the matter. They contended that, as A. was not within either of the two classes of established officers defined by the Act, he was not entitled to apply to the Minister under sect. 15, and that, in determining his application, the Minister was assuming a jurisdiction which he did not possess:—

HELD: the Minister necessarily had jurisdiction to determine whether A. was an established officer or servant or not, that being the very issue which he had to settle before making an order under sect. 15.

[**EDITORIAL NOTE.** The Minister is by statute empowered to decide any dispute as to the right of any officer or servant of an asylum to a superannuation allowance. In the present case, this depended on the question whether the servant was an established officer or servant within the meaning of the Act. The court has held that the decision of that question is an essential preliminary arising in the course of the inquiry, and, as the Minister is given jurisdiction to decide the right to a superannuation allowance, he must also have jurisdiction to decide this preliminary point.

AS TO SUPERANNUATION OF ASYLUM OFFICERS, see HALSBURY, Hailsham Edn., Vol. 21, pp. 392, 393, para. 675; and FOR CASES, see DIGEST, Vol. 33, p. 248, Nos. 1687, 1688.]

Cases referred to:

(1) *R.* v. *St. Olave's District Board* (1857), 8 E. & B. 529; 16 Digest 443, *3078*; *sub nom. R.* v. *Metropolitan Board of Works*, 27 L.J.Q.B. 5; 30 L.T.O.S. 132.

(2) *Colonial Bank of Australasia* v. *Willan* (1874), L.R. 5 P.C. 417; 16 Digest 440, *3060*; 43 L.J.P.C. 39; 30 L.T. 237.

APPLICATION for an order of *certiorari* to remove to the King's Bench Division of the High Court an order of the Minister of Health under the Asylums Officers' Superannuation Act, 1909, s. 15, for the purpose of quashing the order. The facts are fully set out in the judgment of VISCOUNT CALDECOTE, L.C.J.

J. H. Thorpe, K.C., and *A. H. Pocock* for the applicants.

The Solicitor-General (*Rt. Hon. Sir William Jowitt, K.C.*) and *Valentine Holmes* for the first respondent, the Minister of Health.

C. Erskine Simes for the second respondent, Averill.

VISCOUNT CALDECOTE, L.C.J.: This is an application for an order of *certiorari* to remove to this court an order of the Minister of Health made by him under the Asylums Officers' Superannuation Act, 1909, s. 15, for the purpose A
of quashing the order which the Minister made. Averill was for some years an officer or servant of what may be called, for the purposes of this case, the Staffordshire Mental Hospitals Board. During the period of his service, there was some alteration in the constitution of his employers, but, for the purposes of this case, what I have said is accurate. He was employed in a permanent capacity as a plumber from Dec. 7, 1896, to Sept. 27, 1934, in the mental hospital in question. He then resigned or left the hospital's service voluntarily. In 1939, B
shortly after the outbreak of war, he went back to the service of the mental hospitals board, and was re-employed by them for a short period until Mar. 29, 1940, when his temporary services came to an end. Three days later, however, on Apr. 1, 1940, he was re-engaged as a temporary plumber, and continued in that capacity until Aug. 22, 1940, when he left, owing to ill health. After he had ceased to be in the employment of the mental hospitals board, he preferred a claim for a superannuation allowance under the provisions of the Asylums C
Officers' Superannuation Act, 1909, and, in accordance with the provisions of sect. 15, as he said, he made his application to the Minister of Health (the Minister of Health being now the Minister in place of the Secretary of State as originally enacted), and asked for an order to be made that he was entitled to such an allowance. Letters were written to the secretary to the Minister of Health by the clerk of the mental hospitals board setting out their view of the facts, and the Minister D
of Health, upon that information and no doubt upon other information, determined the matter and made an order that Averill was

> . . . entitled to receive from the Board a superannuation allowance calculated in accordance with the provisions of that Act.

The application for an order of *certiorari* to quash that determination is based upon a contention that the Minister of Health had no jurisdiction to determine the matter, inasmuch as Averill was not an established officer or servant E
of the mental hospitals board. Sect. 15 of the Act provides as follows:

> In the case of any dispute as to the right to superannuation allowance of any officer or servant of an asylum, or as to the amount of the superannuation allowance to which any such officer or servant is entitled, such dispute shall be determined by the Secretary of State [now the Minister of Health], whose decision shall be final.

The contention of the applicants for the order of *certiorari* is that it is only persons who are established officers or servants of the asylum and persons who F
had been placed in one of the two classes into which established officers are divided who are entitled to apply to the Minister of Health, and that, as Averill was not such a person, the Minister of Health was assuming a jurisdiction which he did not possess. It is necessary to look at sect. 1 (1) of the Act to appreciate the contention on behalf of the applicants:

> For the purposes of this Act the established officers and servants employed in asylums G
> shall be divided into two classes. The first class shall consist of all those established officers and servants who have the care or charge of the patients in the usual course of their employment. The second class shall include all other established officers and servants.

In connection with that provision, the definition of established officer or servant in sect. 17 (1) must be read:

> "Established officer or servant" means such officer or servant employed in a per- H
> manent capacity as has the care or charge of the patients or whom the visiting committee of an asylum shall by resolution determine to be an established officer or servant . . .

It seems to me that the two classes into which established officers and servants are divided by the provisions of sect. 1 (1) result in a division into two classes of all established officers and servants, the first class of which is composed of persons who in fact have the care or charge of the patients in the usual course of their employment. As I understand the section, it is not a question of any determination by the visiting committee which entitles them to be put in the first class. It is quite true that, by subsect. (2), the visiting committee are responsible for dividing established officers and servants into classes, but, by the provisions of subsect. (1), as I read them, even though the visiting committee do not put a person in that first class who is entitled to be put in that class, the rights of a person so entitled to a superannuation allowance hold good. The superannuation allowance is given to the established officers and servants of the two classes by the provisions of sect. 2 of the Act. The Solicitor-General, who appeared for the Minister of Health, contended that there was some overlapping between the provisions of sect. 1 (1) and the definition of established officer or servant. He drew a distinction between the two provisions by reason of the omission of the words " in the usual course of their employment " from the definition of established officer or servant. I find it unnceessary to say whether I accept that interpretation of the two provisions, though I am bound to say that my inclination is to read the definition of established officer or servant as meaning very much the same, if not exactly the same, as the provisions of sect. 1 (1) of the Act. I do not think, however, that anything really turns upon whether or not the words " in the usual course of their employment " are to be implied in the definition. The fact is that, by virtue of the provisions of sect. 1 (1), persons who are in, or are entitled to be in, the first class of established officers or servants are those who have the care or charge of the patients in the usual course of their employment. The facts about this particular man were that, in the course of his duties as plumber, he very often had with him one of the class of persons who are quite able to assist such a tradesman as he was and serve as a plumber's mate or in some such capacity, and, generally speaking, he had the companionship and help of such an inmate as that. On other occasions, he had a larger number of persons to help him—for instance, when there was some labourers' work to be done in consequence of some mishap. His contention before the Minister of Health was that he was a person who had the care or charge of patients in the usual course of his employment. If that was right, he was entitled to be regarded as an established officer and servant, and, I think, as an established officer and servant of the first class.

The contention that the Minister had no jurisdiction to decide whether or not Averill was an established officer or servant seems to me to be opposed to the fair meaning and proper construction of the provisions of sect. 15, which, in the clearest terms, provides that any officer or servant of an asylum may go to the Minister of Health in the case of any dispute as to his right to superannuation allowance. The Minister has decided in his favour. I am not going to express any opinion at all upon the question as to whether or not the Minister came to a right decision. There were obviously facts which it would be his duty to consider—such facts as I have already mentioned, for instance, as to the way in which Averill had the help of one of the patients in the mental hospital—but it is not necessary for me to express any opinion as to whether or not the Minister was right, the sole question here being whether he had any jurisdiction to entertain the question. It seems to me that, applying the language of sect. 15 in its plainest interpretation, the case which Averill wanted the Minister of Health to decide was the case of a dispute as to the right to superannuation allowance which he was making, claiming to be an officer or servant of an asylum, and, although it is quite true that those words must be understood to be qualified by addding the word " established " (because it is only established officers or servants who have the right to superannuation allowance), it is none the less, as it seems to me, a dispute within the meaning of the section as to the right to superannuation allowance of any officer or servant.

The main and substantial argument addressed to us on behalf of the applicants, and the one to which the Solicitor-General devoted the greater part of his argument, was that for the Minister to assume jurisdiction to decide that question was first of all to deal with a matter collateral to the issue which he had to decide, and was not a jurisdiction which he had the right to entertain. That seems to me to be a contention which is mistaken. It would mean that an officer or servant who sought the decision of the Minister of Health with the statement or allegation that he was entitled to a superannuation allowance would have to be met by the Minister of Health saying : " I cannot hear you, because you are not an established officer or servant. Somebody else must decide that." In other words, the Minister of Health would have to hold himself unable to decide the very issue upon which the officer had come to him—namely, whether, as an established officer or servant he was entitled to a superannuation allowance—and to tell the officer so. If the Minister, on the other hand, agreed to entertain the application and decided that the man was an established officer or servant, it would seem impossible to suppose that he was thus acting without jurisdiction, especially if he may be assumed to have decided A rightly that the man was an established officer or servant. To put it more briefly, the very question which the Minister under sect. 15 seems to be required to decide, if the application is made to him, is the question whether a man is entitled to a superannuation allowance, and, in order to decide that question, it is necessary to ascertain whether the man is an established officer or servant. It seems to me to be a question which comes within the principles laid down in two cases to which we have been referred. One of them was *R.* v. *St. Olave's* B *District Board* (1), where an almost precisely similar question was involved—namely, whether or not the applicant was a servant of the board. LORD CAMPBELL, C.J., said, at p. 533 :

> It was not a case in which their jurisdiction depended on a preliminary point ; but on the appeal being lodged, they had at once jurisdiction to dispose of it ; and the question whether Defree was or was not an officer entitled to compensation was not a C preliminary fact, but the very point which on the appeal they were to inquire into.

Later, WIGHTMAN, J., put it clearly when he said, at p. 534 :

> I am unwilling to proceed upon verbal distinctions ; but I cannot help remarking that in this Act the terms are varied. " Every officer " may apply for compensation, but " any person making any such claim to compensation whose claim is rejected " may appeal. It seems to me that on appeal the inquiry would have to be on the very circumstance whether the claimant was an officer or not. D

Again, in *Colonial Bank of Australasia* v. *Willan* (2), the opinion was there given by SIR JAMES COLVILLE with reference to a question which had been raised as to the right of an inferior court to exercise a particular jurisdiction. He said, at pp. 442, 443 :

> In order to determine the first [the question of want of jurisdiction], it is necessary to have a clear apprehension of what is meant by the term " want of jurisdiction." E There must, of course, be certain conditions on which the right of every tribunal of limited jurisdiction to exercise that jurisdiction depends. But those conditions may be founded either on the character and constitution of the tribunal, or upon the nature of the subject-matter of the inquiry, or upon certain proceedings which have been made essential preliminaries to the inquiry, or upon facts or a fact to be adjudicated upon in the course of the inquiry. It is obvious that conditions of the last differ materially from those of the three other classes.

Then, later on, he said, at p. 443 : F

> But an objection that the judge has erroneously found a fact which, though essential to the validity of his order, he was competent to try, assumes that, having general jurisdiction over the subject-matter, he properly entered upon the inquiry, but miscarried in the course of it. The superior court cannot quash an adjudication upon such an objection without assuming the functions of a court of appeal, and the power to retry a question which the judge was competent to decide. G

The present case comes within the last class of cases to which SIR JAMES COLVILLE referred—namely, a case which arose upon facts or a fact to be adjudicated upon in the course of the inquiry. I think that the fact or facts to be adjudicated upon in the course of the inquiry in this case were whether or not Averill was entitled to be treated as an established officer. If he was, it is not disputed, as I understand it, that he would be entitled to a superannuation allowance. The Minister has not decided what the character of the superannuation allowance was, and whether it was one which would be given to a person H in the first class or to one in the second class. He simply decided that Averill is entitled to receive from the board a superannuation allowance calculated in accordance with the provisions of that Act. I think that this application must fail, for the reason, which I have tried to express, that the Minister of Health necessarily had jurisdiction to decide the status of the applicant as the very issue which he had to settle before he could decide whether or not to make an order in favour of the applicant. I think that the application should be dismissed.

HILBERY, J.: I am of the same opinion.

ASQUITH, J.: I agree.

Application dismissed with costs.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *H. L. Underwood*, Stafford (for the applicants); *Solicitor to the Ministry of Health* (for the first respondent); *W. H. Thompson* (for the second respondent).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

CHARENTE STEAMSHIP CO., LTD. *v.* WILMOT.

[COURT OF APPEAL (Lord Greene, M.R., and Luxmoore and du Parcq, L.JJ.), **November 24, December 9, 1941.**]

Income Tax—Deductions against profits—Wear and tear—Each item of plant and machinery to be considered separately—Surplus on one item not to be set off against deficiency on another item—Income Tax Act, 1918 (*c.* 40), *Sched. D, Cases I and II, rr.* 6, 7.

The respondents, who were steamship owners, decided in 1935, in accordance with their practice, to sell certain ships and to replace them with others more suitable for their trade. Three of these ships, the P., the M. and the S., were not sold until 1938. The M. and the S. each realised a price which, when added to the amount allowed for depreciation in previous years, exceeded the cost price of those ships. The P. was sold at a price which, when added to the amount allowed in previous years in respect of depreciation, was less than its cost. The Crown contended that the surplus on the M. and the S. should be brought into account in an allowance for wear and tear under the Income Tax Act, 1918, Sched. D, Cases I and II, r. 7:—

HELD: in considering whether any allowance can be made under r. 7, each item must be considered separately. The respondents were, therefore, entitled to the allowance claimed in respect of the P. without bringing into account the surpluses on the M. and the S.

[**EDITORIAL NOTE.** The present case turns upon the construction of Sched. D, Cases I and II, r. 7, and possibly upon the construction of the word "any." Income tax is a tax upon income, and considerations affecting capital are, consequently, outside the scope of the Income Tax Acts. Two exceptions, however, have been engrafted upon that principle. The first is a wear-and-tear allowance, which is a notional sum allowed every year in respect of a loss in value of plant or machinery employed in business. That is r. 6. The other exception is r. 7, which states that, in respect of the replacement of plant or machinery which has become obsolete, there may be deducted a sum which is arrived at in the following way. One ascertains the original cost of the plant or machinery which has been replaced during the year of assessment, and deducts from that sum (i) the amount which, in the course of years, has been allowed in respect of depreciation of that plant or machinery owing to wear and tear, and (ii) the amount, if any, realised on the sale of that plant and machinery. The difference between the former figure and the sum of the two latter figures is, broadly speaking, the amount which is allowed. The point in the present case is whether or not surpluses on some items should be set off against deficiencies in respect of others. That is, is the loss to be assessed, in the present case, by considering each ship separately, or must the business be considered as a whole? The court has decided in favour of the former construction.

AS TO OBSOLESCENCE OF PLANT, see HALSBURY, Hailsham Edn., Vol. 17, pp. 169, 170, para. 346; and FOR CASE, see DIGEST, Supp. Income Tax, No. 276 c.]

Case referred to:

(1) *South Metropolitan Gas Co.* v. *Dadd* (1927), 13 Tax Cas. 205; Digest Supp.

APPEAL by the Crown from an order of MACNAGHTEN J., dated, July 14, 1941. The facts are fully set out in the judgment.

The Solicitor-General (*Rt. Hon. Sir William Jowitt, K.C.*) and *Reginald P. Hills* for the Crown.

J. Millard Tucker, K.C., and *F. Heyworth Talbot* for the respondents.

LUXMOORE, L.J. [delivering the judgment of the court]: This appeal raises a question with regard to the proper construction to be placed upon the Income Tax Act, 1918, Sched. D, Cases I and II, r. 7, which provides as follows :

> In estimating the profits or gains of any trade . . . chargeable under this schedule there shall be allowed to be deducted as expenses incurred in any year so much of any amount expended in that year in replacing any plant or machinery which has become obsolete as is equivalent to the cost of the plant or machinery replaced after deducting from that cost the total amount of any allowances which have been at any time made in estimating profits or gains as aforesaid on account of the wear and tear of that plant and machinery, and any sum realised by the sale of that machinery or plant. A

Put shortly, the question is whether, for the purposes of the rule, all obsolete items of plant or machinery replaced during the appropriate period are to be dealt with individually or as a totality.

The point is new, and comes before this court for the first time. The facts material to be considered in the present case are these. The Charente Steamship Co., Ltd. (hereafter referred to as the company) owned a fleet of some 50 steamships. B From time to time, according to a regular plan of revision, particular ships which are deemed to have become unsuitable for the company's business are sold and replaced by others more suitable. During the company's trading year ending Dec. 31, 1935, which was the basis of the assessment to income tax for the year 1936-37, the company decided to dispose of a number of ships, including the Patrician, the Musician and the Senator, and to replace the ships to be disposed of by others which were in fact purchased in that year. The Patrician, C the Musician and the Senator were not sold until 1938, because no suitable opportunity for sale arose. In the case of the Patrician, the total amount of allowances under Sched. D, Cases I and II, r. 6, for wear and tear in the previous assessments to income tax, together with the sale price of that vessel, was less than its original cost, while in the case of the Musician and also in that of the Senator the total amount of the like allowances, when added to the sale price D of the particular vessel, exceeded its original cost. In these circumstances, the company claimed the benefit of r. 7 in respect of the Patrician. The claim was resisted by the Crown, on the ground that the respective amounts by which the total of the allowances for wear and tear and the sale price of the Musician and the Senator respectively exceeded the original cost of each of those ships should be brought into account and set off against the allowance claimed in the case of the Patrician. E

The company appealed to the Special Commissioners, and contended (i) that the company was entitled, in respect of the replacement of a ship where the total amount of the allowances for wear and tear in respect of that ship, together with its sale price, was less than its original cost, to an allowance of such " deficiency " as a deduction as expenses, and, also, that it was immaterial that the replacement during the same period of some other ship resulted on the same basis in a " surplus," and (ii) that the sales of the Musician and the Senator were sales of F capital assets, and that any " surplus " was a capital profit and should be disregarded in a computation directed solely to income.

The Crown contended that the Patrician had not in fact been replaced during the year ended Dec. 31, 1935, but had been kept in commission (as was the fact) for some years subsequent to that year, and that no *prima facie* case for loss of replacement had, therefore, been made out. Alternatively, the Crown contended that, in the application of r. 7, plant or machinery must be looked at as a G whole, and that, in determining whether or not any deduction is to be allowed, regard must be had to the net result of the replacement of all the plant replaced during the year ended Dec. 31, 1935.

The Special Commissioners found that the Patrician had been replaced within the meaning of r. 7 within the period to which the assessment relates—namely, the year 1935—and expressed the opinion that, for the purpose of determining H the allowance to be made under r. 7, the plant or machinery must be taken as a whole, and that the company could not be allowed to select merely those items in respect of which a loss could be shown, but that regard must be had to the net result of the whole replacement during the year. They therefore dismissed the appeal.

The company requested the Special Commissioners to state a case for the opinion of the High Court pursuant to the Income Tax Act, 1918, s. 149. This was complied with, and the case stated ultimately came before MAC-

NAGHTEN, J., who allowed the company's appeal. The question whether the Patrician had been replaced in 1935, which had been raised before the Special Commissioners, was waived at the hearing before MACNAGHTEN, J., but without prejudice to the right of the Crown to raise it again in any suitable case. The judge expressed the opinion that r. 7 dealt only with the case where there was a deficiency in the replacement of obsolete plant or machinery—that is, the replacement of a capital asset—and it is pre-supposed that allowances for depreciation A of the asset had been made in previous years, and that the result of the replacement was a deficiency. He said that the rule did not purport to deal with the replacement of a capital asset which had resulted in a surplus, and that he could see no sufficient reason for implying what was not expressed in the rule. Before expressing this opinion, he said:

> It is to be observed that, if a shipowner is so fortunate as to be able to sell his ship for more than it cost, income tax is not chargeable on the excess, because, as has been B said, income tax is a tax on income. It is not a tax on capital or on the appreciation of a capital asset, such as a ship or any other plant or machinery. It would, I think, be somewhat whimsical to construe r. 7, which, on the face of it, purports to give relief from taxation, so that in effect it would impose taxation on a subject-matter which, but for the sale, would be exempt from taxation.

With all respect to the judge, we are unable to agree that the answer to the C question raised can be found as the result of considering whether the amount by which the total of the allowances for wear and tear in respect of a ship, or of the proceeds of sale of that ship, exceeds the original cost thereof is capital or income, for, although the allowances for wear and tear are permitted deductions in ascertaining the amount of the profits or gains to be brought into charge, yet none of these sums can properly be described as being capital or income. In our judgment, the answer can be ascertained only by determining the true D construction of r. 7. It is to be observed that r. 7 is itself complementary to r. 6, which provides for deduction in each year for wear and tear of plant or machinery in charging the profits and gains of a trade, so long as the total amount of the deductions allowed on account of wear and tear for the previous years does not exceed the actual cost of the machinery or plant in question. Obviously, in the application of r. 6, each item of machinery and plant falls to be considered separately, for the amount of the depreciation (which is usually assessed on a E percentage basis) must necessarily vary with the nature, age and user of the particular piece of machinery or plant to be considered.

Rule 7 was introduced by the Income Tax Act, 1918. Its object was to allow the taxpayer some relief in cases where, during a particular year, it became necessary or prudent to acquire and instal new machinery or plant because the existing machinery or plant or parts of it had become inefficient on account of obsolescence. F It was not intended to apply, and obviously does not apply, to all plant and machinery acquired or installed in any particular year. By its terms, the rule is limited to such plant or machinery as may be acquired or installed to replace that which has become obsolete. If the plant or machinery replaced is not obsolete—and this is a question of fact to be determined by the Special Commissioners—then the rule can have no application, and no allowance can properly be claimed in respect of it: *South Metropolitan Gas Co.* v. *Dadd* (1).

G Further, it is to be observed that r. 7 authorises a claim on the part of the subject for an allowance in respect of what, apart from the rule, would not be open to him—namely, an allowance in respect of the expenditure upon new machinery or plant. The allowance has no relationship to the actual amount expended on the new machinery or plant. It is based on the original cost of the machinery or plant replaced. It can be ascertained only after bringing into account the allowances for wear and tear during the previous years in respect H of each particular item replaced and the proceeds derived from its sale. Under r. 6, as has already been stated, each item of machinery or plant must in practice be considered in the first instance separately, for regard must be had to its nature, age and user, although it is true that the several sums to be allowed in respect of wear and tear are finally added together, so that the amount deductible appears in the assessment as one lump sum. It has never been suggested that any part of the proceeds of sale of items of plant or machinery sold during the year ought to be considered or accounted for by the ascertainment of the allowances for wear and tear.

In considering whether any allowance can be made under r. 7, each replaced item must necessarily be considered separately. The words of the rule, although they may obviously be applicable to any number of items of plant or machinery replaced, are equally obviously applicable to one such item, and it seems to us that they are so applicable, because the words of the rule, on their natural meaning, point to a distributive construction. The words do not directly require the person claiming the allowance to bring into account anything in respect of an item or items of plant or machinery replaced which, although obsolete, would not qualify for allowance, because the total amount received in respect of it or them by way of previous allowances for wear and tear and of its or their proceeds of sale exceeds its or their original cost. It is the subject who makes the claim. He can make it only if the facts relating to any particular item or items satisfy the requirements of the rule. We can find no words which require the subject to bring into the account anything in respect of any particular item or items which do not satisfy those requirements. If the legislature had so intended, the latter part of the rule could easily have been framed to make that intention clear by directing the deduction from the total cost of all obsolete plant and machinery replaced during the particular year of the total amount of all allowances during previous years on account of wear and tear of all such plant or machinery and all sums realised by the sale thereof. The material words used in r. 7 are " any " and " any sum," not " all " and " all sums." For these reasons, we are of opinion that the contention of the company is correct, and that, on the facts stated, the company is entitled to an allowance in respect of the replacement of the Patrician, without bringing into account anything in respect of the so-called " surpluses " arising in the case of the Musician and the Senator. In the result, the appeal fails and must be dismissed with costs.

Appeal dismissed with costs. Conditional leave to appeal to the House of Lords.

Solicitors : *Solicitor of Inland Revenue* (for the appellant) ; *Simpson, North, Harley & Co.* (for the respondents).

[*Reported by* W. K. Scrivener, Esq., *Barrister-at-Law.*]

Re AN ARBITRATION BETWEEN SEA AND LAND SECURITIES, LTD., AND WILLIAM DICKINSON & CO., LTD. THE ALRESFORD.

[King's Bench Division (Atkinson, J.), **November 26, December 8, 1941.**]

Shipping—Charterparty—Time charter—Hire—Cesser of hire—Charterers deprived of use of ship during fitting of degaussing apparatus.

A ship was chartered for a period of 6 months. During that period the ship put into Blyth to load coal, and there being a likelihood of some delay in loading, the charterers suggested to the owners that the opportunity should be taken to have her equipped with degaussing apparatus. They did not, however, enter into any agreement as to the continuation of the hire while this was being done. The fitting of the apparatus was not at that time compulsory. The charterers were deprived of the use of the ship for over 10 days while the apparatus was being fitted. Accordingly they withheld from the claimants an appropriate payment of the hire, on the ground that the ship had been deliberately withdrawn from their use, with a consequential failure of consideration, for that period. The claimants contended that the hire was payable throughout the whole contract period except in so far as excused by the express terms of the charterparty. Clause 12 of the charterparty provided that accidents preventing the working of the ship were to lead to the ship being off hire, except where the damage occurred through the respondents having chosen rivers or ports which caused danger to the ship :—

Held : clause 12 indicated that it was the intention of the parties that the use of the ship was to be a condition precedent to the payment of hire. Accordingly, the hire was not payable during the period in question, inasmuch as the charterers had no use whatever of the ship, which had been withdrawn from their use by the voluntary and deliberate act of the owners.

[**EDITORIAL NOTE**. It has been said that, except as specially provided by the charterparty, hire continues to be payable throughout the chartered period. Text-book writers and decided cases are not, however, unanimous in their support of this proposition and, after a careful examination of all the authorities, it is here decided that hire is not payable in respect of a period during which the charterers have no use of the vessel by reason of a voluntary act of the owners.

As to Liability for Hire under Time Charter, see HALSBURY, Hailsham Edn., Vol. 30, pp. 308-312, para. 500; and for Cases, see DIGEST, Vol. 41, pp. 358-363, Nos. 2074-2114.]

Cases referred to:

(1) *Inman S.S. Co., Ltd.* v. *Bischoff* (1882), 7 App. Cas. 670; 41 Digest 357, *2064*; 52 L.J.Q.B. 169; 47 L.T. 581.

(2) *Havelock* v. *Geddes* (1809), 10 East, 555; 41 Digest 325, *1834*.

(3) *Wehner* v. *Dene Steam Shipping Co.*, [1905] 2 K.B. 92; 41 Digest 402, *2496*; 74 L.J.K.B. 550.

(4) *Lina, Akt.* v. *Turnbull & Co.*, [1907] S.C. 507; 41 Digest 360, case *h*.

(5) *Modern Transport Co., Ltd.* v. *Duneric S.S. Co.*, [1917] 1 K.B. 370; 41 Digest 321, *1797*; 86 L.J.K.B. 164; 115 L.T. 535.

(6) *Snia Societa di Navigazione Industria e Commercio* v. *Suzuki & Co.* (1924), 29 Com. Cas. 284; 41 Digest 304, *1659*.

Case Stated by an umpire for the opinion of the King's Bench Division of the High Court of Justice as to whether a ship on time charter was on hire while it was being fitted with degaussing apparatus. The facts are fully set out in the judgment.

A. W. Roskill for the claimants.

A. J. Hodgson for the respondents.

Atkinson, J.: This is a case stated by a lay umpire, raising a question as to whether a ship on time charter was off hire whilst being degaussed. Sea and Land Securities, Ltd., were the owners of the Alresford, and the respondents, William Dickinson & Co., Ltd., were the charterers. On Oct. 23, 1939, the time charterers, the respondents, hired the Alresford on time charter for six months, and they sub-let her at a profit. On Mar. 19, 1940, the ship put into Blyth for the purpose of loading coal for Norway. It was known that there would be some delay, as the government were giving preference at that time to coastal traffic taking coal to London, and so the opportunity for having the ship degaussed was seized by the owners. The umpire finds that on Mar. 19, 1940, this ship arrived at Blyth and was at once

> . . . made fast at the wharf of the Blyth Drydocks & Shipbuilding Co., Ltd., at 12.15 p.m. . . . for the purpose of being fitted with degaussing apparatus.

The umpire finds that she was so occupied until 10 a.m. on the morning of Mar. 28, a period of 8 days and 21¾ hours, and the ship was then loaded and was again from 9 p.m., on Apr. 2, 1940, until 10 a.m. on Apr. 4, 1940, occupied in completing the fitting of the degaussing apparatus. He says further in his award that, therefore, for 10 days, 10 hours and 45 minutes the time charterers were deprived of the use of the ship, as a result of which they withheld payment of hire for that period, a sum amounting to £1,083 19*s.* 4*d.* Then he finds that during that period the ship would have to had to wait her turn to load, and he also finds that it would have been quite easy for the time charterers to fill in the intervening time by putting the vessel in for a cargo from the east coast to London. He also finds as follows:

> Whilst it was admitted that the time charterers had suggested to the owners that the opportunity should be taken to fit the said apparatus at Blyth, there was no agreement or understanding that the vessel should continue on hire whilst this was being done or otherwise.

I take it that his finding was that the suggestion was made by the time charterers, whom I will call the charterers, in the belief that it would follow that they would not have to pay hire whilst the ship was out of their service. The view taken by the umpire is that the charterers are right in their contention, and that they were entitled to make the deduction in question, and that is the question which has been put forward to the court for decision.

The charterers say that there was an interruption of the contract, that the ship had been let to them for six months, that it was deliberately withdrawn from their use by the respondents, that there was a failure of consideration for a definite period, and that hire cannot be payable for a time during which they were deliberately deprived of the use of the ship. The umpire has found that they were not interested in the value of the ship or her cargo. On that, the owners say that the law is that, come what may, hire is payable throughout the whole contract period, except in so far as it is excused by the express terms of the charterparty. They say that, even though the ship is withdrawn from the use and service of the charterers, hire continues to be payable, and, if that withdrawal is a breach of the charterparty, they concede that there may be a claim for damages. In this case, if the withdrawal were a breach of the charterparty, it would seem that the damages must inevitably amount to more than the amount of the hire, because the umpire finds that this vessel was sublet at a profit. I should say that this same question has arisen between charterers and sub-charterers, and I am told, although it does not appear in the case, that the decision in this case will settle the same question which is at issue between the charterers and the sub-charterers.

Is it the law that a charterer has to pay hire to the owners of the ship he charters in all circumstances, except in so far as expressly excused by a term in the charterparty ? Even if the ship is deliberately withdrawn from the use of the charterer in breach of the law, there is a sharp difference of opinion between textbook writers on the matter. I shall refer to four of those textbooks, and I may say that I have consulted a fifth on the matter. This passage was read to me from SCRUTTON ON CHARTERPARTIES, 14th Edn., p. 425 :

> Except as specially provided by such a clause, hire continues to be payable throughout the chartered period. The charterer cannot rely on an excepted peril as excusing him from paying hire during the time in which by such excepted peril he is unable to use the ship.

It is the first two lines of that paragraph which are the relevant ones for the purposes of this case. There it is stated very definitely and without any qualification :

> Except as specially provided by such a clause, hire continues to be payable throughout the chartered period.

Then I was referred to CARVER, CARRIAGE BY SEA, 8th Edn., para. 572. This is under an article, the first paragraph of which deals with " Time occupied in repairs not deducted unless so stipulated." That is the side-note. Then the section says :

> The same is true of other detentions which may occur. If they arise owing to defaults of the shipowner, there may be a counterclaim against him ; but in the absence of agreement to the contrary, the time for which the freight is to be paid runs without a break from the beginning to the end of the agreed voyage or service.

That is very clear language. Then, on the other hand, I was referred to ABBOTT, LAW OF MERCHANT SHIPS, 14th Edn., p. 679 :

> In all the instances before mentioned the owners take upon themselves the chance of the long or short duration of the voyage. But if the merchant engage to pay a certain sum for every month, week or other portion of the voyage in this case the risk of the duration falls upon the merchant ; and if no time be fixed for the commencement of the computation, it will begin from the day the ship breaks ground and commences the voyage, and will continue during the whole of the voyage and during all unavoidable delays not occasioned by the act or neglect of the owners or master or by such circumstances as work a suspension of the contract for a particular period.

Then in MAUDE & POLLOCK, LAW OF MERCHANT SHIPPING, 4th Edn., Vol. 1, p. 378 there is this :

> Questions have arisen as to the effect of a detention during the voyage on the claim for freight, where it is to be paid at so much for a given time, as, for instance, at so much per month. The determination of these cases depends also upon the terms of the contract. The general rule is that the freight continues payable if the detention does not defeat the object of the voyage or suspend the contract and does not proceed from the default of the shipowner.

Then HALSBURY'S LAWS OF ENGLAND, Hailsham Edn., comes down on the side of the last two authorities, and I see this in Vol. 30, pp. 309, 310 :

> If, however, the ship is not lost, but merely delayed, the hire continues to be payable (in the absence of stipulation to the contrary) notwithstanding the loss of time, unless the delay is attributable to the shipowners' default or the charterparty expressly provides for cesser of hire during delay due to the cause in question or the delay is such as to frustrate the contemplated adventure without the fault of either party.

Thus, the writers of the textbooks, in regard to the matter, are fairly evenly divided. At any rate, three textbook writers indicate that, if the withdrawal from hire and inability to use the ship are due to the act of the owner, hire must cease to be payable.

It is not easy to determine whether the use of a ship is a condition precedent to liability for hire, and the principle by which the difficulty is to be solved appears in a passage in MAUDE & POLLOCK at p. 299. This passage, I may say, A was cited with approval by LORD BLACKBURN in *Inman S. S. Co., Ltd.* v. *Bischoff* (1), to which I shall be referring later. In construing charterparties, it is rather difficult to ascertain whether the particular stipulations in them amount to conditions precedent. This is to be determined by seeking for the intention of the parties as apparent on the instrument and from the surrounding circumstances, and by applying the ordinary rules of construction to each particular case. It depends not on any formal arrangement of the words used, B but upon the reason and sense of the thing as it is to be collected, if I may put it so, from the whole contract. Generally speaking, any stipulation which goes only to a portion of the consideration, or, in other words, the breach of which would deprive the party who has a right to insist upon it to a portion only of the benefit of his contract, will be construed not to be a condition precedent. It must be remembered, however, that although this rule is a very useful one, C it is only a rule of construction, or a means of discovering the intention of the parties, to be applied where the words will bear either sense. It is clear, however, that the courts will not make contracts for the parties, and, if the parties use language which definitely shows that they intend such a stipulation to be a condition precedent, it will be so considered. Constructions leading to absurd and unreasonable results will be avoided if this can be done without violence to the terms used, because, where the intention is not clearly expressed, the parties D will not be presumed to have meant to have made an absurd or unreasonable contract. When one reads the contract with that paragraph in mind, the owners by cl. 1 agreed to let—that is to say, they agreed to let for payment—and the charterers agreed to hire—that is to say, they agreed to pay for the use of the ship—the said steamer :

> . . . for six calendar months from the time the steamer is delivered and placed at the disposal of the charterers ready to load.

E Then the ship was to be employed in lawful trades, within certain limits, mainly European trade. That appears by cl. 1. Then cl. 2 provides as follows :

> . . . the owners shall provide and pay for all the provisions and wages, and for the insurance of the steamer, and for all deck and engine-room stores, and maintain her in a thoroughly efficient state in hull and machinery for and during the service.

Then cl. 5 provides as follows :

> F . . . the said charterers shall pay as hire for the said steamer [a certain sum] per calendar month, commencing from the time the steamer is placed at the disposal of charterers and *pro rata* for any fractional part of a month (the days to be taken as fractions of a month of 30 days) until her re-delivery to owners as herein stipulated.

Then the clause goes on to provide that the payment of the hire shall be made in Newcastle-on-Tyne. Then cl. 8 provides as follows :

> G . . . the whole reach and lawful burthen of the steamer, including lawful deck capacity (compatible with vessel's seaworthiness), not exceeding what she can reasonably stow and carry, shall be at the charterers' disposal [with certain reservations].

Then cl. 12 provides as follows :

> . . . in the event of loss of time from deficiency of men or owners' stores, breakdown of machinery, or damage to hull or other accident preventing the working of the steamer, and lasting more than 24 consecutive hours, the hire shall cease from the commence- H ment of such loss of time until she be again in an efficient state to resume her service ; but should the steamer be driven into port or to anchorage by stress of weather, or from any accident to the cargo, or in the event of the steamer trading to shallow harbours, rivers or ports where there are bars causing detention to the steamer through grounding or otherwise, time so lost and expenses incurred (other than repairs) shall be for charterers' account.

Then cl. 13 provides as follows :

> . . . the charterers shall give owners sufficient time for cleaning boilers.

Clause 14 is the ordinary exceptions clause. It is common ground that, although a great number of things are mentioned in the charterparty, degaussing is not mentioned in it. Then cl. 18 provides as follows :

> . . should the steamer be lost or missing, the hire shall cease from the date when she was lost or last spoken, or if not spoken, then from the date when last seen, and hire paid in advance and not earned shall be returned to the charterers.

Clause 23 gives the charterers the option of subletting.

It seems to me that cl. 12 gives a very clear indication of the intention of the parties to the contract. Under that clause, any loss of time due to damage to machinery or hull or other accident preventing the working of the steamer would lead to the ship being off hire. It would be strange if hire were not to be payable if the ship was out of use because of an accident and yet was to continue to be payable if the ship were out of use owing to the deliberate act of the owners. On the other hand, the latter part of the clause indicates that, where the accident was due to the charterers having chosen rivers or ports which might cause danger to the ship, and did in fact cause damage to the ship, or loss of time, they should continue liable. Broadly speaking, however, that clause seems to me to draw a line, because it refers to loss of time due to, amongst other things, "damage to hull or other accident," an accident for which the owners are in no way to blame—namely, to put the ship off hire. Degaussing was not in the minds of the parties when the contract was made, but it does seem to me that this clause does indicate that the use of the ship was to be a condition precedent to the payment of hire, at any rate if loss of the use of the ship was due to an accident, and, if that were the intention, I should have thought that *a fortiori* that would have been the intention if the ship was withdrawn by the owners.

If the withdrawal had been something forced upon them by law, the case of the charterers would be more difficult. As to that, the umpire finds as follows :

> The fitting of the said apparatus was not then compulsory. There was, however, a strong obligation on the owners to present the vessel for the fitting of the said apparatus because a memorandum issued by the Admiralty on Jan. 20, 1940, gave details of this device. This memorandum was circulated on Jan. 22, 1940, by the War Risks Associations and in the first paragraph this circular stated as follows : "In view of the serious loss suffered by enemy action of this nature, you will no doubt take steps to have your ships fitted with the device in question at the earliest opportunity."

Then he goes on to describe a scheme which had been created by the Merchant Shipping Defensive Measures Expenses Committee, which apparently provided for compensation being paid to owners for the time lost by a ship in having work of this sort done, and he says that he had ascertained that the owners in this case had not applied for compensation for the loss of time by reason of that. He does not in terms say that the scheme applies to the ship, but I must take it that he meant that the ship was within the scheme, or he would not have set the matter out in the way in which he has done, and he would not have asked for an answer to the three questions which he sets out in his award, in which he really asks whether the owners made application for compensation, and, if so, whether they received it. I do not think that the existence of that scheme can affect the question which I have to determine, but I think that it is quite clear that the withdrawal by the owners, which was not compulsory, and was a withdrawal for the benefit of themselves and for the safety of the ship, must be regarded as a deliberate withdrawal of the ship for their own purposes. So much for the inferences which I should be inclined to draw from the terms of the charterparty.

I now turn to the cases which have been cited to see which of the principles laid down in the five textbooks to which I have referred seems best supported by authority. There are four cases which seem to throw some light upon this question. The first is *Havelock* v. *Geddes* (2). In that case, a ship had been let for freight for 12 months, and the point was whether freight ceased to be payable during the time when certain repairs were effected. I do not think that it would be helpful for me to cite the broad facts of that case in this case, but I do want to refer to a passage in the opinion of LORD ELLENBOROUGH, at pp. 564, 565 :

> The next plea submitted to the consideration of the court is pleaded to the first breach only. It states that during the 12 months mentioned in the charterparty,

> divers goods were shipped on board the vessel, to be carried from London to St. Domingo; that at the time of shipping them the vessel was not tight, staunch, etc., and sufficiently equipped, etc., but on the contrary was decayed, leaky, ill-fitted, and in an unseaworthy state; that in consequence thereof it became necessary to unload and repair the ship; that by means of the premises the ship became unemployed by and unserviceable to the defendants for a great part of six calendar months; and that the defendants have paid for the hire and service of the ship for the residue of the said six calendar months.

Then he goes on to say, at pp. 565, 566:

> There is another plea similar to this, except that it does not state that the defendants paid for all the time the ship was not unserviceable to them, or unemployed: and it avers that the ship was not in their service or employ for 10 calendar months in the whole. To these pleas the plaintiff has also demurred, and the question upon them is, whether the defendants have shewn such a neglect in the plaintiff, as will excuse them from the payment of the freight which the first breach claims. These pleas are founded, not upon the stipulation forthwith to make the vessel tight, staunch, etc., but upon the stipulation to keep it so; and it is not alleged that there was any defect at the commencement of the 12 months for which the vessel was hired; but that at the time of shipping the goods during the 12 months she was not tight, etc. It is, therefore, perfectly consistent with the allegations in these pleas, that the ship had been put into a perfect state, and thoroughly equipped, immediately after the execution of the charterparty; that she was so when the defendants took her into their service; but that she became otherwise (which might be from one of the accidents to which all vessels are subject) whilst in the defendants' employ. It is indeed consistent with these pleas, that the vessel might have performed a voyage for the defendants before this defect occurred: and as it is a general rule that pleas are to be taken most strongly against the party pleading them, inasmuch as it is probable he would state his case as favourably for himself as the facts would permit, we should be warranted in assuming this to be the case. The pleas do not state that there was any delay in making the repairs, or through any default in the plaintiff that the defect had occurred. The question then is, whether, because the plaintiff has undertaken to keep the vessel tight, etc., the defendants have a right to deduct anything out of the freight they are to pay, in respect of the time which may be taken up in making good such defects as may occur during the period for which the vessel is hired. And we are of opinion that they are not. From the accidents to which ships are liable, it was in the ordinary course of things to expect that this ship might want repairs in the course of her voyage; and when the defendants were making their bargain, they should have stipulated to deduct for the time which might be exhausted in making those repairs, if they meant to make that deduction. Without such a stipulation, we think the true construction of the charterparty is, that whilst those repairs are going on, the ship is to be considered as in the defendants' service, and the defendants liable to continue their payments. As these pleas therefore do not show that it was owing to any default in the plaintiff that the defect in the ship occurred, or that there was any delay in repairing it; we are of opinion that no deduction is to be made from the freight on that account; that these pleas therefore are bad, and that the demurrer to them must be allowed.

That does seem to me to indicate that, if the time lost was owing to any default in the plaintiffs, or to some delay on their part in repairing, hire would not be payable for the period in question. On the other hand, I can find nothing there to support the principle for which the ship contends in this case—namely, that, come what may, and whatever the circumstances may be, the hire is payable. That seems to me to support the opinions expressed in ABBOTT and in MAUDE & POLLOCK, and is, indeed, one of the authorities upon which they relied for their statements—namely, that, if the charterer is deprived of the use of the ship owing to some act on the part of the owner, the hire is not payable.

The next case to which I want to refer is *Wehner* v. *Dene Steam Shipping Co.* (3). In that case, the plaintiffs were subcharterers for a trip of a steamship belonging to the defendants, which had been chartered by them to the William Brauer Steamship Co. The owners, by exercising certain rights of lien, had in their possession a sum of £800 at the end of the term, which *prima facie* belonged to the plaintiffs, the owners of the cargo. The hire was for £1,100 per month, and was payable half-monthly on the 9th and 23rd of each month in advance. At noon on Dec. 23, 1902, the sum of £550 became payable by the William Brauer Steamship Co. to the defendants, the owners. It was not paid, and on the following day the shipowners retook possession of the ship, as they were entitled to do under the terms of the charterparty. They claimed to retain out of the £800 money belonging *prima facie* to the plaintiffs by virtue of their lien, the sum of £550 which had become due for hire the day before, and, as I say, they retook possession. The argument there was the same as that here. In that case, the shipowners contended that hire was payable throughout the whole term of the contract, and that they were exercising their rights in withdrawing the ship when they did, as was not challenged, and that they were entitled, therefore, to be paid the hire for the whole time. There were other questions considered in that case, which was tried by CHANNELL, J., but I need only refer to that part of his judgment which deals with the point involved here. He decided that they were not entitled to hire for that period, but were entitled to deduct the sum of £35 only, attributable to one day, the day from Dec. 23, 1902, to Dec. 24, 1902. Having decided the question in regard to whether they had a right to withdraw, CHANNELL, J., said, at p. 101:

> . . . the defendants can now in any case only assert a right to a very small part of the £550. When that sum did become due at noon on Dec. 23, it was due as a payment in advance, and if it was not paid the defendants were entitled, under the time charterparty, to resume possession of their ship. On Dec. 24 they did in fact retake possession. It is true that the charterparty provides that the right to retake possession was to be without prejudice to their other rights; but I do not think that that would give the owners the right to retake possession the middle of a half-month, and also to claim the hire for the whole of that period. I think that Mr. Leck was right in saying that the consideration had either wholly or partially failed, and that the defendants could only claim hire in respect of that portion of the half-month during which the charterers actually had the use of the vessel. The half-month in question commenced at noon on Dec. 23, and there was only one day's use of the vessel after that time in respect of which the defendants can claim hire . . .

It seems to me that the view there taken was that, even where the ship was withdrawn as of right, there was a failure of consideration, and that hire was not due for the period for which it was withdrawn. Why should not the same result follow when a ship is withdrawn in breach of agreement, and when there is no contractual right of withdrawal? Supposing that in this case the degaussing had been done in the last 10 days of the six months, the argument of counsel for the claimants would have been just the same, but then the case would have been exactly on all fours with *Wehner* v. *Dene Steam Shipping Co.* (3). Indeed, it would be an *a fortiori* case, and the hire would not have been payable. Why? Because the charterers had not the use of the ship at the time in question. Why should a different principle apply because the 10 days came somewhat earlier in the period of the charter? It seems to me that that case is far more consistent with the charterers' contentions as put before me than with those of the shipowners.

The next case to which I want to refer is *Lina, Akt.* v. *Turnbull & Co.* (4), a Scots case, where the point argued was whether or not a ship was off hire during a period when she was in quarantine in some port. I want to read only a few lines from the report of that case. It would have been so easy in that case to say, if the contention of counsel for the claimants is right, "What is there to discuss? Hire is payable throughout the time, and there is an end of it." In *Lina, Akt.* v. *Turnbull & Co.* (4), LORD STORMONTH-DARLING said:

> The second question depends on the terms of the charterparty and on the ordinary rules of maritime law. Both sheriffs lay stress on this being a time charter, and, in my opinion, that affords a sufficient ground of judgment.

Why? LORD STORMONTH-DARLING continues as follows:

> The owners had no voice in the question as to what ports (within the defined limits) their ship was to be sent to, and the correlative of that was that hire should go on at a certain rate so long as they continued to furnish a seaworthy ship capable of performing its stipulated service. Quarantine may or may not be a "restraint of princes and rulers," but even if it is and as such is "mutually excepted," it does not follow that payment of hire calculated by time should be suspended during the whole course of its continuance.

It may be only a small indication, but, if counsel for the claimants was right, it would not have mattered whether or not they chose any particular port, because the ground of the decision there seems to have been that, as the owners had no voice in the question as to the ports to which the ship was to be sent, they were in no way responsible for the ship being put out of use, and they therefore said that for that time a hire was payable, and the clear implication in that was that, if they had been, hire would have been suspended.

The last case to which I wish to refer, and it is one which to my mind is really extremely clear, and which seems to me to be conclusive on this question, is *Modern Transport Co., Ltd.*, v. *Duneric S. S. Co.* (5), the headnote of which is as follows :

> A time charter provided that the owners should let and the charterers should hire a steamship for 12 months at a certain rate payable monthly for hire. The charterparty contained certain restrictions on the user of the ship and certain exceptions, by one of which restraint of princes was mutually excepted. The charterers were to have the option of subletting the ship. After the ship had been placed at the charterers' disposal the Admiralty by notices addressed first to the owners and then to the charterers requisitioned the ship for the service of the government, and sent the owners a form of chartyparty free from the restrictions of the time charter and specifying a monthly sum for hire less than that named in the time charter. The ship was then placed at the disposal of the Admiralty and was restored to the owners during the currency of the time charter :—
>
> HELD, that the owners were entitled to hire under the time charter notwithstanding the requisitioning of the ship by the Admiralty.

In that case, the argument of counsel for the charterers appears at p. 373 :

> There was a restraint of princes which operated so as to prevent the defendants from giving to the plaintiffs the use of the ship upon which the right to the payment of the hire under the charterparty arose. The "use and hire" of the ship was the consideration for which the plaintiffs had to pay the defendants. The use of the ship and the payment of the hire are dependent upon one another. During the time when the ship was under requisition the defendants did not give the plaintiffs the use of the ship, and the hire therefore was not payable for that time.

It was not suggested that there was frustration. There is the argument of counsel for the respondents in this case. In that case, counsel for the shipowners, arguing the other way, might have been saying, as it seems to me : "What is all this about ? Hire is payable, and, come what may, there is no clause in the charterparty providing for its suspension. Therefore, there is an end of the case." However, that was not the argument put forward. In that case, SWINFEN EADY, L.J., said, at p. 377 :

> Upon the plaintiffs' appeal the only question is whether they continued liable to pay the monthly hire while the vessel was under Admiralty requisition. The plaintiffs contended that there was an entire failure of consideration, and that they could not be liable as they did not have the use for which alone they were to pay the hire. The first answer is that the defendants did not agree to give the use of the ship absolutely and unconditionally, but only unless prevented (amongst other things) by the restraint of princes. Again, there was not an entire failure of consideration if the charterparty was subsisting, as the plaintiffs would become entitled to the hire payable by the Admiralty.

That reasoning runs through the judgments in that case. It seems to me that the inference from that is obvious. First, where one has a case where the defendants have agreed to give the use of a ship absolutely and unconditionally during the period in question, hire would cease in these circumstances. Here, however, the charterparty did, absolutely and unconditionally, so far as degaussing is concerned, give the use of the ship to the charterers, and, where there was restraint due to the excepted cause, then the point was that it was impossible to say that the owners agreed to give absolute and unconditional use of the ship to the charterers during the period when she was restrained by princes, and that, therefore, there was no breach of the charterparty. Secondly, the other ground was in regard to the failure of consideration, which was applied there, because, of course, the charterers would get the hire payable by the Admiralty. In the case with which I have to deal, neither of those grounds applies. In this case, the charterers were entirely deprived of the use of the ship, not by any excepted cause, but by the owners for their own advantage, and during the time in question the charterers got no use whatever of the ship.

In none of these cases can one find the principle laid down for which counsel for the claimants contends. I sought in vain for any cases supporting the proposition of counsel for the claimants. Looking at CARVER ON CARRIAGE BY SEA to see if I could find justification for the proposition of counsel for the claimants, I could find only one case bearing on the matter, *Inman S. S. Co., Ltd.* v. *Bischoff* (1). In that case, the ship had been chartered to the Admiralty on monthly hire for three months certain, and thenceforward until the Admiralty should give notice of discharge. There was a proviso in the charterparty which in substance provided that, if for any cause the ship should become incapable of performing efficiently the service contracted for, the commissioners could put the ship out of pay or make such an abatement out of the hire as they thought fit. The owner in that case effected an insurance against loss of freight by perils of the sea, and the case was an action brought against the underwriters on that policy. In that case, it was said that during the term in question the ship became inefficient through perils of the sea. As a matter of fact, the vessel ran aground shortly A before reaching land when she was taking troops to South Africa and became inefficient, and the Admiralty refused to pay the freight claimed. The owners were claiming against the underwriters for loss of freight, and the question was whether the loss was a loss due to a peril of the sea or a loss because of the Admiralty's contractual right to make an abatement from freight to such extent as they thought fit. If the loss was due to this exception clause in the contract, then the loss was not one for which the underwriters were responsible. B The ship sailed for the Cape with troops on Feb. 18, 1879, and on Mar. 21, 1879, she struck a rock and became damaged and inefficient. The troops were taken off her, but the stores were left in her until Apr. 18, 1879. A certificate of fitness was given on Apr. 17, 1879. That, however, did not seem to have satisfied the commissioners until a later date. At any rate, the Admiralty would pay freight only up to Mar. 21, 1879, the time of the accident, although obviously they had the use of the ship until Apr. 18, 1879. LORD BLACKBURN said, C at p. 683:

> It seems to me clear that neither Captain Adean at the Cape, nor the commissioners at home, nor anyone else, had power to discharge the City of Paris before the three months certain for which she was hired. Had she totally perished, so that she never could have been employed at all again, the hire would have ceased from the time of her destruction, but here use was made of her as a store ship till Apr. 17, and after she was repaired she was capable of performing the work of a transport efficiently. D

Then LORD BLACKBURN referred to *Havelock* v. *Geddes* (2). He read part of the passage which I have already read, and then went on to express the view that what the Admiralty had really done was to exercise its power to deduct from the freight by way of mulct what it thought fit, and that, therefore, there was not a loss of freight due to perils of the sea. How that can be stated as an authority for the broad proposition in CARVER ON CARRIAGE BY SEA I utterly E fail to see. I have read it carefully, but I cannot find there any suggestion of this broad principle relied on by counsel for the claimants, a principle which is one without any qualification, except in so far as it is covered by an express clause in the charterparty.

I hold that the view taken by the umpire was right. I think that, under this charterparty, the freight was not payable during the period in question, inasmuch as the charterers had no use whatever of the ship during that period, F and it was withdrawn from their use by the voluntary and deliberate act of the owners. I repeat that I do not think that the fact that, knowing degaussing was going to be done, the charterers suggested that this would be a suitable time is relevant, because I am satisfied that the umpire was not finding that they were assenting to it except on the terms that they got payment. They were not assenting to it or waiving their rights in regard to the matter in any way. G

Perhaps I should just refer to the argument of counsel for the respondents that this technically came within the expression "ship's stores," and, therefore, would be covered by a clause in the charterparty. I cannot bring myself to agree with him there. I do not think that on any reasonable construction of that expression it could be held to include degaussing apparatus. It may be that this is rather an academic discussion, because it would seem clear, if I am wrong in this view, that the withdrawal of the ship would lead to a claim for H damages, and the damages would *prima facie* at least equal the hire paid, because, if the charterers had to pay, the subcharterers would have to pay too, and the subcharterers, being deprived of the use of the ship—and there is a finding in the award in regard to getting coastal trade—would have been entitled to damages against the charterer for the hire payable by him (the subcharterer), and the loss of profit, and the charterer in his turn would be able to claim, as it seems to me, the return of the hire paid by him and the profit which he would have lost if the ship had been available, or, in other words, what he had to pay plus the damages which he would have to pay to the subcharterer. That seems to me to be the result of *Snia Societa di Navigazione Industria e Commercio* v. *Suzuki & Co.* (6), which must be looked at in order to ascertain what one would have received if the charterparty had been performed, and what one would have to pay, and then one should deduct one from the other. In any event, however, it is not for me to determine the question of damages in this case. If damages are the right remedy, they must be determined by the umpire. I think that the view which the umpire took in regard to the matter was right, and, therefore, I answer the question asked me in favour of the respondents.

Award affirmed.

Solicitors: *Sinclair, Roche & Temperley*, agents for *Botterell, Roche & Temperley*, Newcastle-upon-Tyne (for the claimants); *William A. Crump & Son* (for the respondents).

[*Reported by* D. K. BELCHER, *Barrister-at-Law.*]

LONDON PASSENGER TRANSPORT BOARD *v* MOSCROP.

[HOUSE OF LORDS (Viscount Maugham, Lord Russell of Killowen, Lord Macmillan, Lord Wright, Lord Porter), **November 7, 10, 13, 1941, January 7, 14, 1942.**]

Trade Unions—Imposing conditions on employees—Employees of public authority accorded right of representation by union officials—Right of employees to be represented by officials of other union—Condition of employment of employees who are or are not members of a union placing them under disability or disadvantage—Trade Disputes and Trade Unions Act, 1927 (*c.* 22), *s.* 6.

The appellants had accorded their employees the right to be accompanied by a representative of trade union A at the hearing of appeals in respect of disciplinary action against such employees. The respondent, an employee of the appellants, was a member of trade union B, and he claimed a declaration that the condition of his employment whereby he was denied the advantage of representation by an official of his own trade union, when such advantage "is granted to or is the right of other servants," members of another union, was unlawful. The respondent contended that the denial by the appellants of the right of their employees to be represented by officials of a union other than union A was a "condition" within the Trade Disputes & Trade Unions Act, 1927, s. 6 (1), and, as such, was void by sect. 6 (3) of the Act.

HELD: the right accorded by the contract of employment did not constitute a "condition" within the meaning of sect. 6 of the Act, and the respondent's claim failed.

Decision of the Court of Appeal ([1940] 4 All E.R. 281) *reversed and decision of* MORTON, J., ([1940] 3 All E.R., 225) *restored.*

[**EDITORIAL NOTE.** Employers have a common law right to allow or refuse at their discretion to any employee representation on appeals. This discretion was *pro tanto* taken away by the special term in the contract of employment to the extent that an official of the Transport Union might accompany employees upon the hearing of a disciplinary appeal. This modification of the employers' common law right was sought to be construed as a condition imposed upon the employee within the meaning of the Trade Disputes & Trade Unions Act, 1927, s. 6 (1). When the term of the contract is thus viewed as a modification (if not a restriction) upon the employers' common law rights, it is difficult to see how it can be a condition imposed upon the employee. It appears to be better described as a privilege granted to the employees. The matter is, of course, purely a question of the construction of the Act.

FOR THE LAW ON THE POINT, see HALSBURY, Hailsham Edn., Vol. 32, p. 490, para. 782; and FOR CASES, see DIGEST, Supp., Trade & Trade Unions, No. 1047.]

Cases referred to:

(1) *Russian Commercial & Industrial Bank* v. *British Bank for Foreign Trade, Ltd.*, [1921] 2 A.C. 438; 30 Digest 144, *199*; 90 L.J.K.B. 1089; 126 L.T. 35.

(2) *Austen* v. *Collins* (1886), 54 L.T. 903; 30 Digest 145, *209*.

(3) *Faber* v. *Gosworth U.D.C.* (1903), 88 L.T. 549; 30 Digest 143, *195*.

(4) *Re Clay, Clay* v. *Booth, Re A Deed of Indemnity*, [1919] 1 Ch. 66; 30 Digest 144, *201*; 88 L.J.Ch. 40; 119 L.T. 754.

(5) *Boyce* v. *Paddington Borough Council*, [1903] 1 Ch. 109; 16 Digest 488, *3701*; 72 L.J.Ch. 28; 87 L.T. 564.

APPEAL by the London Passenger Transport Board from a decision of the Court of Appeal (SCOTT, CLAUSON and LUXMOORE, L.JJ.), dated Nov. 4, 1940, reported [1940] 4 All E.R. 281, reversing a decision of MORTON, J., reported [1940] 3 All E.R. 225. The facts are fully set out in the opinion of VISCOUNT MAUGHAM.

A. S. Comyns Carr, K.C., and *H. E. Salt* for the appellants.

W. P. Spens, K.C., and *R. Moelwyn Hughes* for the respondents.

VISCOUNT MAUGHAM: My Lords, this appeal involves the true construction of a somewhat obscure section of the Trades Disputes and Trade Unions Act, 1927 (which I shall call the Act). It is sect. 6, and it contains provisions as to persons employed by local and other public authorities. The appellants, who are in the latter category, have been held, under a somewhat curious chain of circumstances, to have committed a breach of the provisions of subsect. (1) of that section, and it will be convenient to state its terms so far as relevant at once.

> 6.—(1) It shall not be lawful for any local or other public authority to make it a condition of the employment or continuance in employment of any person that he shall or shall not be a member of a trade union, or to impose any condition upon persons employed by the authority whereby employees who are or who are not members of a trade union are liable to be placed in any respect either directly or indirectly under any disability or disadvantage as compared with other employees.
>
> (2) It shall not be lawful for any local or other public authority to make it a condition of any contract made or proposed to be made with the authority, or of the consideration or acceptance of any tender in connection with such a contract, that any person to be employed by any party to the contract shall or shall not be a member of a trade union.
>
> (3) Any condition imposed in contravention of this section shall be void.

There is no dispute as to the facts. The respondent who is and was at all material times a motor-omnibus driver entered the employment of the London General Omnibus Co., Limited. on April 12, 1928. He joined the Transport and General Workers Union (which I shall call the Transport Union) shortly after he entered the service of the omnibus company and he was still a member thereof until after a strike in 1937 took place. During the years 1928 to 1937 inclusive the Transport Union was the only trade union which was concerned with the particular class of employees to which the respondent belonged.

One of the terms of employment in force between the respondent on the one hand and his successive employers on the other hand from April 12, 1928, up to April, 1937, was as follows:—

> Appeals in respect of any disciplinary action shall be heard weekly before a properly constituted disciplinary board. Drivers and conductors attending such appeals shall be allowed to appear in plain clothes and to be accompanied by a representative of the union.

It was not disputed at the hearing that the respondent and his employers agreed to this term. "The union" referred to means the Transport Union. The said term was part of an agreement between the omnibus company and other companies of the one part and the Transport Union on behalf of the motor omnibus drivers and conductors of the other part dated Sept. 23, 1932.

After the strike in 1937 the terms of the respondent's employment are to be found in an agreement, being part of the terms of settlement of the strike, dated June 15, 1937, and made between the Transport Board and the Transport Union. A book called the brown book is expressed to be a memorandum setting out the agreed rates of pay and the conditions of service of the Transport Board's drivers and conductors, and contains in cl. 3 of the schedule to the agreement the following provisions:

> APPEALS
>
> Appeals against depot superintendent's decisions shall be heard by the divisional superintendent concerned. Divisional superintendents may also hear charges in the first instance, according to the gravity of the charge.
>
> Appeals against the decisions of the divisional superintendents shall be heard weekly before a properly constituted disciplinary board.
>
> Drivers and conductors appearing before a divisional superintendent or on appeal may be accompanied by an official of the union.

The union referred to in the clause is the Transport Union and it purported to act on behalf of all the drivers and conductors of motor omnibuses employed in the Central London Area. It is common ground that the privilege of being "accompanied" by an official of the Transport Union was understood to mean the right to speak as an advocate on behalf of the driver or conductor. Further, it is common ground that the Transport Union would not in practice allow an official of theirs to appear for any man who was not a member of that union or whose contributions were more than six weeks in arrear. It follows that the employees in question were only entitled as of right to assistance in stating A their cases before the divisional superintendent or on appeal if they were members of the Transport Union and had paid their contributions up to a recent date, and it appears that the Transport Board have adhered strictly to this rule.

At the date of the agreement of June 15, 1937, the Transport Union was the only trade union representing the drivers and conductors concerned, but some of the drivers and conductors did not belong to that or any other trade union. It must, therefore, be observed that employees who were not members B of the Transport Union were in fact placed under a disadvantage as compared with employees who were members of the Transport Union. The respondent himself was then under no disadvantage; but some time after the date of the agreement of June 15, 1937, he ceased to pay his contributions to the Transport Union, and by reason of such cesser he ceased to be a member of the Transport Union in or before the month of Dec. 1937., In Feb., 1938, he joined the National Passenger Workers Union (which I shall call the National Union) C which had then recently been formed. These facts did not come to the knowledge of the appellants until Apr. 18, 1939.

In Feb., 1939, a question arose whether the respondent had been guilty of some breach of duty. The matter came before the depot superintendent and the respondent was cautioned. He appealed to the divisional superintendent who affirmed the decision of the depot superintendent, and therefrom the D respondent appealed to the disciplinary board. The hearing of this appeal was fixed for Apr. 18, 1939, and the respondent presented himself on that day accompanied by the general secretary of the National Union, who was prepared to present the respondent's case and to represent him before the disciplinary board. The Transport Board refused to allow this gentleman to represent the respondent before the disciplinary board, and in consequence the respondent declined to proceed with his appeal. It is only fair to the appellants to say E that it was stated by T. E. Thomas, a witness on their behalf at the trial, that the presence of representatives of trade unions in unfriendly rivalry is a source of disturbance to the conduct of the appellants' business. The respondent did not ask to be allowed to be represented by a solicitor or by some other friend, and it is only a matter of conjecture that such a request would in the circumstances have been refused.

On May 18, 1939, this action was commenced by the respondent with the F support of the National Union. The statement of claim did not set out a breach of sect. 6 of the Act by alleging that at a certain date the defendants had imposed a condition upon persons employed by them whereby employees not members of the Transport Union were placed at a disadvantage with those who were. If that had been pleaded, particulars of the condition and of the time and mode of its imposition might have been obtained. The fact that he had been refused G the assistance of the secretary of the National Union as above stated was set out, and it was then alleged that:

> by reason of the matters aforesaid the plaintiff has, contrary to the provisions of the Trade Disputes and Trade Unions Act, 1927, s. 6 (1), been placed and is liable to be placed under a disability and disadvantage as compared with other servants of the defendants.

This might be true in many cases where no improper condition had been H imposed upon the employees, and this whatever may be the true meaning of the word "condition" and the word "imposed." I do not usually like to criticise a pleading in a difficult case, but lack of precision sometimes adds, as in this case, to the difficulty of the judge and of a court of appeal. After a prolonged hearing and the able assistance of counsel, I am still in doubt as to the cause of action intended to be pleaded.

The respondent, without any further statement of his cause of action, claimed:

> (1) a declaration that the condition of the plaintiff's employment with the defendants whereby the plaintiff is denied as an appellant before the defendant's disciplinary

Board the advantage of representation by an official of his own trade union while such advantage is granted to or is the right of other servants of the defendants who are members of another and their own trade union is unlawful;

(2) an injunction to restrain the defendants, their servants or agents, from enforcing such condition as aforesaid; and

(3) such further or other relief as to the court may seem just.

In a careful judgment, Morton, J., found that no condition, express or implied was ever imposed to the effect that men could not be accompanied by anyone other than an official of the Transport Union. In order fully to explain his view, I cannot do better than cite his words on this point [p. 231]:

> All that the board has done in the present case is to contract with all members of its platform staff that they may be accompanied by an official of the Transport Union at the hearing of an appeal. That was a privilege, and I do not doubt that it was a valued privilege. At the time it was granted, and right on until February, 1938, according to the evidence, the Transport Union was the only trade union to which members of the platform staff belonged. Apparently they did not all belong to it, but the board was in no way concerned as to whether any particular man belonged to it or not. The board said, in effect, to all members of its platform staff: "So far as we are concerned, you can be accompanied by an official of the Transport Union." It is true that the officials of the Transport Union would not appear for a non-member or for a member who was not "in benefit," that is, whose contributions were more than six weeks in arrear. That, however, was a matter between the Transport Union and the men. It rested entirely within the volition of each individual man whether he did or did not belong to the Transport Union or keep up his contributions.
>
> It may be said that by specifying that men could be accompanied by officials of the Transport Union the board impliedly stated that men could not be accompanied by anyone else. Assuming that to be true, in my judgment it is a misuse of language to describe this as imposing a condition.

There was, however, another point—when was such a condition as that claimed by the plaintiff ever imposed by the Transport Board? The answer, thought the judge, was "never." He stated at p. 232:

> It was the plaintiff who brought about a state of affairs in which the Transport Union would not allow any of its officials to accompany him.

He accordingly dismissed the action with costs.

An appeal was heard before the Court of Appeal (Scott, Clauson and Luxmoore, L.JJ.), and a somewhat unusual course was taken in that court. All the lords justices thought that the declaration and injunction claimed before Morton, J., were sought in order to establish the right of the respondent to appear on the specified appeals by an official of the National Union, and that this contention was based on the hypothesis of an implied clause whereby the respondent was denied the advantage of representation by an official of his union, a condition rendered void by the Act. In the joint judgment of Clauson and Luxmoore, L.JJ., it is stated at p. 292, that the plaintiff claimed in effect that a condition:

> entitling him to be represented by an official of his own trade union on disciplinary appeals should be read into his own contract of employment in order to render valid the condition in favour of a member of the Transport Union in the benefit conferred by cl. 3 of the schedule to the agreement of June 15, 1937. The judge asked himself the question, when was such a condition as that claimed by the plaintiff imposed, and came to the conclusion that the answer was "never." We respectfully agree with that conclusion.

The court then pointed out that not only was such a condition never imposed by the board, but that, if it had been imposed, it would be contrary to the provisions of sect. 6, since employees who were not members of any trade union would suffer a disadvantage as compared with those who were and it would, therefore, be void under subsect. (3). It followed that the order of Morton, J., was quite correct. It seems, however, that counsel for the then appellant asked leave to amend the form of the declaration. There was considerable argument as to the form it should take. The declaration ultimately made by the Court of Appeal was in these terms:

> This court doth declare that the condition in regard to representation by an official of the Transport and General Workers' Union imposed as part of the terms of employment of employees of the defendant board by the provisions of cl. 3 in the schedule to the memorandum of agreement of June 15, 1937, in the pleadings mentioned implies upon its true construction that no employee unless he be a member of the Transport

> and General Workers' Union shall be entitled to be represented on the hearing of an appeal by any person and that the said condition is accordingly void by virtue of the Trade Disputes and Trade Unions Act, 1927, s. 6.
>
> And the plaintiff is to be at liberty to apply for an injunction.

I should say here that I do not understand what injunction could properly have been obtained following on this declaration; for I do not think the court would grant so useless an injunction as that the board was not to allow the representation to members of the union except as a matter of discretion. The result, if this order stands, is that the respondent instead of obtaining by his action a right of representation for himself on the specified appeals has succeeded only in depriving employees who are members of the Transport Union of any such right of representation. It should be added that SCOTT, L.J., agreed with the form of declaration suggested by his colleagues; but he went further and thought that, on the admitted facts, the Transport Board was "guilty of the forbidden act of" imposing a "condition which put the plaintiff at a disadvantage" etc., and that this condition was void. As I read his judgment, he would have been prepared to decide that the result followed that the plaintiff was himself entitled to be represented on the specified appeals.

My Lords, it appears from the statement of leading counsel for the respondent, which we of course unreservedly accept, that the Court of Appeal misunderstood his contention in so far as they thought that he was contending on behalf of his client for any right to attend the appeals in question with an official of his union or with any other person. Throughout, he says, he was contending only for equality for his client as compared with members of the Transport Union and was seeking to obtain it by a declaration that the term as to representation on the appeals was void. It is not surprising to me that the lords justices misunderstood the real nature of the plaintiff's claim, for the declaration claimed was that "the condition whereby *the plaintiff is denied as an appellant* . . . the advantage of representation, etc., was unlawful." If there had been such a condition and it was null and void, the conclusion might have been that the plaintiff was entitled to be represented on the appeals. The respondent by para. 5 of his case before this House states:

> It was contended by the plaintiff that the board had unlawfully imposed upon him a condition within the meaning of sect. 6 and had thereby committed a breach or breaches of the duty towards the plaintiff imposed on the Transport Board by the section.

This certainly looks as if it was still the basis of the respondent's case that the appellants had imposed a condition, express or implied, upon the respondent denying his right to be represented on appeals. Your Lordships will have to consider whether this view is or is not correct.

My Lords, I think we must express our regret that the statement of claim was not amended when the liberal amendment of the declaration was permitted by the Court of Appeal. The respondent's real claim is now manifest. He is seeking no right for himself of any kind. He asks, or at least he now asks, merely to have a paragraph contained in cl. 3 of the schedule to the agreement of June 15, 1937, declared to be void. I will repeat the paragraph:

> Drivers and conductors appearing before a divisional superintendent or on appeal may be accompanied by an official of the union [meaning the Transport Union].

Accepting this view of the action three questions have been argued: First, have the appellants "imposed a condition upon" their employees whereby employees not members of the Transport Union are "liable to be placed under any disability or disadvantage" in relation to representation on appeals "as compared with other employees"? Secondly, does sect. 6 (1), upon its true construction, extend to cases of discrimination between competing trade unions, that is, do the words "a trade union" (in the second branch of the subsection) include "a particular trade union" so that a condition placing one trade union at a disadvantage as compared with another is prohibited? Or does the subsection prohibit such a discrimination as between unionists and non-unionists? Thirdly, is the action in any view of the construction of sect. 6 maintainable by the plaintiff, that is, could he bring it except in the name of the Attorney-General, or, alternatively, could he properly ask for the declaration which he ultimately obtained except in a representative capacity and with the parties substantially interested as defendants? There was also a point raised before your Lordships, but not before the other courts, based on the joint effect of sect. 5 (4) and sect. 73 (3) of the London Passenger Transport Act, 1933; but with this point I shall not find it necessary to deal, and I will say no more about it.

Section 6 of the Act is by no means easy to construe. Some things are perhaps clear. The section deals only with local or other public authorities and prohibits them from doing certain things. There is no prohibition on any trade union. Subsection (1) is in two branches relating to different things. The first branch A
relates expressly to "a condition of the employment or continuance in employment" of any person. The second, the material one here, relates only to the imposing of a condition upon persons employed by the authority, whereby employees who are or are not members of a trade union are liable to be placed in any respect, either directly or indirectly, under any disability or disadvantage as compared with other employees. No penalty is imposed; but the "condition in contravention" of the section is to be void (subsect. (3)). B

What is meant by the word "condition"? It is clear that it does not mean here a condition in law, i.e., a provision that, upon the happening of some uncertain event, an obligation shall come into force, or that an obligation shall not come into force until some event happens. In my opinion, "condition" in this case means "a term of the contract." Such a term, I think, might be express or implied, and the contract need not be in writing, though it is C
almost inevitable that a list of the terms of employment of a large number of persons employed by an authority would necessarily be in print or in writing, either in a book (as in the present case) or in some document which could be shown, or at any rate would be readily accessible, to the employees. On the other hand, it is impossible to disregard the fact that the prohibition in subsect. (1) is directed to the authority and to no one else. It is they who may not "impose" a term on their employees; the latter, or their trade union on their behalf, D
if strong enough, may impose conditions on the authority. Therefore, it is not legitimate to read the section as if it ran, "No condition whereby employees of a local or other public authority who are or are not members of a trade union are liable . . . shall be made a condition of the employment or continuance in employment of any persons by the authority." The prohibition in the second branch of sect. 6 is directed to conditions *imposed* by the authority upon the employees, and these words *prima facie* point to a condition imposing a E
disadvantage upon a class of employees. In a case where a statutory prohibition involving the possibility of a prosecution for misdemeanour has to be construed, the words of prohibition must be strictly construed, that is, the meaning of the words cannot properly be extended beyond their natural significance, unless it is clear from the context that the legislature intended them to be used in a wider sense. For example, the word "imposed" does not mean "imposed or assented to." If a trade union should compel a local or public F
authority to make it a condition that none but members of the trade union should be employed by the authority, it seems to me impossible to hold that there had been a breach of sect. 6. On the other hand, an authority might, I think, "impose a condition" at the suggestion of some employees or a trade union on their behalf. Difficult questions of fact may arise, but they are rendered inevitable by the words used in the section. G

Is there reason to think that the appellants have in this case imposed upon their employees a condition to the effect stated in my first question? The term which is said to be a breach of sect. 6 (1) is of a somewhat special character. The board is clearly entitled to exercise its free discretion as to the persons who shall be allowed to accompany and represent employees appealing against adverse decisions, except in so far as it may have bound itself by contract to permit or to refuse such representation. No doubt members of the Transport H
Union will be entitled as of right under the clause (if it is valid) to the privilege in question and other persons will not be so entitled; but there is nothing in the clause to take away any right or privilege from any of these other persons. It was strongly contended on behalf of the respondent that there was an implied condition that no employee unless he be a member of the Transport Union shall be entitled to be represented on the appeals in question by any person. This implication in fact forms part of the declaration made by the Court of Appeal. It will be remembered that the declaration originally claimed was founded

on an implied condition whereby *the plaintiff* was denied the right of representation on the specified appeals, and that this is now altered. In my opinion it is incorrect to hold that either of these conditions can be implied from the clause as to appeals which I have more than once cited. The reason why the appellants were entitled to refuse to allow the respondent to be represented at the hearing of his appeal by the general secretary of his union was simply that the board at common law had a discretion in the matter. With all respect to the Court of Appeal, cl. 3 of the schedule does not justify the implication, because the suggested clause would leave the rights of persons not members of the Transport Union exactly where they were apart from the implication. It is well-settled that no term, whether of the nature of a condition or not, can be implied in a contract except where it is necessary to give the transaction the efficacy that both parties must have intended it to have. So far from such an implication being necessary here, it would be entirely without effect.

In the absence of any such negative implied term, where is the condition imposed whereby the employees who are members of the National Union or non-unionists are placed directly or indirectly at some disability or disadvantage as compared with members of the Transport Union ? I have been unable to satisfy myself that any such condition or term can be found in this case. There has been given to the members of the Transport Union a privilege which does not, in my opinion, involve the imposition of a condition which would be contrary to the prohibition in sect. 6 (1). To avoid misconception, I should say distinctly that I am not so deciding merely on the ground that a benefit or advantage is being given to the members of the Transport Union, and that there is nothing in the contract whereby a disadvantage or disability is expressly or by implication imposed on others. If under a contract rights are conferred on one class of employees and lesser rights are conferred on another, it might well be possible to bring the case within sect. 6. For example, if a fixed weekly wage were given to unionists and a smaller wage to non-unionists (or *vice versa*), it seems to me that a court might well infer from the comparison of the two clauses that there was in effect a condition imposing " directly or indirectly " a disadvantage on one of the two classes. In the present case, bearing in mind that the plaintiff, and others in the same position, are themselves responsible for any disadvantages under which they may be, and the difficulty of finding as a matter of construction that there is a condition imposed which creates any disadvantage, I cannot see any sufficient ground for the conclusion that there has been a breach by the appellants of the provisions of sect. 6 (1).

As I have reached this result on the first point, it is not necessary to decide the second question, which in my opinion is one of very great difficulty, on which different minds may well reach different conclusions. I will only say that I am not at present convinced that the second branch of sect. 6 (1) is limited only to attempted discrimination between unionists and non-unionists. On the other hand, I think it right to deal with the third point, which raises questions of general importance, since, as VISCOUNT FINLAY, in *Russian Commercial Industrial Bank* v. *British Bank for Foreign Trade, Ltd.* (1), at p. 445, observed on a similar question, it

> . . . concerns also the proper administration of justice, and it appears to me that we ought to express our opinion upon the point whether the suit was rightly brought and should be entertained.

I cannot call to mind any action for a declaration in which (as in this case) the plaintiff claimed no right for himself, but sought to deprive others of a right which did not interfere with his liberty or his private rights. Still less can I think that there is any precedent for such an action in the absence of the persons who are interested in opposing the declaration. It has been stated again and again, and also in this House, that the jurisdiction to give a declaratory judgment should be exercised " with great care and jealousy," (*Austen* v. *Collins* (2), at p. 905), and " with extreme caution " (*Faber* v. *Gosworth U.D.C.* (3), at p. 550 ; and see *Re Clay* (4), and *Russian Commercial and Industrial Bank* v. *British Bank for Foreign Trade, Ltd.* (1), at pp. 445, 453 and 461). We must first test this matter irrespective of sect. 6 of the Act, which imposes a statutory prohibition but does not purport to confer a right. Suppose a person in a particular parish were to bring an action for a declaration that persons residing in an adjoining parish were not entitled to a right of way over a neighbouring forest,

and suppose that his counsel had to admit that his client had no such right of way, but was prejudiced or affected because persons in his parish were being tempted to move to the adjoining parish in order to get the benefit of the right of way, can anyone doubt that the action would be at once dismissed ? That seems to be clear. Then what difference does sect. 6 make to the present plaintiff ? Assume for this purpose that there has been a breach of the prohibition contained in the section and that the clause in the 3rd Schedule to the brown book as regards representation is therefore void, and that no employees A
have any contractual right of representation on the appeals. What special interest has the plaintiff to enable him to bring this action ? We are not here concerned with anything but his civil right, if any, under the section. I think it is plain that there has been no interference with any private right of his, nor has he suffered special damage peculiar to himself from the alleged breach of the general prohibition as to certain acts directed to local or public authorities contained in sect. 6. (See *Boyce* v. *Paddington Borough Council* (5), at p. 114, B
and cases there cited). Therefore, he could not sue without joining the Attorney-General.

I also think it desirable to mention the point as to parties in cases where a declaration is sought. The present appellants were not directly prejudiced by the declaration, and it might even have been thought to be an advantage to them to submit to the declaration ; but, on the other hand, the persons really interested were not before the court, for not a single member of the Transport C
Union was, nor was that Union itself, joined as a defendant in the action. It is true that in their absence they were not strictly bound by the declaration, but the courts have always recognised that persons interested are or may be indirectly prejudiced by a declaration made by the court in their absence, and that, except in very special circumstances, all persons interested should be made parties whether by representation, orders or otherwise before a declaration D
by its terms affecting their rights is made. In the Chancery Division, in which this case started, the rule would seem to be almost invariable, and the well-established practice in actions by shareholders and debentureholders may be mentioned as instances of the rule. With the greatest respect for the Court of Appeal I think the amended declaration pronounced by that court, even if the section was applicable, ought not to have been made.

On the above grounds I am of opinion that the order of Morton, J., was right, E
and that the order of the Court of Appeal should be reversed with the usual consequences as to costs. The cross appeal necessarily fails and should be dismissed with costs. I move your Lordships accordingly.

Lord Russell of Killowen [read by Lord Porter] : My Lords, I am of opinion that the plaintiff has no cause of action and that the judgment of Morton, J., dismissing his action should be restored.

According to the natural reading of the Trade Disputes and Trade Unions F
Act, 1927, s. 6, that section appears to me to be dealing only with questions of unionism and non-unionism ; and I see no reason in the case of a penal enactment for stretching its language to include questions as to membership of particular unions. As I read the section, it makes provision to the following effect : the first branch of the first subsection makes it unlawful for a public authority to require an employee to be a unionist or a non-unionist ; the second G
branch makes it unlawful for a public authority to impose a condition upon an employee whereby, if he is a unionist he is placed under a disability or disadvantage as compared with a non-unionist, or if he is a non-unionist he is placed under a disability or disadvantage as compared with a unionist ; the second subsection makes it unlawful for a public authority to require a contractor who enters into a contract with the authority to employ unionists or non-unionists. By the third subsection any condition imposed in contravention H
of the section is avoided. If I am right in this view of the section's meaning, this case is outside it. Whatever be the effect of the clause contained in the fifth paragraph of cl. 3 in the schedule to the brown book (which I call for brevity the representation clause), or of any provision properly implied from it, the plaintiff, being himself in fact a unionist, cannot complain or pray the section in aid.

If, however, I am wrong in my construction of the section, the plaintiff must still, in my opinion, fail. No condition has been imposed on the plaintiff.

No condition has been imposed on him expressly ; and I can see no justification, by necessity or otherwise, for reading into the plaintiff's contract of service, the implied clause which has found favour with the Court of Appeal. The representation clause is a modification, in favour of employees, of the board's common law right to refuse representation. There is no provision express or implied prohibiting the plaintiff from being represented on any appeal by an official of his own union or by another person. The result is that, if the plaintiff wishes to be represented on an appeal, his representative must be someone whom the board is willing to admit to its investigations. I am unable to construe the clause in question as the imposition of a condition within the meaning of the section.

A further point remains for consideration. The plaintiff's statement of claim is, as I read it, based upon the view that the board's conduct on April 18, 1939, constituted the imposition of a condition within the section ; and SCOTT, L.J., was of opinion that sect. 6 was not limited to conditions in a contract, but that a course of conduct or practice of the board in only allowing men to be represented on appeals by an official of the Transport Union would constitute the imposition of a condition within the meaning of the second head of subsect. (1).

However, CLAUSON and LUXMOORE, L.JJ., based their judgments only upon the view that the board's contract with the plaintiff involved as a term thereof a provision (implied from the express representation clause) that, unless he was a member of the Transport Union, he was not to be entitled to be represented on an appeal by anyone. I have already stated my difficulty in justifying this implication ; but, with it as the basis of their order, the Court of Appeal made a declaration that the representation clause was void. This appears to me to have been a complete re-casting of the plaintiff's alleged cause of action, and the matter was unfortunately carried through without any amendment of the statement of claim. This should not be so. Any departure from the cause of action alleged or the relief claimed in the pleadings should be preceded, or, at all events, accompanied, by the relevant amendments, so that the exact cause of action alleged and relief claimed shall form part of the court's record, and be capable of being referred to thereafter should necessity arise. Pleadings should not be "deemed to be amended" or "treated as amended." They should be amended in fact.

For myself, I do not agree with SCOTT, L.J. In my view a condition to be within the section must be a contractual condition. The section provides for its being "void." The condition must therefore be capable of "avoidance." To say that a person's conduct, or act, or practice, or attitude is "void" is meaningless and of no effect. The only way, as it seems to me, to give effect to sect. 6 (3) is to read the word "condition" in the section as meaning contractual condition.

What, then, is the effect of the declaration made by the Court of Appeal ? It "avoids" the representation clause. In other words that clause is struck out of the brown book ; with the result that the board on the hearing of appeals is left to the exercise of its common law rights of allowing or refusing to allow an appellant, as and when he presents himself at the hearing of any appeal, to be accompanied or represented by a representative as the board, in the exercise of its discretion, thinks fit on the particular occasion and in the particular case. An appellant could not complain if he were refused representation, nor would he have any remedy under sect. 6 by injunction or otherwise.

The result of this litigation, if this appeal failed, would be that the plaintiff, who set out to get something for himself, had only succeeded in taking something away from his mates. In my opinion, however, the appeal should succeed, and the plaintiff's action should be dismissed. The cross-appeal fails and should be dismissed.

LORD MACMILLAN [read by LORD WRIGHT] : My Lords, the plaintiff's statement of claim as it still stands on record unamended asks for something very different from what he has been given in the Court of Appeal. What he finally decided to ask from this House differs from both of these formulas. There were also other incidental attempts to frame an appropriate declaration. The uncertainty thus manifested as to what the plaintiff really conceived to be his rights has embarrassed the presentation of his case throughout. This is in no way the fault of the experienced counsel who appeared for him, but is, in my opinion, simply due to the fact that the statute which the plaintiff invokes does not fit his case and that no amount of contrivance will make it do so.

The plaintiff's real grievance is that he has not a right to insist on a representative of his trade union being allowed to accompany him when attending the hearing of an appeal before his employers' disciplinary board, whereas members of another and rival trade union are entitled to such assistance. For this grievance the Trade Disputes and Trade Unions Act, 1927, does not, in my opinion, provide the plaintiff with a remedy. The Act in its title professes, *inter alia*, to regulate the position of "persons employed by public authorities A
in respect of membership of trade unions," and in sect. 6 enacts certain measures designed, as I read them, to prevent local or other public authorities from discriminating between unionists and non-unionists in the matter of the terms of their employment. Now it may well be that the provision dealing with representation on appeals contained in the agreement between the plaintiff's employers and the Transport and General Workers' Union places employees who are not members of a trade union under a disadvantage as compared with B
those who are members of a trade union, but the plaintiff is not entitled to complain of this. He is not a non-unionist complaining of a disability imposed upon him as such in comparison with unionists. His complaint is that a privilege conferred on the members of a particular trade union is not available to him as a member of another trade union. This is a complaint of discrimination among trade unionists, not of discrimination between unionists and non-unionists. In my opinion the statute, which renders unlawful only certain C
specific acts on the part of public authorities, does not cover the appellant's case. I do not think that, in the case of a statute the contravention of which may involve penal consequences, it is permissible to extend its operation beyond what its terms precisely enact.

If further reasons were necessary for dismissing the action, they are not far to seek. It is only by the most forced reading of the section that a condition of D
employment can be said to have been imposed on the plaintiff when there was conferred on drivers and conductors permission to be accompanied by a representative of the Transport Union at the hearing of appeals. What has really happened is that the plaintiff has chosen, for reasons which no doubt seemed good to him, to render himself by his own action ineligible for a privilege conferred on employees to whom the assistance of a representative of the Transport Union is available. My noble and learned friends have other criticisms to E
make, the cogency of which I recognise, but I find it sufficient to say that, in my opinion, the action is misconceived, and that the plaintiff is not entitled to obtain from your Lordships any one of the varied selections of declarations proffered. The appeal should accordingly be allowed and the judgment of MORTON, J., dismissing the action, should be restored. The cross-appeal should be dismissed.

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LORD WRIGHT: My Lords, I have had the advantage of reading in print the opinions which have been delivered by my noble and learned friends LORD MAUGHAM and LORD RUSSELL OF KILLOWEN. I agree with them that the appeal should be allowed and that the action fails.

The main ground on which I reach this conclusion is that the facts show no condition of employment imposed upon the respondent within the meaning of the Trade Disputes and Trade Unions Act, 1927, s. 6 (1). What is relied on G
as amounting to such a condition is said to be found in the following words contained in the agreement dated June 15, 1937, between the appellants and the Transport and General Workers' Union (conveniently called the Transport Union) of which the respondent was then a member. The words are:

> Drivers and conductors appearing before a divisional superintendent or on appeal may be accompanied by an official of the union [*i.e.* the Transport Union].

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This clearly means that the appellants will grant to every employee a right to be represented by the union official. It is agreed that the appellants were bound by the clause *vis-a-vis* each employee, including the respondent. Now it cannot be contested that, apart from these words, the appellants had a right to allow or to refuse at their discretion to any employee representation on appeals. This discretion is *pro tanto* taken away by the clause to the extent of its express words, which limit the appellant's discretion and give a privilege ot the employees which otherwise they would not have had. But I am unable to regard the grant of that privilege as a condition imposed on the parties employed within sect. 6 (1) of the Act. The privilege is given to all the employees without exception. The words used are simple and straightforward. There is no principle of construction known to me which would here justify extending or limiting their plain meaning. The difficulty which, it is said, has arisen, does not spring from any construction of the words themselves, but because of the circumstances external to the contract, which is that the Transport Union will not (unless they change their rules or practice as they are free to do) allow its officials to accompany or represent on appeals employees who are not members of the union or who are members in arrear with their subscriptions. It is only that fact which prevents such employees from availing themselves of the particular privilege granted by the appellants. There is nothing in the contract itself which disables any employee from enjoying the privilege. Indeed, at the date of the contract, the respondent was a member of the union.

The Court of Appeal sought to avoid this difficulty by turning the clause round and making it imply " upon its true construction that no employee, unless he be a member of the Transport Union, shall be entitled to be represented on the hearing of the appeal by any person." With the greatest respect to the Court of Appeal it is, in my opinion, impossible to extract that meaning from the clause. All that the clause says is that an employee (whether unionist or non-unionist) is to be allowed (so far as the appellants are concerned) to be accompanied by a representative of the Transport Union. It has nothing to say as to representation by any other person. As to that the appellants' general discretion remains unaffected. I read the words " condition imposed, etc.," in an untechnical sense as meaning a term of the employment, but, whatever meaning they may have in other connections, I cannot regard them as including what is simply the grant of a privilege of which it is within the employees' option to avail themselves or not, as they like or are able.

In the result, the respondent fails to bring himself within the first words of the relevant limb of the section. It is, therefore, unnecessary to consider the precise terms of any of the three differing declaratory judgments which have been claimed or propounded in the proceedings, whether before MORTON, J., or the Court of Appeal or this House. I must, however, associate myself with what has fallen from LORD MAUGHAM and LORD RUSSELL OF KILLOWEN by way of condemning the looseness of practice which allows substantial changes to be made in the relief claimed or cause of action without precise and formal amendment of the pleading.

It is unnecessary, in my opinion, in this appeal, to decide whether the discrimination to prevent which the Act is directed is limited to discrimination between unionists and non-unionists, or includes also discrimination between members of one union and members of another union. On that matter I adopt the same attitude as LORD MAUGHAM. On the questions of procedure I agree that no cause of action is shown. The respondent is not claiming any relief or advantage for himself, and the case is not one in which the court should exercise its discretionary power to make a declaratory judgment. I also agree that the action is not properly constituted in regard to parties. I do not desire to add anything on these matters to what LORD MAUGHAM has said. I concur in the motion proposed.

LORD PORTER: My Lords, this case raises a short but difficult point as to the construction of the Trade Disputes and Trade Unions Act, 1927, s. 6. The particular section has already been quoted and I need not set it out in full, nor need the facts of the case be repeated. The appellants are admittedly a public body and, therefore, within the mischief of the section. That portion of the wording which applies to them and is material for the determination of the present case may be put in shortened form :

> It shall not be lawful . . . to impose any condition upon [employees] whereby employees who are or are not members of a trade union are liable to be placed in any respect either directly or indirectly under any disability or disadvantage as compared with other employees.

Two main contentions were put forward on behalf of the appellants : (i) it was said that the section only dealt with disputes between unionists and non-unionists, that the plaintiff was a member of a trade union, albeit not one whose officials might represent him, and that, as the Act had no application to disputes between the members of one trade union and those of another, its provisions were not applicable ; (ii) that in any case no such condition as that referred to in the section had been imposed.

In the view which I take, it is not necessary to come to any final conclusion as to the first point, but, as at present advised, I am not prepared to accept the argument. Of course, if "members of a trade union" means "trade union members," the appellants are right. The section would then mean that trade unionists A
and non-trade unionists must not be placed at a disadvantage, one as compared with the other. To my mind, however, those words may be construed with at least equal plausibility as meaning members of a particular trade union shall not be placed at an advantage or disadvantage as compared with those who are not members of that trade union, whether they be members of another trade union or of none. *Prima facie* the phrase "other employees" embraces all who are not included in the class composed of members of a trade union and there B
may be less difficulty in construing "a" as meaning "one," or a "particular," trade union than in imputing to it the meaning of "any."

Assuming this view to be correct, it has to be determined whether any condition has been imposed whereby the respondent has been subjected to a disability as compared with members of the Transport and General Workers' Union. In discussing the point I find it simpler to consider the contrast between unionist and non-unionist than between members of one trade union and members of C
another, not because of any difference in principle, but because the distinction between the two former classes is more simply expressed in words than that between the two latter. Let me assume then that the respondent is a non-unionist, as indeed he is, if "union" means what in his contract it is defined to mean, *i.e.*, the Transport and General Workers Union.

By the refusal to allow him to be represented by any one other than an official D
of the union, the appellants were, in fact, preventing him from being represented at all, since it was well known that those officials would represent none but their own members, and it became known, at any rate at the hearing, that the respondent was not a member of that union. He was, therefore, placed under a disability as compared with members of the union.

The difficulty does not lie in ascertaining whether or not the respondent has suffered a disability, but in determining whether a condition has been imposed. E
If all that phrase meant was that the contract between the party complaining and the authority must not contain any terms by reason of which a non-unionist is under a disadvantage as compared with a unionist, I should have less difficulty in construing the phrase as the respondent suggests. It may be true to say that the contract with the non-unionist contains no term placing him under a disability. I discuss this question later, but the contract with unionists contains a term which F
puts them at an advantage as compared with the non-unionists and, accordingly, places the non-unionist at a disadvantage as compared with the unionist.

The section, as I understand it, presupposes a contract applicable to a class of persons which may be composed of unionists or non-unionists or both, and in such a contract advantage or disadvantage are relative terms. There is no *datum* line—the position of each party is relative to that of the other. If one has an advantage, the other must have a relative disadvantage, with the result G
that the contract which is applicable to both contains a term which puts one under a disability as compared with the other. Is this "imposing a condition ?" It was argued on behalf of the appellants that the word "impose" connoted that the condition was unwillingly accepted by the employee and that anything to which he willingly agreed could not be said to be imposed. I doubt this. I think that, if he agrees, he agrees, and his willingness depends upon the fact of the agreement, not upon whether the particular term would have been H
assented to without some corresponding advantage. All that I think a tribunal can consider is whether, albeit on a balance of advantages and disadvantages, the employee in fact thought fit to accept the employment. If he does not wish to do so, he need not enter into the contract at all. Nor can I believe that, if a would-be driver in applying for employment says, "I am a unionist (or non-unionist, as the case may be) and I know you do not like such persons. I also know you usually pay £5, but I will take £4," the resultant term of the contract to pay £4 is not imposed, whereas, if the employer had expressed the same

view, the term would properly be said to be imposed. The object, as I see it, of using the word " imposed " is not to indicate willingness or unwillingness on the part of the employee, but that the condition, if it is rightly to be so described, must be shown to be so imposed to his disdavantage. I do not think you " *impose* " an increase of salary or ameliorated conditions upon an employee ; you " *grant* " them.

If this be the true view, no condition contrary to the section has been imposed A upon the members of the Transport and General Workers' Union, because they have not been subjected to a disadvantage, but have only received a benefit.

Has then a condition been imposed on the respondent ? The Court of Appeal found that it had. It was suggested that their method of approach was to construe the respondent's contract as containing an implied term that he would not, as of right, be entitled to be represented by any one except one of the B officials of the Transport and General Workers' Union, and that that in effect meant no representation at all. I should have difficulty in accepting such an argument. I see no necessity for implying such a term in order to give efficacy to the contract, and, if a term is to be implied, this necessity must exist.

In your Lordships' House, counsel for the respondent maintained—as indeed, I think they maintained in the court below—that, on the true reading of the C contract, the term was there and did not need to be implied. The term suggested was that a non-unionist would not be allowed to be represented by anyone except an official of the Transport and General Workers Union and, therefore, in effect, would be denied representation. As the Court of Appeal stated it :

> . . . the condition inr egard to representation by an official of the Transport and General Workers' Union imposed as part of the terms of employment of employees of the defendant board by the provisions of cl. 3 in the schedule to the memorandum of D agreement of June 15, 1937 implies upon its true construction that no employee unless he be a member of the Transport Union shall be entitled to be represented on the hearing of an appeal by any person.

By " entitled " they meant " shall have the contractual right to be." I do not think that by this statement the Court of Appeal meant that a term ought to be implied. What they said was that the express term, when truly construed, connoted that no one other than a member of the Transport and General Workers' E Union would be allowed representation as of right. If I thought that this was the true construction of the respondent's contract, I should agree with the Court of Appeal, but I do not think it is. The provision as to representation of employees before the disciplinary board contained in the brown book concerns only members of the Transport and General Workers' Union and forms no part of the contract of service between the appellants and the respondent. Plainly, not all the terms of that agreement are effective in F the case of the respondent—*e.g.*, he is a driver, and terms which concern conductors are no part of his contract. So, likewise, he is a member of another union, and terms which affect members of the Transport and General Workers' Union in no way concern him.

His contract of employment, then, is unembarrassed and unaided by the provisions of cl. 3 of the schedule—the representation clause—just as I think G they are unaffected by cl. 5 of the schedule which deals with the recognition of the Transport Union. There is, it is true, an omission from his contract of a term which might have been imposed, but there is no imposition, and, indeed, no such term as is contended for. The employer is not imposing a term ; he is omitting an advantage. If, then, that part of cl. 3 which deals with representation forms no part of the respondent's contract, it cannot be, or have been, imposed on him, and there is no term of his employment which falls under the H ban of sect. 6 of the Act of 1927.

This conclusion makes it unnecessary to pronounce upon the further points taken on behalf of the appellants and I must not be taken to assent to them. There are, however, two observations which I should add. I do not agree with the suggestion of SCOTT, L.J., that the appellants, by refusing to allow the respondent to be represented by the secretary of his trade union, imposed a condition whereby he was liable to be placed at a disadvantage as compared with others. The section is, I think, dealing with the terms of a man's employment, not with the decisions which the employer may take from time to time in individual cases. In coming to a decision to refuse representation, he is merely relying upon the general law that there is no obligation upon an employer to let his employee be represented on a matter of discipline, and reliance upon the general law is not, in my view, the imposition of a condition. I think, and as, indeed, I believe all your Lordships think, that it was unfortunate that so great a change between the remedy asked and that given by the Court of Appeal should have been made without the appropriate amendment in the pleadings. These, however, are minor matters, and, for the reasons which I have given, I would A allow the appeal.

Appeal allowed with costs, cross-appeal dismissed with costs.

Solicitors: *R. B. McDonald* (for the appellants); *Cole & Matthews* (for the respondents).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

CROFT *v.* SYWELL AERODROME, LTD.

COURT OF APPEAL (Lord Greene, M.R., and Clauson and du Parcq, L.JJ.), **November 11, 12, December 17, 1941.**]

Income Tax—Schedule A—Profits arising from ownership and occupation of land—Aerodrome—Activities ancillary to main purpose—Income Tax Act, 1918 (*c.* 40), *Sched. A, Sched. B, Sched. D.* C

S. A., Ltd., owned an aerodrome at Sywell, in the county of Northampton, known as Sywell Aerodrome, part of which they let to B. A., Ltd., together with the sole right to use and occupy a service hangar and the sole right to sell petrol and to execute repairs to aircraft using the aerodrome. D S. A., Ltd., also received income from the rent of two clubhouses leased to N.A.C. and E.M.F.C., respectively. The company also received income from garage rents, housing and landing fees in respect of other aircraft using the aerodrome, and a percentage of the money obtained by a company from the sale of ice-cream. They also collected the landing fees payable by other users of the aerodrome. The company's profits had already borne tax under Sched. A and Sched. B. The Revenue contended that the profits E should also be assessed under Sched. D. after deduction of the amounts of the Sched. A and Sched. B assessments:—

HELD (DU PARCQ, L.J., dissenting): the respondent's activities were solely the exercise and exploitation of their rights of property and, on the facts of the case, there was no element of profit which was not exhausted by the Sched. A assessment.

Decision of LAWRENCE, J. ([1941] 2 All E.R. 325) *affirmed.* F

[**EDITORIAL NOTE.** The owner of land may make use of it for purely agricultural purposes and the assessment of the land under Sched. A and Sched. B exhausts his liability to tax. If he builds a factory on the land and manufactures goods in the factory, he becomes liable to tax under Sched. D, as a person carrying on a trade. The facts of this case seem to disclose an intermediate position, where he may be said to be carrying on a trade although he erects no buildings on the ground. LORD GREENE, M.R., points out that, as owners of an aerodrome, the taxpayers were merely making G a profit out of the land and their tax liability is exhausted by the Sched. A assessment, following the line of reasoning laid down in *Fry* v. *Salisbury House Estate, Ltd.* (1). On the other hand, DU PARCQ., L.J., in a dissenting judgment, seems inclined to start from the opposite point of view, that the fact that the taxpayers have been fortunate enough to discover a trade which can be carried on without buildings does not exempt them from liability to be taxed under Sched. D, and takes the view that, on the facts of this case, the taxpayers were carrying on a business on the land. The immunity H from tax which arises from the decision in the *Fry* case (1) has been the subject of legislation in the Finance Act, 1940, and that of 1941, but these provisions do not seem to touch the point here raised.

AS TO APPLICATION OF SCHEDULES, see HALSBURY, Hailsham Edn., Vol. 17, pp. 83-85, paras. 168-172; and FOR CASES, see DIGEST, Vol. 28, pp. 6, 7, Nos. 12-16.]

Cases referred to:

(1) *Fry* v. *Salisbury House Estate, Ltd., Jones* v. *City of London Real Property Co., Ltd.,* [1930] A.C. 432; Digest Supp.; 99 L.J.K.B. 403; 143 L.T. 77; 15 Tax Cas. 266; *affg.,* [1930] 1 K.B. 304.

(2) *Glanely* (*Lord*) v. *Wightman*, [1933] A.C. 618 ; Digest Supp. ; 102 L.J.K.B. 456 ; 149 L.T. 121 ; 17 Tax Cas. 634 ; *on appeal from* 147 L.T. 466.
(3) *Elliott* v. *Burn*, [1935] A.C. 84 ; Digest Supp ; 103 L.J.K.B. 578 ; 151 L.T. 526 ; 18 Tax Cas. 595.
(4) *Coman* v. *Rotunda Hospital, Dublin* (*Governors*), [1921] 1 A.C. 1 ; 28 Digest 82, *462* ; 89 L.J.P.C. 162 ; 123 L.T. 529 ; 7 Tax Cas. 517.
(5) *Carlisle & Silloth Golf Club* v. *Smith*, [1913] 3 K.B. 75 ; 28 Digest 17, *90* ; 82 L.J.K.B. 837 ; 108 L.T. 785 ; 6 Tax Cas. 198 ; *affg.* [1912] 2 K.B. 177.
A (6) *Inland Revenue Comrs.* v. *Stonehaven Recreation Ground Trustees*, [1930] S.C. 206 ; Digest Supp. ; 15 Tax Cas. 419.
(7) *Carnoustie Golf Course Committee* v. *Inland Revenue Comrs.*, [1929] S.C. 419 ; Digest Supp. ; 14 Tax Cas. 498.
(8) *Smith* v. *York Race Committee*, [1934] 1 K.B. 517 ; Digest Supp. ; 103 L.J.K.B. 518 ; 151 L.T. 52 ; 18 Tax Cas. 541.
(9) *Whelan* v. *Leney* (*Alfred*) *& Co., Ltd.*, *Loughnan* v. *Marston's Dolphin Brewery, Ltd.*, [1936] A.C. 393 ; [1936] 1 All E.R. 468 ; Digest Supp. ; 105 L.J.K.B.
B 197 ; 154 L.T. 537 ; 20 Tax Cas. 321.
(10) *Shop Investments, Ltd.* v. *Sweet*, [1940] 1 All E.R. 533 ; Digest Supp. ; 163 L.T. 92 ; 23 Tax Cas. 39.
(11) *Smith* v. *Lion Brewery Co., Ltd.*, [1911] A.C. 150 ; 28 Digest 57, *291* ; 80 L.J.K.B. 566 ; 104 L.T. 321 ; 5 Tax Cas. 568.
(12) *Russell* v. *Town & County Bank* (1888), 13 App. Cas. 418 ; 28 Digest 45, *227* ; 58 L.J.P.C. 8 ; 59 L.T. 481 ; 2 Tax Cas. 321.
C (13) *Inland Revenue Comrs.* v. *Melross* (1935), 19 Tax Cas. 607 ; Digest Supp.
(14) *Jones* v. *Nuttall* (1926), 42 T.L.R. 384 ; 28 Digest 15, *77*.
(15) *Forth Conservancy Board* v. *Inland Revenue Comrs.*, [1931] A.C. 540 ; Digest Supp. ; 100 L.J.P.C. 193 ; 145 L.T. 121 ; 16 Tax Cas. 103.
(16) *Glenwood Lumber Co., Ltd.* v. *Phillips*, [1904] A.C. 405 ; 30 Digest 502, *1604* ; 73 L.J.P.C. 62 ; 90 L.T. 741.
(17) *Robinson Bros.* (*Brewers*), *Ltd.* v. *Durham County Assessment Committee* (*Area No.* 7), [1938] A.C. 321 ; [1938] 2 All E.R. 79 ; Digest Supp. ; 107 L.J.K.B.
D 369 ; 158 L.T. 498.

APPEAL by the Crown and cross-appeal by the taxpayer from an order of LAWRENCE, J., dated May 9, 1941, and reported [1941] 2 All E.R. 325, where the facts are fully set out.

The Attorney-General (*Rt. Hon. Sir Donald Somervell, K.C.*) and *Reginald P. Hills* for the appellant.

E *Cyril King, K.C.*, and *J. S. Scrimgeour* for the respondents.

Attorney-General : The issue in the present case is whether or not a trade which is carried on in whole or in part in the open air is assessable under Sched. D. As regards the cross-appeal, LAWRENCE, J., held that the proper case under which to assess the profits was Case VI. The Crown contends that the proper case is Case I. The present case deals with an aerodrome, but the F principle involved applies to a number of activities which are at present taxed under Sched. D. as trades which are largely carried on in the open air. The main issue is whether or not, in the case of an aerodrome, there is a trade activity to be assessed under Case I or under Case VI separately from, and over and beyond, the occupation of land which is the subject of Sched. B. The question as to whether or not the running of an aerodrome is a trade activity admits of only one answer. All land is assessable under Sched. B in respect of occupation. G If the land is used for husbandry, Sched. B exhausts the liability to tax. If, however, a trade or profitable activity is carried on, the occupier is assessed under Sched. D. The law, however, does not impose double taxation. The question is whether or not the company is carrying on something in the nature of a trade. If it is, one finds something which comes within the words of Sched. D. Profits which are obtained from carrying on a concern are not profits from the occupation of land, and, therefore, they are not franked by the Sched. B H assessment. The word " occupation " is inapt to cover the activities which are in question in the present case. [Counsel referred to *Carlisle & Silloth Golf Club* v. *Smith* (5), *Coman* v. *Rotunda Hospital, Dublin* (*Governors*) (4), *Carnoustie Golf Course Committee* v. *Inland Revenue Comrs.* (7), *Fry* v. *Salisbury House Estate, Ltd.* (1) and *Glanely* (*Lord*) v. *Wightman* (2).]

Hills, following on the same side : The Income Tax Acts provide that a profitable activity is to be taxed under Sched. D. If a person is carrying on a trade or profession, he is doing something which takes him outside the status of occupier. [Counsel referred to *Glanely* (*Lord*) v. *Wightman* (2), *Inland Revenue*

Comrs. v. *Melross* (13), *Jones* v. *Nuttall* (14), *Coman* v. *Rotunda Hospital Dublin (Governors)* (4), *Carlisle & Silloth Golf Club* v. *Smith* (5) and *Forth Conservancy Board* v. *Inland Revenue Comrs.* (15).]

King, K.C.: There is a definite finding negativing the contention of the Crown that the assessment under Sched. D, Case I can be upheld. There was ample evidence before the commissioners on which they could come to that conclusion. On the case as it stands, there is a finding, based on facts, against the Crown. That leaves the argument in the case between Sched. B and Sched. D, Case VI. The whole of the profits mentioned in the case stated are in law exhaustively charged under Sched. A or Sched. B, or under both those schedules. All the profits arose because of the exploitation by the company of its property interests in land. That carries its profits into Sched. A and keeps them there. There are only two things by which the Revenue seeks to show that the present case is taken out of the ordinary case of an exploitation of a proprietary right. Those things are (i) the requirements by the licence of certain equipment, and (ii) the provision of a groundsman by the company. There is authority for the proposition that, when one is considering a document which may be called a licence, one has to look, not so much at the words, as at the effect, having regard to the right which is conferred upon the holder of the licence: *Glenwood Lumber Co., Ltd.* v. *Phillips* (16). In the present case, the profits arose because the company exercised a right of property in land, and the profits are not attributable to any other source. The profit which arises from the provision of first-aid services is not a profit which arises from the provision of services. [Counsel referred to *Elliott* v. *Burn* (3), *Whelan* v. *Leney (Alfred) & Co., Ltd.* (9), *Carlisle & Silloth Golf Club* v. *Smith* (5), *Carnoustie Golf Course Committee* v. *Inland Revenue Comrs.* (7), *Inland Revenue Comrs.* v. *Stonehaven Recreation Ground Trustees* (6), *Glanely (Lord)* v. *Wightman* (2) and *Shop Investments, Ltd.* v. *Sweet* (10)].

Attorney-General, in reply: In considering this class of case, it is necessary to start with Sched. A. That covers the landlord's property. The nature of that property is most easily comprehended by considering the case of an ordinary lease with usual covenants. The tax is based on the amount of the rent if the property is let at a rack rent. If there is no actual rack rent, the commissioners have to do their best to ascertain what the rack rent would be. That is what LORD DUNEDIN meant when he said in *Fry* v. *Salisbury House Estate, Ltd.* (1), that any income which represents the real property is to be assessed under Sched. A. Sched. B purports to tax occupation. There is nothing illogical in Sched. B operating in respect of occupation and Sched. D operating in respect of trade or profitable activity. If there is a profitable activity under Sched. D, it does not matter whether it is carried on in the open air or partly in the open air and partly in buildings. In the present case, it is plain that the aerodrome is being carried on for profit. [Counsel referred to *Robinson Bros. (Brewers), Ltd.* v. *Durham County Assessment Committee (Area No. 7)* (17).]

LORD GREENE, M.R.: The income of the respondents is derived from two classes of transactions. The one class consists of actual demises of buildings and the other of licences. The licensees are (i) Brooklands Aviation, Ltd., whose licences cover the non-exclusive use of the landing-ground and the exclusive right to repair aircraft and supply petrol, (ii) two flying-clubs, which have non-exclusive licences to use the landing-ground, (iii) owners of visiting aircraft who pay a landing fee, and (iv) a company which sells ice-cream. Whatever trades or businesses any of these licensees may carry on, I should have thought it clear that those trades or businesses are not in any sense carried on by the respondents, who are not repairers of aircraft, or sellers of petrol or ice-cream.

The Attorney-General in his argument for the Crown contended that, although, as regards the profits earned by the licensees in their businesses, the respondents were not assessable, yet the respondents were in a sense carrying on those businesses vicariously. The execution of repairs and the supplying of petrol were, he said, part of the business of an aerodrome proprietor, who normally performs such services, and the respondents could not escape from the allegation that they were carrying on such a business by showing that the services in question were rendered to those desiring them, not by the respondents themselves, but by licensees. I am afraid that I cannot follow this argument. If the argument had been that the respondents were carrying on the business of granting leases and licences of an aerodrome which they had constructed, I could have understood it, but it would not have assisted me to solve the question which is before us—namely, whether or not profits derived from such transactions are exclusively taxed under Sched. A and Sched. B. To assert that the respondents are carrying on a business and, therefore, are liable to tax under Sched. D, is to beg the question.

However, in the course of this judgment I shall have to consider certain services performed by the respondents. They are (i) the services of their groundsman, whose function is to keep the surface of the landing-ground in good order, and (ii) the provision of first-aid appliances under a condition contained in the licence from the Air Ministry. This condition can apparently be satisfied by keeping the appliances in an accessible place, without the necessity of having any staff to use them or hand them out.

Upon the facts, the General Commissioners held that the respondents were liable to be assessed under the Income Tax Act, 1918, Sched. D, Case VI.

The first contention on behalf of the Crown was and is that the respondents were, in respect of the sum of their activities, carrying on a trade and were consequently assessable under Case I. This contention the commissioners quite clearly negatived by implication. This appears from the language of Case VI, which applies only to profits not falling under any of the foregoing cases. Having regard to the conclusions which I have reached, I think that it is unnecessary to consider the question whether, in view of the finding of the commissioners, it is open to the Crown to argue that the relevant case is Case I.

The respondents' contention was to the effect that all their profits are derived from their property rights as owners of the aerodrome or from the occupation of the land, or, alternatively, from a combination of the two, and that, accordingly, they are completely covered by the assessments under Sched. A or Sched. B or both, as the case may be. The contention that the profits are derived from occupation found favour with LAWRENCE, J., and these appeals result.

The questions raised by the appeals call for some re-examination of certain features of the Income Tax Acts which relate to assessments under Sched. A and Sched. B. If I may begin with a commonplace, income tax is a tax on income, and this observation applies equally in the cases of Sched. A and Sched. B and in those of the other schedules. There is, however, this difference. Whereas the other schedules deal only with income actually received (calculated, it is true, in accordance with the relevant rules), in the case of Sched. A and Sched. B the actual perception of income is not necessary in order to attract the tax. The owner of lands is deemed to obtain income from his mere ownership, and the occupier of lands is deemed to obtain income from his mere occupation. The measure of the income so deemed to be dervived is, in the ordinary case, determined by reference to the annual value as defined. To quote the language of LORD DUNEDIN in *Fry* v. *Salisbury House Estate, Ltd.* (1), at pp. 439, 440 :

> The result is that by the operation of the assessment under Sched. A which is made imperative by the statute . . . the income of the assessee is so far dealt with and cannot be dealt with again.

The same is true of income which is assessed under Sched. B. Where, therefore, in respect of any particular land, tax has been assessed (as it must be) both in respect of the property in the land under Sched. A and in respect of the occupation of the land under Sched. B, no further tax is exigible in respect of any income referable to that property or that occupation, even if such actual income greatly exceeds the value upon which the tax is calculated. Similarly, apart from specific provisions, the taxpayer who derives from his property or his occupation an actual income which falls below the assessed value can obtain no deduction of tax. It is perhaps not unnatural that the Revenue authorities, finding in certain cases a very large excess of actual income over the assessed value have endeavoured to levy tax upon that excess by treating it as referable to a trade under Sched. D, Case I, or to a profit under Case VI. Instances of these endeavours are to be found, in the case of Sched. A, in *Fry* v. *Salisbury House Estate, Ltd.* (1), and, in the case of Sched. B, in *Glanely* (*Lord*) v. *Wightman* (2). The effect of these decisions is that, where profits are referable to property or occupation, the Crown, like the subject, is bound by the statutory measure in accordance with which such profits fall to be ascertained. A further principle, I think, also emerges—namely, that, even if the profits in question are made by means of a highly organised commercial operation, such as in ordinary parlance would be described as a trading operation, the relevant schedule, be it Sched. A or Sched. B, must be applied. Once a profit is referable to property or occupation, it must remain in that category. It cannot be taken out of that category by calling the operation which gives rise to it a trading operation.

These considerations, however, do not solve the question of what profit-making operations are referable to the right of property under Sched. A or to occupation under Sched. B. In ordinary legal phraseology, the right to occupy is one of the rights of property, and may, of course, become separated from the others. For the purpose of the Income Tax Acts, however, the right of occupation is treated as always so separated, although it may be enjoyed by the person who owns the other rights of property. Thus, a person who is both owner and occupier is regarded as taxable in two different capacities in respect of two different profits, calculated on two different principles. It is or may be—and in the present case I think it is—important to bear this in mind. To say, for instance, that each of the heads of profit which it is sought in the present case to tax falls under one or other of the two schedules is an unsatisfactory answer. If the respondents are right, it is because these heads of profit are shown to fall under one or the other of the two schedules. They cannot fall under both.

On principle, and apart from authority, and leaving aside special cases for which particular provision is made, I think that the broad distinction between the two schedules is that the profits falling under Sched. A are those annual profits which an owner makes, or could make, by granting or limiting part of his rights as owner of the land in favour of others, while those falling under Sched. B are those annual profits which an occupier makes, or could make, by his own operations on the land itself or by the unaided bounty of nature. The essence of the distinction which I see lies in the difference between rights which are a legal conception with no physical existence or reality and the land itself as a physical thing. Let me take the simple case of land belonging to A which is let at a rack rent to B. Here A is not himself, by his own operations, extracting profit from the land itself. He is transferring to B for an annual consideration part of his rights of property in relation to the land. B, on the other hand, is the occupier, and, as such, is in a position to extract profit from the land itself by his own operations. In other words, A is exploiting his rights, and B is exploiting the land itself which is the subject-matter of those rights. If, on the other hand, A, instead of leasing the land, retains it in his own hands, he is treated for tax purposes as deriving two different profits—namely, the one which he could have made by exploiting his rights of property, and the other which he makes, or could have made, by exploiting the land itself. The word "exploit," as I have used it, requires a word of explanation. To adopt the illustration of Romer, L.J., in *Glanely* (*Lord*) v. *Wightman* (2), at p. 473, a man who occupies his land merely by sitting on it and therein writing poetry is not exploiting either his right of property in the land or the land itself. It is not correct to say that one of the rights of property is to sit on the land and write poetry. It is a right of property to occupy land, but the purpose for which it is occupied is, from the point of view of property rights (and apart from such matters as restrictive covenants) irrelevant. The reason why a person can lawfully sit and write poetry on his land is not that his right of property confers any rights to write poetry, but is that he is entitled to occupy that particular land by sitting on it or standing on it or lying on it, as he pleases. The writing of poetry, on the other hand, is a thing which anyone is entitled to do wherever he may be, just as is the right to twiddle one's thumbs. The word "right" in regard to these activities is used in a sense totally different from that of rights of property. Similarly, an occupier in virtue of his right of occupation is entitled to sit on the land, but the writing of poetry is not an exercise of the right of occupation. The right to occupy the piece of land is essential to the writing of poetry on that piece of land, and that is all that can be said about it.

The extraction of profit from the land may, of course, take different forms. Thus, the occupier may himself consume the fruits of the land, or he may sell them to others. Such sales again may take different forms. The sale of potatoes grown on the land, the agistment of cattle, the provision of the services of a stallion and the accommodation of visiting mares are all, in the last analysis, utilisation for profit of products of the land, and they are inherently different from transactions under which the proprietor of a general or limited property in land grants to another rights over or in relation to the land. The typical example of such transaction is, of course, that of a lease, but, for the purposes of Sched. A, profits derived from property are not confined to profits derived under leases, as appears from the decision of the House of Lords in *Elliott* v. *Burn* (3), to which I will refer later.

These considerations appear to me to provide an answer to the question why, and on what principle, a person who, for example, sets up a refreshment stall on his land, or provides services for people admitted to his land, is not exhaustively taxed under Sched. A or Sched. B (as the case may be) in respect of the profits so earned. Such a person, in my view, is not exploiting his rights of property or of occupation, save in the sense, and to the limited extent, that he must own or occupy the land before he can erect and carry on the refreshment stall or perform the services. The profits earned in such a case are referable, not to the exercise of the rights of property or of occupation, since the customers come on to the land for the purpose of obtaining refreshment or procuring the benefit of the services. If, on the other hand, the owner of land having (let me suppose) a remarkable view, or some historic monument, merely allows the public to come on to the land in return for an admission fee, I cannot myself see why it should be said that his profits are not covered by the Sched. A assessment, since all that he is doing is to exploit his right of property by granting licences to come upon the land. The fact that he keeps the paths in order or the monument in repair in order to make a visit more attractive to the public again appears to me to make no difference, any more than does the action of the landlord of a house in keeping it in repair.

To revert now to my illustration of A and B, it is to be noted that B's position is a dual one. As the tenant, he had vested in him part of the property rights of A. As the tenant in occupation, he is in a position to exploit the land itself to his own advantage. Suppose that B in his turn sub-demises the land to C. What he is then doing is not to exploit the land itself. It is to exploit the rights in the land which the headlease has conferred upon him. In other words, the profit which he derives from the sublease is a Sched. A matter, and not a Sched. B matter. This does not mean, however, that he is liable to bear tax in respect of the rent which he receives. He may or may not have to bear some tax, according to circumstances. For example, if both the headlease and the sublease are at the same rent, being a rack rent, C deducts the tax on paying his rent to B and B deducts the same amount of tax on paying his rent to A (Sched A, No. VIII, r. 4). If, on the other hand, the headlease is at a rent which is less than a rack rent and the sublease is at a rack rent, B can deduct from the rent which he pays to A only a proportionate part of what C has deducted from the rent which he pays to B. The result of this is that the tax payable under Sched. A is to be regarded as payable in respect of the totality of the property rights in the land, notwithstanding that those rights may be separated so as to lie in different hands, and any exploitation of those rights by any of the persons among whom they are distributed is covered by the one assessment. The incidence of the tax as between those persons may result in one of them paying the whole, or in the tax being distributed among them, as in the last example given above. In support of this view, I would call attention to the language used in Sched. A, No. VIII, r. 4 (1), in the second proviso to which reference is made to " such persons as aforesaid "—namely, " a landlord, owner or proprietor . . . who is also a tenant or the occupier " and the contrasted phrase " a tenant occupier " in r. 1.

The relevance of these observations to the present case will appear from what follows. The respondents are, as I have pointed out, the owners, and, in so far as regards the land as distinct from the buildings, they are the occupiers. If the lease to Brooklands Aviation, Ltd., be assumed to have been the sole transaction, the first question to arise is whether the profit derived by the respondents from the lease, in so far as it relates to the land as distinct from the buildings, is covered by the Sched. A or Sched. B assessments, and, if so, by which if them. If my reasoning is correct, it is not covered by the Sched. B assessment, but is covered by the Sched. A assessment, for the reason that the lease is an exploitation by the respondents of their rights of property in the land, and not an exploitation of the land itself. They are not by the lease extracting profit from the land by their own exertions, such as tilling the land, or by waiting for the fruits of the land to fall into their laps without exertion of their own, as in the case of an apple falling from an untended apple tree. They are for an annual consideration conferring upon another company something which they can confer only by virtue of their right of property in the land—namely, the right to come upon the land and do certain acts upon it. The matter may be tested by assuming that the respondents had demised the A land to X, who had then (in the absence of any restrictive covenant in his lease) granted the lease to Brooklands Aviation, Ltd. It appears to me that X would thereby have been exploiting the right of property vested in him under the lease, and not his right as occupier. If X's lease to Brooklands Aviation, Ltd., had been a profitable one to him, it is to be assumed as a matter of business that, when X's lease came to an end, if Brooklands Aviation, Ltd., desired to renew their agreement, the rent payable by X under a new lease would be put up, and, B accordingly, the Sched. A tax which would ultimately fall on the head landlords would be increased by reason of the proved increase in annual value. In the result, the statutory profits derived from the property rights divided between the head landlords and X would bear one tax which would reflect the increased value of those rights.

If, in the present case, the land had been demised to Brooklands Aviation, C Ltd., with appropriate restrictions on user, and a power reserved to the respondents to grant licences to others to bring their aircraft to ground upon the land, there could, since *Fry* v. *Salisbury House Estate, Ltd.* (1), have been no question but that the Sched. A assessments covered the profits derived from the lease. It is suggested, however, that the case is different, because here Brooklands Aviation, Ltd., so far as the land is concerned, are merely licensees. Does this make any difference ? On principle, I cannot see that it does. When the owner D of land grants a licence to another to come upon his land, he is exercising his rights of property just as much as when he is granting a lease. It is by virtue of his proprietary rights that he has power to grant the licence, and this is equally true whether he is a freeholder or a leaseholder. The fact that a licensee carries on a trade on the strength of his licence has nothing whatever to do with the owner who grants the licence. It does not convert him for tax purposes into a person carrying on a trade, any more than in the case where a tenant E carries on a trade. The fact that the land is peculiarly suitable for carrying on the trade, whether under a lease or a licence, will, or should in the long run, be reflected in its annual value for tax purposes. If, for instance, a person owns a piece of land contiguous to a racecourse where there is great demand for parking accommodation, the existence of the demand should in theory be reflected sooner or later in an increased assessment for the purposes of Sched. A. I cannot F see, however, on what principle the profit which the person in question makes from granting temporary licences to park motor cars on the land can be said not to be covered by the Sched. A assessment, but to fall under Sched. D, Case I, or Sched. D, Case VI. If, on the other hand, more is done than the mere granting of licences—for example, if the cars are washed, or if repairs are effected—the profits realised by those activities will clearly fall outside Sched. A.

I cannot find in any one of the respondents' activities anything but the G exercise and exploitation of their rights of property. If the grant of one licence is merely an exercise of such rights, I cannot see that the grant of half-a-dozen licences bears a different character. The Crown's case is that, although, if there had been only one activity, the profits derived from it might have been covered by Sched. A, yet, when one takes the totality of the activities, there is a trade under Sched. D, Case I, or, at any rate, a profit, which is not covered by Sched. A, and is, therefore, assessable under Case VI. This argument, with all respect, H appears to me to be fallacious. Nought plus nought plus nought does not equal one. If the Crown is dissatisfied at the sight of a landowner obtaining by the exercise and exploitation of his property rights a profit greater than the annual value of the land as assessed under Sched. A, its remedy is to obtain, if it can, a revision of the assessment, and not to endeavour to force into another schedule profits which are already taxed under Sched. A. In my view, the present attempt deserves to fail just as completely as did the attempt in *Fry* v. *Salisbury House Estate, Ltd.* (1).

I have set out the conclusions at which I have arrived on principle, but they cannot, of course, stand if the authorities forbid it, and I must now turn to a consideration of certain cases on which reliance was placed. I may begin by saying that the Crown's unsuccessful attempts in *Fry* v. *Salisbury House Estate, Ltd.* (1) and *Glanely* (*Lord*) v. *Wightman* (2) achieved one most useful result, since the decisions in those cases have shed a flood of light on much that was previously obscure in the principles governing Sched. A and Sched. B in A their relation to Sched. D. The cases principally relied on by the Crown before us were all earlier than those decisions, and must be interpreted in the light of the law as laid down in those decisions. The principal case to which reference must first be made is *Coman* v. *Rotunda Hospital, Dublin* (*Governors*) (4). In that case, the hospital was endeavouring to obtain for the profits of the Rotunda rooms the exemption given in favour of hospitals by the Income Tax Act, 1842, s. 61, Sched. A, No. VI, para. 3, now reproduced in the Income Tax Act, B 1918, s. 37 (1) (*a*). In order to make good that claim, it was necessary for the hospital to establish that the profits were profits of tenements belonging to it—that is, that they were assessable under Sched. A, that being the schedule under which the exemption was and is granted. The case seems to me to have been a clear one, since, once the nature and source of the profits were examined, it became impossible to describe them as "profits of tenements." LORD C BIRKENHEAD said of the hospital that they [p. 8]:

> . . . afford the hirers not merely a right or licence to use the rooms, but also fixtures and fittings, some of which are clearly not part of the building but are separate chattels and the respondents provide certain services, such as heat, light and attendance.

If I may apply my own phraseology, the profits were derived in part by the exploitation of the hospital's right of property and in part by the provision of chattels and services. Clearly, therefore, there was subject-matter for assess- D ment under Sched. D. LORD FINLAY put the matter in this way, at p. 18:

> Profits are undoubtedly received in the present case which are applied to charitable purposes, but they are profits derived not merely from the letting of the tenement but from its being let properly equipped for entertainments, with seats, lighting, heating and attendance. The subject which is hired out is a complex one. The mere tenement as it stands, without furniture, etc., would be almost useless for entertainments. The business of the governors in respect of these entertainments is to have E the hall properly fitted and prepared for being hired out for such uses. The profits fall under Sched. D, and to such profits the allowance in question has no application, as they cannot be properly described as rents or profits of lands, tenements, hereditaments or heritages.

I call attention to the words "The mere tenement as it stands, without furniture, etc., would be almost useless for entertainments." As appears from the case stated, which is printed in the report in 7 Tax Cases, the hospital made F no attempt to apportion the profits as between the tenement itself and the other matters provided, and there would obviously have been no point in attempting to do so. In the present case, there is nothing analogous to the provision of chattels and services found in the *Rotunda* case (4), and I cannot regard that case as in any way inconsistent with the conclusions at which I have provisionally arrived, as above set forth. In the *Rotunda* case (4), there G was, as LORD TOMLIN puts it in *Fry* v. *Salisbury House Estate, Ltd.* (1), at p. 462:

> . . . utilisation of the land attributable neither to the property quality nor to the occupation quality producing profits assessable to tax under Sched. D.

In *Fry* v. *Salisbury House Estate, Ltd.* (1), reference is made in some of the opinions delivered to the fact that in the *Rotunda* case (4) the hospital remained in occupation and granted mere licences. I do not understand these passages as suggesting that there is, for present purposes, any difference in H principle between a lease and a licence. They are, I think, directed to pointing out that in the *Rotunda* case (4) the hospital was actually carrying on activities which could only be carried on by a person in occupation, whereas in *Fry* v. *Salisbury House Estate, Ltd.* (1) the company had granted leases.

Before leaving the *Rotunda* case (4), I must refer to one passage in the opinion of LORD BIRKENHEAD upon which the Attorney-General placed particular reliance. LORD BIRKENHEAD said, at p. 13:

> It is for that purpose that Sched. B is directed to tax the benefit of occupation where the land or tenement is not occupied as a dwelling or warehouse or for the purpose of

carrying on a trade or business, the profits of the trade or business being assessed under Sched. D.

As was pointed out by CLAUSON, L.J., in the course of argument, this passage as reported is merely a paraphrase of s. 63, Sched. B, No. VII, in the Act of 1842, now Sched. B, r. 1. If the actual words of the statute had been adopted, the passage would have run : "where the land or tenement is not occupied as a dwelling-house and is not a warehouse occupied for the purpose of carrying on a trade." When this is appreciated, the passage affords no support to the Crown's argument. A

The next case which was greatly relied upon was *Carlisle & Silloth Golf Club* v. *Smith* (5). In that case, the club was tenant and occupier of the golf course with its buildings, and the subject-matter which it was sought to tax were the profits derived from visitors, who, on payment of green fees, were entitled to enjoy the amenities of the club and the services provided. The main argument put forward by the club was a very narrow one. It claimed to be exempt from B assessment because it was a members' club and was not carrying on any business. The question of to what extent, if any, the profits from green fees ought to be attributed to property or occupation was not raised, no doubt for the very good reason that, without the provision of amenities and services, the green fees would not have been earned at all. The judgment of HAMILTON, J., is directed to disposing of the argument which I have mentioned. His conclusion upon it is as follows, at p. 187 : C

> In my judgment, therefore, the club has . . . annexed to its ordinary enterprise of a golf club services systematically [rendered] to strangers for the purpose of obtaining, among other advantages, the revenue that those strangers provide.

In the Court of Appeal, there are two observations which must be noted, one by BUCKLEY, L.J., and one by KENNEDY, L.J. BUCKLEY, L.J., said, at p. 81 :

> If a landowner laid down upon his land a golf course and charged fees for admission D and user—if, that is to say, the links were a proprietary golf links carried on with a view to profit—there can be no question but that the proprietor would be assessable.

In the same case, KENNEDY, L.J., said, at p. 83 :

> . . . it appears to me that this club is really carrying on the business of supplying to the public for reward a recreation ground fitted for the enjoyment of the game of golf . . . E

Both the Lords Justices were thinking of a golf club of the familiar type, with amenities and services, as was the case upon the facts before them, and I find nothing in these expressions which is inconsistent with the views which I have provisionally stated in the present case. In any event, the point with which we have to deal in the present case was not raised or argued in the *Carlisle* case (5). In the case of bare land, however, as distinct from services and the amenities F of a club house, and so on, I cannot myself see that a person who leases the land to others, or grants licences to others to come upon it, is doing anything more than exploiting his own rights of property, even if the tenant or licensee is, by the terms of the lease or licence, entitled himself to carry on a trade upon the land. If a landowner lays out his land as a cricket field and leases it to a cricket club, it cannot be suggested that the profits so derived are not covered by the Sched. A. assessment, which can, if necessary, be raised so as to reflect the G annual value of the land as so laid out. In order to secure the tenancy, the landlord has to level the land and prepare the pitch, and it may be that in the lease he undertakes to cut the grass and keep the pitch rolled and in order. Such an undertaking would have the effect of lowering the annual value. I cannot see that it would take the case out of Sched. A, any more than the undertaking by the landlord of a house to keep the house in repair. If, instead of granting a lease to one club, the landowner grants licences to different clubs H to play on different days of the week, what difference can it make ? I cannot find any satisfactory ground for drawing any distinction between the case of a lease and the case of a licence. The granting of the one is just as much the exercise of the ordinary rights of property as is the granting of the other. The fact that, in order to secure the rent or the sum payable for the licence, the landowner has to put and keep the land in a particular condition does not, in my view, make any difference. Any increased value in the land due to its suitability or adaptation to a particular purpose and any expense incurred by the proprietor in keeping the land in such a condition as to earn a profit are, it seems to me, matters to be taken into account in fixing the Sched. A valuation, just as they would be in the case of a house or other building. Before leaving the *Carlisle* case (5), I must observe that the decision was approved in the House of Lords in the *Rotunda* case (4). This fact was not unnaturally relied on by the Attorney-General, but the *Carlisle* case (5) was clearly being treated by the House of Lords as being, as in fact it was, a decision based on the provision of services and amenities which fell outside the scope of Sched. A.

The next case relied on was *Inland Revenue Comrs.* v. *Stonehaven Recreation Ground Trustees* (6). That again was a case of a ground laid out and provided with all the necessary equipment for various games. It was not, and could not have been, seriously argued that the profits derived from such a concern were covered by Sched. A. The substantial argument in the case appears to have been that the ground was carried on entirely for the benefit of subscribers, and was, therefore, a mutual concern. I do not find that this case assists me in the solution of the present problem.

The two other cases relied on by the Attorney-General—namely, *Carnoustie Golf Course Committee* v. *Inland Revenue Comrs.* (7) and *Smith* v. *York Race Committee* (8)—do not carry the matter any further. The facts were entirely different from those in the present case, and the point which we have to consider did not arise.

Three cases relied upon by counsel for the respondents must be mentioned. In *Elliott* v. *Burn* (3), a surface owner whose land was let to a farmer at a rack rent granted to a colliery company the right to withdraw support from the surface in consideration of annual rents. These annual rents the Crown claimed to be assessable either under Sched. A, No. II, r. 7, or under Sched. D, Case III, or Sched. D, Case VI. It was held by the House of Lords that the rents arose from the owner's property in the lands, and that liability in respect of them was exhausted by the Sched. A assessment. The ground of the decision (so far as here relevant) was that the right of support which the owner had given up was a natural right incident to the land itself, and the payments made must be regarded as arising from the ownership of land. This decision appears to me to lend support to the views which I have ventured to express, since it is an example of the exploitation (in a special manner and not by a lease of the land) of one of the owner's rights of property in the land.

The next case was *Whelan* v. *Leney (Alfred) & Co., Ltd.* (9). This was another example of an attempt by the Crown to obtain payment of tax on rents exceeding the annual value. As in *Fry* v. *Salisbury House Estate, Ltd.* (1), the attempt failed. The Crown's contention was that the rent there paid was paid, not for the land alone, but partly for the ties affecting the subject-matter of the demise—namely, the licensed houses—which could be separated from the property in the land. LORD RUSSELL OF KILLOWEN pointed out, at p. 402 :

> . . . the rent is paid for the land, the ownership of which carries with it the power to impose a tie if the existing tenancy determines and (by abstaining from determining the tenancy) to retain a tie if the sitting tenant is willing to remain.

This case again appears to me to be at any rate consistent with my view as to the scope of "property" under Sched. A.

The last case was *Shop Investments, Ltd.* v. *Sweet* (10), a decision of WROTTESLEY, J., whose judgment, if I may say so, I have found particularly illuminating, and, in my opinion, manifestly correct. There the appellant company, whose business was that of acquiring and modernising properties and letting or selling the properties so modernised, had on one occasion, contrary to their usual practice, let a cinema furnished with all its equipment and plant. Assessments were made in respect of the profits of this letting, the amount of the Sched. A assessment being allowed as a deduction. The company contended, wrongly, that the profits were covered by the Sched. A assessment. It also contended that the profits made by letting the furniture and so forth must be separated from the profit made by letting the cinema building itself, for which purpose an estimate must be made of what part of the total rent was referable to the furniture and so forth. The object of this contention was, of course, to enable the company to show that a proportionate part of the rent greater than the assessed annual value was attributable to the building itself.

Wrottesley, J., agreed with this contention, and, in my opinion, rightly so. If the owner of a building the assessed annual value of which is £X can let it unfurnished for £X + £Y, he cannot be separately taxed in respect of the sum of £Y. If, instead of letting it unfurnished, he furnishes it and lets it furnished for £X + £Y + £Z, to tax him on £Y + £Z would be to exact double tax in respect of £Y, which, as the result of the artificial measure of profits adopted under Sched A, has already in law borne tax. An apportionment such as was made in this case could, I think, have been claimed in the *Rotunda* case (4) and A
the *Carlisle* case (5) and similar cases if the point had been considered, and if (as seems unlikely) any benefit could thereby have accrued to the taxpayer in those cases.

I have so far ignored the one thing done by the respondents which, in my view, falls outside the profit-making activities with which Sched. A and Sched B are concerned—namely, the provision of tools and equipment, which is a condition of the licence. Compliance with this condition cannot, in my opinion, B
change the whole picture and turn what would otherwise be profits covered by Sched. A or Sched. B into profits assessable under Sched. D, any more than would be the case if, for example, under housing bye-laws, the landlord of a block of flats were bound to keep fire-fighting appliances on the premises. On principle, however, that part of the profits made by the respondents which ought to be apportioned to the provision of this equipment—a matter for the C
commissioners—is assessable under Sched. D. The point, however, is obviously too trivial to lead to any practical result.

I have given the best consideration which I can to the authorities, which, I must confess, do not appear to me to throw a particularly clear light on the point which we have to decide. I am of opinion that, upon the facts of this case and in view of the absence of any provision of services (other than those of the groundsman, with which I have already sufficiently dealt), use of chattels D
or other matters extraneous to the land itself other than the equipment, there is no element of profit which is not exhausted by the Sched. A assessment. I agree, therefore, with the conclusion of Lawrence, J., but for reasons different from those which found favour with him. He considered that the profits here in question were derived from occupation, and did not refer to Sched. A at all. I have given my reasons for taking a different view. In his example of the tennis court, he appears to regard the occupier's pleasure in using it as one E
of the things taxed. I am not satisfied as to the correctness of this view, since Sched. B is concerned with profits actually earned or deemed to be earned, and not with pleasure, which is essentially a non-profitable activity. However this may be, if the tennis court is let, or if others are given a licence to play upon it, the profits so derived are, in my judgment, referable to property (either freehold or leasehold, as the case may be), and not to occupation. I should F
also say that the criticisms of Lawrence, J., of the *Carlisle* case (5) and of similar cases cannot, in my opinion, be supported, as it does not seem to me that (apart from any question of apportionment, which might have arisen, but in fact did not) the profits there in question could have been held to be exhaustively taxed under Sched. B any more than under Sched. A. The references of Lawrence, J., to repairs and the selling of petrol and ices suggest a view of the facts too unfavourable to the respondents, who do not carry on any of these G
activities themselves. Had they done so, however, they would, in my opinion, have been liable to tax under Sched. D, Case I, in respect of the profits so made, and would not, as Lawrence, J., appears to think, have been covered by the assessment under Sched. B any more than they would have been by that under Sched. A.

I must say in conclusion that my preference for Sched. A rather than for Sched. B as the relevant schedule is based on the view which I have ventured H
to express as to the basic distinction between the two schedules. If that view were unsound, I would agree that the profits now in question are profits of occupation which are exhaustively taxed under Sched. B. I would dismiss the appeals.

Clauson, L.J.: At the end of the arguments in this case, I had reached the opinion that there was nothing to be found in the circumstances of the case to justify the assessment of Sywell Aerodrome, Ltd., to any tax beyond that already paid by them under Sched. A and Sched. B, and that the orders of Lawrence, J., should for this reason by affirmed. du Parcq, L.J., was good enough to furnish me with a copy of the judgment which he is about to deliver, in which he reaches a different conclusion. I was in the course of preparing a judgment explaining my reasons for taking a view differing from that taken by du Parcq, L.J., when Lord Greene, M.R., was good enough to furnish me with a copy of the judgment which he has just delivered, in which he comes to the same conclusion as that which I had reached myself—namely, that the orders of Lawrence, J., must be affirmed—though the reasons given by Lord Greene, M.R., for his conclusions differ from those given by Lawrence, J. Having considered the judgment of Lord Greene, M.R., I am satisfied that the reasoning with which he supports his conclusions is unimpeachable, and that any judgment I might frame would merely have to reproduce those arguments in different language. I am sure that neither du Parcq, L.J., nor Lawrence, J., will charge me with discourtesy if, in these circumstances, I refrain from burdening the pages of the reported cases with any separate judgment, but adopt, not only the conclusions, but also the reasons, of Lord Greene, M.R., as my own.

du Parcq, L.J.: The questions raised by these two appeals may be stated thus. (i) Do the facts found, and set out in the case stated in paras. 2–5, inclusive, justify the conclusion of the commissioners "that there was a liability under Sched. D"? (ii) If the answer to the first question is in the affirmative, is the only proper inference from those facts, as the Crown contends, that tax is chargeable under Sched. D, Case I, and not, as the commissioners held, under Sched. D, Case VI?

Without reciting the facts, which are set out in the case, I find it necessary to summarise them shortly in order to show how the problem presents itself to my mind. The Sywell Aerodrome Co., Ltd., to which I shall refer as the company, is a trading corporation with the object, *inter alia*, of acquiring, providing and maintaining aerodromes, garages, hangars, sheds, landing-grounds, and other accommodation for, or in relation to, conveyances and vehicles of every kind. It owns freehold land which has been laid out as an aerodrome and equipped with hangars and garages. A licence has been granted to the company by the Air Ministry permitting the use of this aerodrome:

> . . . as a regular place of landing or departure for aircraft carrying passengers for hire or reward.

It was a condition of this licence that first-aid appliances should be provided by the licensees. The company receives landing-fees from aircraft using the aerodromes and charges rent for its garages. It obtains a further part of its income from "rent" paid by two clubs for the privilege enjoyed by their members of using the aerodrome, and these receipts, on the view presented by the Crown, stand on the same footing as that of the landing-fees received from the so-called "casual users of the aerodrome." It employs a groundsman, whose duty it is, *inter alia*, to cut the grass. The company does not itself undertake the repair of aircraft or supply petrol either for aircraft or for cars, but has secured the provision of these services by granting to another trading company, Brooklands Aviation, Ltd. (to which I shall refer as the Brooklands company), the sole right to use and occupy a service hangar and the sole right to sell petrol and execute repairs to aircraft using the aerodrome. It has provided in some small measure for the refreshment of its patrons by giving to a third company the right to sell ice-cream on its premises, and it is rewarded for this concession by a percentage of the ice-cream vendor's takings. Finally, it has let to the Brooklands company for four years certain buildings erected on the land which are to be used for the purposes of an R.A.F. reserve school of flying. The lease grants to the Brooklands company the right to use for the flying purposes of such a school the fields comprising the aerodrome "in common with all other users thereof." The demise is expressed to be:

> . . . subject to the rights of all other permitted users of the aerodrome for flying purposes so that no such rights shall be granted as will prevent the enjoyment by the tenant [the Brooklands company] of the rights granted by the lease.

It must be added that admittedly:

> . . . in fixing the rent payable under the lease regard was had to the fees which would normally be charged to the aircraft of [the Brooklands company] for landing.

Those being the facts, I have no doubt that the company is carrying on what would in ordinary parlance be called a business. This is by no means conclusive as showing that the profits of its activities can be taxed under Sched. D. In *Fry* v. *Salisbury House Estate, Ltd.* (1), Lord Dunedin had no doubt that the respondent company was carrying on a business (pp. 446, 447), but the greater part of the profits which it derived from that business could not fall within A the ambit of Sched. D, because they were already franked under Sched. A. It is necessary to consider, reading the relevant sections of the Act in the light of authority, whether Sched. A or Sched. B singly leaves, or those two schedules together leave, any profits untouched which can be brought within Sched. D.

It is elementary that, income tax being a tax on income, each of the schedules imposes a tax on profits and gains, and that none of these profits and gains must be taxed twice over. Under Sched. A and Sched. B, the tax is on a B presumed income, in the one case on the profits of ownership, and in the other on the profits of occupation. These profits are so far distinct that, in the case of many owners who are also occupiers, tax is charged under both Sched. A and Sched. B. Similarly, an owner who occupies his land and carries on a trade upon it may well be liable to taxation on the profits of his trade under Sched. D. If, however, he lets his land and parts with the entire possession of it, his C liability to tax is exhausted by his assessment under Sched. A, because even though all the profits which he makes are indirectly increased by the activities of trading tenants, they are profits of ownership. It is his good fortune if his real income as an owner is greater than his presumed income. He may, of course, make further profits from dealings with his tenants which do not flow from ownership at all—e.g., by undertaking for reward the task of cleaning their windows—and, in that case, he will pay under Sched. D in respect of D profits derived from his trading activity; but this liability is independent of, and additional to, the liability which attaches to him in his capacity of owner, the latter being strictly limited by the terms of Sched. A. As Lord Loreburn said in *Smith* v. *Lion Brewery Co., Ltd.* (11), at p. 155:

> You cannot, by saying that a man carries on the business of owning house property, shift the method of assessing that property for income tax from Sched. A to Sched. D. E

Those words were cited with approval by Lord Dunedin in *Fry* v. *Salisbury House Estate, Ltd.* (1), at p. 444.

If the company had let its aerodrome on such terms that it parted with the entire possession of it, it would be plain, on the principles which I have stated, that, whatever might be the activities of its tenants, its taxable profits would be represented by what I have called its presumed income. The case then would be exactly on all fours with *Fry* v. *Salisbury House Estate, Ltd.* (1). In my opinion, F however, when one is considering whether this case is (if I may express myself thus briefly) a Sched. A case or a Sched. D case, its special facts take it out of the *Fry* v. *Salisbury House Estate, Ltd.* (1) category and bring it within the decision of the House of Lords in *Coman* v. *Rotunda Hospital, Dublin* (*Governors*) (4). There the choice had to be made between Sched. A and Sched. D liability. The hospital owned rooms adapted for use as concert halls or theatres. The G governors let them from time to time to persons who used them as places of public entertainment. On the occasions of such lettings, the governors provided seats, and they also provided heating, lighting and attendants. They remained in occupation of the rooms, and continued to exercise a general control over them. It was held that their profits were assessable under Sched. D. Lord Atkinson said, at p. 35.:

> The governors of the Rotunda are, in my opinion, engaged in the business of letting H for reward their rooms heated, lighted and furnished with seats . . . and cleaned, managed and regularly controlled by their servant, the keeper. . . for the purpose of providing through the operations of those who take their rooms, recreation and amusement to such members of the general public as choose to pay for admission.

For a reason which will presently appear, I must also quote the next sentence, in which Lord Atkinson said, at p. 35:

> I do not think that services thus rendered can be regarded as mere incidents attached to the letting of the rooms themselves,

At first sight, there may appear to be some inconsistency between the words of Lord Loreburn in *Smith* v. *Lion Brewery Co., Ltd.* (11), at p. 155, which Lord Dunedin approved in *Fry* v. *Salisbury House Estate, Ltd.* (1), at p. 444, and this statement by Lord Atkinson in *Coman* v. *Rotunda Hospital, Dublin (Governors)* (4), at p. 35. However, when proper weight is given to the concluding words of the first sentence which I have cited from the opinion of Lord Atkinson in the *Rotunda* case (4), the two statements are found to be entirely consistent. The owner of a theatre who leaves it in the exclusive possession of his tenant is not troubled by Sched. D at all. If he remains in occupation and provides services and equipment, although the rents paid by those to whom he lets the theatre constitute his sole remuneration, he may be chargeable under Sched. D, on the ground that he is carrying on the business of providing amusement to the public through the operations of his licensees.

When the facts of the present case are considered, it is, I think, true to say that they differ in one respect from those of the *Rotunda* case (4). It may be fairly said that the services rendered by the company—namely, the provision of a groundsman and of first-aid appliances—are, in the words of Lord Atkinson, "mere incidents attached to the lettings." However, the facts of this case, taken as a whole, seem to me even more strongly to support the case for Sched. D liability than did those of the *Rotunda* case (4). If the governors in the *Rotunda* case (4) had provided no services except such as were incidental to the letting, but, while remaining in occupation and control of the premises, had themselves sold for the profit of the hospital tickets of admission to some at least of the patrons of those entertainments which their licensees provided, I venture to think that, according to the principles which their Lordships enunciated, the decision of the House of Lords must have been in favour of the Crown. In *Fry* v. *Salisbury House Estate, Ltd.* (1), Lord Atkinson spoke of the *Rotunda* case (4) as deciding [p. 458]:

> . . . that the respondents, the governors of the hospital, used their own premises of which they were in occupation for the purpose of carrying on a profitable trade.

Moreover, Lord Dunedin, at p. 444, and Lord Macmillan, at p. 468, both attached importance to the fact that the owners had remained in occupation, and Lord Macmillan referred to the receipts of the governors in the *Rotunda* case (4) as being [p. 468]:

> . . . receipts of an enterprise quite distinct from the ordinary receipts which a landlord derives from the letting of his property.

It may be noted that in *Fry* v. *Salisbury House Estate, Ltd.* (1) in this court, when counsel for the Crown sought to rely on the *Rotunda* case (4), Lawrence, L.J., at once pointed out, at p. 313, that there the governors remained in occupation, while in the case then before the court the company was not in occupation of the tenements which it had let; the tenants were the sole occupiers.

In the present case, the company, in the view which I take of the facts, is paid money for admission and for the right to enjoy the services of the Brooklands company by those users of the aerodrome who come to it in aeroplanes or cars with a view to enjoying the facilities provided. In my opinion, such receipts are quite different from "the ordinary receipts which a landlord derives from letting his property," and are not profits of ownership. Whether or not they can be said to be profits of occupation is, no doubt, a separate question, though the answer to it may depend on similar considerations, and with it I will now deal. On the latter branch of the case, the *Rotunda* case (4) is not a direct authority, because, in the circumstances of the *Rotunda* case (4), Sched. B could have no application, but the principles which, in my opinion, it establishes may well be applicable here also.

As I understand the argument for the Crown on Sched. B, it was contended that, whereas the person who occupies land for the purpose of husbandry, however great his profits, remains chargeable only under Sched. B, and never comes within the ambit of Sched. D unless he undertakes some profitable activity unconnected with the land, quite a different rule must be applied to the occupier of land "for a purpose other than the purpose of husbandry." Occupiers of the latter class, it was submitted, are taxed for the mere enjoyment of what is financially an unprofitable occupation, and any profits which they may make as occupiers can find no shelter under Sched. B, and must, therefore, seek a resting-place in their appropriate pigeon-holes under Sched. D. I have no doubt that this contention is wrong, though it is true, of course, that occupation, which the law presumes to be profitable, is often in fact unprofitable. I take the law on this point from the opinion of LORD BUCKMASTER in *Glanely (Lord)* v. *Wightman* (2), at p. 629 :

> It is of course obvious that in some sense land is occupied for every purpose of trade, and I think it is plain that the occupation referred to in the schedule is an occupation A which, in itself, and by its enjoyment, is a source of the income and profits to be taxed. Nor is such occupation limited to the purpose of husbandry, as is shown by the later part of the rule.

While it is, I think, undoubtedly wrong to say that, except in the case of husbandry, all an occupier's profits must necessarily fall outside Sched. B and within Sched. D, it is, in my opinion, equally wrong to suppose that all profits made by an occupier to the making of which the occupation of land is essential B fall within Sched. B. A clear case is that of an occupier of land who sets up tea-gardens in the open air. He is supplying service and selling food and drink, and it would be a misuse of language, I think, to say that his occupation of the land was " in itself by its enjoyment " the source of his profits. Anyone who contrives to conduct on the land which he occupies a business which, if the site were enclosed by walls and a roof, everyone would call a shop is no more immune from Sched. D taxation than the normal shopkeeper. If I am right as to such C cases as those, it follows that nothing can be made of the point, which was strongly pressed on behalf of the company, that cl. (*b*) of the proviso to Sched. B, r. 1, which exempts from tax under that Schedule " any warehouse or other building occupied for the purpose of carrying on a trade or profession," without including land not covered by buildings which is so occupied, indicates an intention on the part of the legislature that, when land not covered by a building D is used for the purpose of carrying on trade, the profits of that trade should be taxable under Sched. B alone. If once it is admitted that the profits of some trading activities pursued by an occupier of land on land on which there are no buildings are taxable under Sched. D, that point loses its force.

What I have found the most difficult question in this case now presents itself for solution. On the facts found, is the company's occupation of the land " in itself and by its enjoyment " (I again quote LORD BUCKMASTER) the source E of its profits, in which case those profits are covered by the Sched. B assessment, or is it rather true to say that the company is making profits not merely by occupying the land, or by allowing others for reward to share that occupation with it, but by carrying on a business on the land ? When one is considering the case of lands not used for the purposes of husbandry, it appears to me that the analogy of husbandry is of little service. Husbandry, indeed, is a case apart. Nobody lives on and by the land in the same sense as the farmer. On the F other hand, almost every form of trading or business activity needs some land for its exercise, though in most cases the land is covered by buildings. Apart from the case of husbandry, I am of opinion that, when once it appears that profits are being derived from the sale of goods, or from work and labour, or from any service for reward, it is impossible to regard the occupation of the land *per se* as the source of those profits. G

If the company had done no more than invite and permit aeroplanes to alight on its land and find shelter there, it would, in my opinion, be right to say that its occupation of the land was the source of its profits. Anything done by way of adapting the land for use by the invitees—e.g., the mowing of grass and levelling of runways—may properly be regarded as incidental or ancillary to the occupation. So far, the company's case would be analogous to that of the occupier of a plot of land who clears and suitably equips a space on which he H allows cyclists to leave their bicycles for reward. If, however, to pursue the analogy, the mere occupier becomes a trader, and sets himself to repair bicycles, to provide refreshment for cyclists and to sell to them such accessories as cyclists need, it is clear, to my mind, that the profits of his business as a whole will fall to be taxed under Sched. D.

It may at once be objected that this is an inexact analogy, because, in the present case, the company sells nothing and provides nothing except services which, according to the criterion which I have adopted, are ancillary to the occupation of the land. What, it is proper to ask, will be the position if the hypothetical occupier of my analogy, instead of himself doing repairs for, or selling goods to, the cyclists who pay him for the use of his premises, makes a profit by granting to another person (together, it may be, with the lease of an adjoinging cottage) the right to engage in this business with them ? I have come to the conclusion that in that case he will come under Sched. D liability. There are more ways than one of carrying on a trade, and one way of doing so is by granting to others the right to carry on various branches of trading activity on premises occupied and controlled by the principal trader on such terms that the principal trader directly profits by those activities. A simple instance is that of the amusement park, to which reference was made in the argument. An occupier of land which has no natural attractions invites the public to enter it and to pay for the privilege. If the land were bare, or equipped only with immobile and derelict swings and roundabouts, no one would pay to come in. Remaining in general occupation and control, the occupier grants to a number of other persons the right to occupy portions of the land, either as tenants or as licensees, and there to work swings, roundabouts and other devices or to sell refreshments. It could, no doubt, be argued that the occupier was only enjoying the fruits of mere occupation—that is, granting to strangers the freedom of the land in his occupation and allowing them to make such profitable use as they could of this freedom—but, in my opinion, such an argument disregards the realities of the case. The occupier of the amusement park derives his income, not from his occupation of the land, but from the fact that he is himself carrying on a trade. In my opinion, he is carrying on a trade just as he would be if he engaged persons whose business it is to entertain the public to come on his land and there provide amusement for those members of the public whom he could induce to pay him for admission. It could hardly then avail him anything to say that he was merely, as occupier, licensing entertainers and entertained alike to use the land in his occupation. I do not think that he would improve his position by receiving remuneration from the entertainers whom he licensed instead of making a payment to them. It remains true that those who pay to enter upon his land are not paying merely to come in. They pay to come in and be amused. He is attracting to his land customers who pay, not simply for admission, but for entertainment, services and facilities which he has made it his business to provide through the operation of others. Thus, in the case of this aerodrome, it must be assumed that the knowledge that petrol can be bought and repairs done is a strong inducement to the pilots of aeroplanes to accept the company's invitation to alight, and that, if no such facilities were provided, many, if not all, of them would seek some other landing-place. The business of an aerodrome proprietor is one which, in the nature of things, cannot be carried on in a space surrounded by walls and covered with a roof. If the machines used by the company's customers ran on the ground, so that all its activities could be carried on in a building, I doubt if it would have occurred to anyone to describe the income which the company is making as derived from the occupation of the land "in itself."

Dealing now with the second of the two questions before us, which was the subject-matter of the Crown's cross-appeal before Lawrence, J., I am of opinion that the right conclusion from the facts found by the commissioners is that the company was carrying on a "trade" within the definition of the Act. In my opinion, we are not bound to regard the commissioners' conclusion "that there was a liability under Sched. D, Case VI," as a finding of fact that the company was not carrying on a trade. As I said at the beginning of this judgment, the findings of fact are contained in paras. 2-5 of the case stated. The question for us is whether or not, as a matter of law and construction, the commissioners have drawn the proper inference from those findings. I am of opinion that they have failed to do so. I know of no better way of describing the company's activities than as an "adventure or concern in the nature of trade," and I am of opinion that Lawrence, J., ought to have allowed the cross-appeal.

I have only to add, with regard to a subsidiary point which was argued before us that, in my opinion, it was right in principle to allow a deduction of the Sched. B assessment in arriving at the assessment under Sched. D. We were referred to a statement of Lord Herschell in *Russell* v. *Town & County Bank* (12) in the House of Lords which justifies the allowance of such a deduction [p. 425]:

. . . because it is an essential element to be taken into account in ascertaining the amount of the balance of profits.

I am of opinion that the contentions on behalf of the Crown, which are set out in para. 7 (*a*), (*c*) (1), (2), (3), (4), (5) of the case stated, correctly state the method of assessment which should be adopted. In my opinion, therefore, both appeals should be allowed and the case sent back to the commissioners in order that such adjustments should be made as are necessitated by the substitution of Case I for Case VI as the measure of the assessment. This opinion will not, however, affect the result of the appeal, and, in the circumstances, I may be allowed to add that I cannot but feel misgiving as to the correctness of a judgment which differs not only from that of Lawrence, J., but also from that of Lord Greene, M.R., in which Clauson, L.J., concurs. I am none the less bound to express the view which I have formed.

Appeals dismissed with costs. Leave to appeal to the House of Lords.

Solicitors: *Solicitor of Inland Revenue* (for the appellant); *Oswald Hickson, Collier & Co.*, agents for *Ray & Vials*, Northampton (for the respondents).

[*Reported by* W. K. Scrivener, Esq., *Barrister-at-Law.*]

SWIFT *v.* MACBEAN AND WIFE.

[King's Bench Division (Birkett, J.), **December 12, 1941.**]

Landlord and Tenant—Lease—Term—Certainty—Commencement and termination defined with reference to commencement and termination of war.

Landlord and Tenant—Rent—Requisition of premises—Frustration of tenancy agreement.

By an agreement dated Aug. 30, 1939, the plaintiff agreed to let certain premises, together with the furniture, fixtures and effects therein, to the defendants in the event of war being declared by Great Britain within a period of one year from the date of the agreement. It was further agreed that in this event the tenancy was to commence upon the date of such declaration of war but not before Sept. 16, 1939, and terminate upon the date on which hostilities ceased. Rent was to be payable monthly in advance. In due course the defendants entered into possession of the premises, but, finding them unsuitable for their purposes, secured alternative accommodation and obtained the plaintiff's consent to their subletting the premises. The subtenants vacated the premises on Mar. 7, 1941, and on that date they were requisitioned under the Defence (General) Regulations, 1939. The defendants thereupon refused to pay further rent, alleging frustration of the contract. The plaintiffs contended, however, that the agreement created an estate by demise, to which the doctrine of frustration had no application. The defendants denied that such an estate was created on the grounds that (*a*) the date of the commencement of the contract was uncertain and contingent, (*b*) the subject-matter was furnished premises, and (*c*) the agreement was not for a term of years as the date of its termination was uncertain:—

Held: (i) the intention of the parties was that the tenancy should be for the period of the war, and, though the agreement did not specify the date of its commencement and termination, it was not uncertain and void.

(ii) the fact that the premises were furnished did not prevent the agreement from creating an estate by demise, and consequently the doctrine of frustration did not apply.

(iii) if the doctrine of frustration was applicable, the contract was frustrated.

[**EDITORIAL NOTE.** The commencement and termination of a lease must be certain, but, by a well-known maxim of the law, that is certain which can be ascertained. It has long been the practice of conveyancers to draft leases for a definite term with a proviso for determination on the happening of a certain event, *e.g.*, for 20 years if A so long remains the manager of B & Co. Such a term has been accepted as sufficiently ascertained, and in *Great Northern Ry. Co.* v. *Arnold* (11) a term defined as being for the period of the war was accepted as sufficiently certain, even though there was no primary reservation of a definite term. In the present case both the commencement and the determination of the term were defined with reference to events which were then unascertained, but were events the date of which would in time become fixed, and the term is held to have been sufficiently reserved in law. As to the frustration point, the applicability of frustration to demises was fully discussed in *Matthey* v. *Curling* (6), and the only point that could be suggested in that respect was that there was a distinction between a furnished letting and an unfurnished one. This suggestion the judge has not found acceptable and the doctrine of frustration is held to be equally inapplicable to furnished lettings as it is to unfurnished ones.

AS TO TERM DEFINED BY REFERENCE TO DETERMINING EVENT, see HALSBURY, Hailsham Edn., Vol. 20, pp. 148-150, para. 161 ; and FOR CASES, see DIGEST, Vol. 30, pp. 462-466, No. 1245-1292.

AS TO APPLICABILITY OF DOCTRINE OF FRUSTRATION TO DEMISES, see HALSBURY, Vol. 7, p. 217, note (*e*) ; and FOR CASES, see DIGEST, Vol. 12, p. 399, Nos. 3229- 3231.]

Cases referred to :

(1) *Tay Salmon Co.* v. *Speedie*, [1929] S.C. 593 ; Digest Supp.
(2) *London & Northern Estates Co.* v. *Schlesinger*, [1916] 1 K.B. 20 ; 30 Digest 343, *14* ; 85 L.J.K.B. 369 ; 114 L.T. 74.
(3) *Whitehall Court, Ltd.* v. *Ettlinger*, [1920] 1 K.B. 680 ; 30 Digest 343, *15* ; 89 L.J.K.B. 126 ; 122 L.T. 540.
(4) *Krell* v. *Henry*, [1903] 2 K.B. 740 ; 12 Digest 385, *3168* ; 72 L.J.K.B. 794 ; 89 L.T. 328.
(5) *Taylor* v. *Caldwell* (1863), 3 B. & S. 826 ; 12 Digest 371, *3093* ; 32 L.J.Q.B. 164 ; 8 L.T. 356.
(6) *Matthey* v. *Curling*, [1922] 2 A.C. 180 ; 31 Digest 342, *4857* ; 91 L.J.K.B. 593 ; 127 L.T. 247.
(7) *Sarson* v. *Roberts*, [1895] 2 Q.B. 395 ; 31 Digest 180, *3131* ; 65 L.J.Q.B. 37 ; 73 L.T. 174.
(8) *Newman* v. *Anderton* (1806), 2 Bos. & P.N.R. 224 ; 31 Digest 225, *3642.*
(9) *Emott* v. *Cole* (1591), Cro. Eliz. 255 ; 31 Digest 254, *3943.*
(10) *Williams* v. *Hayward* (1859), 1 E. & E. 1040 ; 31 Digest 216, *3549* ; 28 L.J.Q.B. 374 ; 33 L.T.O.S. 344.
(11) *Great Northern Ry. Co.* v. *Arnold* (1916), 33 T.L.R. 114 ; 30 Digest 463, *1249.*
(12) *Joseph Constantine Steamship Line, Ltd.* v. *Imperial Smelting Corporation*, [1941] 2 All E.R. 165 ; Digest Supp. 165 L.T. 27.
(13) *Hirji Mulji* v. *Cheong Yue S.S. Co., Ltd.*, [1926] A.C. 497 ; 41 Digest 367, *2139* ; 95 L.J.P.C. 121 ; 134 L.T. 737.
(14) *Dahl* v. *Nelson, Donkin & Co.* (1881), 6 App. Cas. 38 ; 41 Digest 517, *3471* ; 50 L.J.Ch. 411 ; 44 L.T. 381.
(15) *White & Carter, Ltd.* v. *Carbis Bay Garage, Ltd.*, [1941] 2 All E.R. 633 ; Digest Supp.

ACTION to recover from the defendants £40 19*s.*, being three months' rent alleged to be due under an agreement between the plaintiff and the defendants, dated Aug. 30, 1939. The facts are fully set out in the judgment.

W. A. L. Raeburn for the plaintiff.

Valentine Holmes for the defendants.

BIRKETT, J. : By his writ issued on July 24, 1941, the plaintiff claimed £40 19*s.*, being three months' rent due on May 16, 1941, June 16, 1941, and July 16, 1941, in respect of premises known as No. 12, Quay Street, St. Ives, in the county of Cornwall, under or by virtue of an agreement in writing made on Aug. 30, 1939.

The defendants denied that they were under any liability to pay the plaintiff's claim for rent for the sum claimed or any sum and pleaded that the agreement of Aug. 30, 1939, was no longer binding upon them by reason of the fact that the town clerk of St. Ives, acting as the agent for the competent authority, the Ministry of Health, had requisitioned the property, the subject of the agreement, on Mar. 7, 1941, under the Defence (General) Regulations, 1939, made under the powers given by the Emergency Powers (Defence) Act, 1939.

The facts, which were admitted or agreed, are as follows. When the outbreak of war seemed likely, Mrs. Macbean was desirous of obtaining a house where she and her husband, together with her mother and aunt, who were both over 70 years of age, might live if war should come. The premises in question seemed suitable for the purpose. The defendants accordingly entered into the original agreement of Aug. 30, 1939, with the plaintiff. The main terms of the agreement were that, in consideration of the payment of £5 by the tenants to the landlord, the landlord was to let and the tenants were to take the dwellinghouse together with the furniture, fixtures and effects therein (these being the subject of an inventory attached to the agreement) in the event of war being declared by Great Britain against any power or state during the period of one year from the date of the signing of the agreement for the period to commence upon the date of such declaration of war (but not before Sept. 16, 1939), and to end upon the date hostilities should cease. The rent was to be 3 guineas per week payable in advance, 13 guineas to be paid on the declaration of war and 13 guineas on the same day of each following month until the cessation of hostilities.

The tenants' and the landlord's covenants were set out in the agreement. The tenant covenanted to preserve the furniture, not to remove any of it and, at the end of the tenancy, to leave it in the rooms where it stood at the beginning of the tenancy. The landlord covenanted to pay all rates, taxes, assessments and outgoings except charges for gas, electric light, or telephone, to keep the demised building in repair during the tenancy, and for quiet enjoyment.

War broke out between Great Britain and Germany, and the defendants entered into possession of the premises under the agreement. After a little time —the exact date was not given—the defendants found the premises unsuitable for their needs and obtained other accommodation in St. Ives. With the plaintiff's consent they sublet the premises to another tenant at 2 guineas per week, instead of the 3 guineas the defendants had to pay under the agreement. Later this subtenant left the premises, but the defendants succeeded in letting the premises again at 2 guineas per week for three months ending Mar. 15, 1941, with an option to renew for a further period. The defendants were informed by their subtenant at the end of two months of the three months ending Mar. 15, 1941, that the premises would not be required further; but the rent was, of course, payable up to Mar. 15, 1941. It appears that the subtenant left the premises before Mar. 15, and on Mar. 7, 1941, the premises were in fact vacant.

On Mar. 7, 1941, the town clerk of St. Ives served a requisition notice on the plaintiff as the owner of the premises, in exercise of the power conferred upon him by the Defence (General) Regulations, 1939, reg. 51, stating that he had on that date taken possession of the premises. On the same day the town clerk also served a requisition notice on the plaintiff, as the owner of the goods and chattels on the premises, in exercise of the power given by the Defence (General) Regulations, 1939, reg. 53, stating that he had on that date taken possession of the furniture, goods and chattels and things owned by the plaintiff then on the premises. On the same day the town clerk also served a requisition notice on James Lanham, Ltd., estate agents, of St. Ives, which was to inform them, as agents for the owner and concerned with the letting of the premises to the defendants, that he had taken possession of the premises.

By a letter, dated Mar. 14, 1941, the town clerk informed the plaintiff that he

> . . . presumed that both you and your lessee will be making a claim for compensation in due course.

By a letter, dated Mar. 15, 1941, the plaintiff informed the defendants that he was advised that the notice of requisition did not affect the liability of the defendants under the agreement of Aug. 30, 1939, claimed the month's rent due in advance on Mar. 16, 1941, and added that a claim for compensation should be made by the defendants to the local authority.

The subsequent correspondence may be shortly summarised. The defendants said that, as possession had been taken from them, they could not pay rent for property which they were not allowed to occupy. The plaintiff, through his solicitors, whilst disclaiming any desire to act harshly, said that the obligations under the agreement remained in full force, and that a claim for compensation by the defendants was the remedy for the situation in which the parties found themselves.

Claims for compensation were submitted on behalf of the defendants, with the result that a figure of £25 per annum was offered by the district valuer to the defendants as the utmost that could be given. The plaintiff, through his solicitors, sent in the forms claiming compensation in respect of the furniture, originally on the footing that the claim was only made in respect of matters not covered by the agreement. Later, by a letter of June 17, 1941, the plaintiff's solicitors told the town clerk that so far as the plaintiff was able to do so by virtue of the agreement of Aug. 30, 1939, he would prefer the annual rent for the furniture from the local authority, although the district valuer told the defendants' solicitors by letter dated July 10, 1941, that the requisitioned furniture was being purchased outright. On the same day, the town clerk informed the plaintiff's solicitors by letter that no question of purchase of either the hereditament or the chattels arose, because it was the policy of the government to requisition for the emergency, and not to purchase.

The position as to compensation, therefore, appears to be that whilst the defendants are said to be liable under the agreement for £163 16*s.* per annum in respect of premises which they cannot occupy or sublet, the compensation under A the Act is suggested to be £25 per annum as a maximum ; and that the plaintiff is possibly to receive some sum as compensation in respect of the furniture.

The Compensation (Defence) Act, 1939, was passed on Sept. 1, 1939. This Act, which provides for compensation to be paid in cases of requisitioning, was clearly passed, so far as lessees were concerned, on the view that in English law the fact that a lessee had been deprived of the possession of the premises is no excuse for non-payment of rent, in the absence of an express exception, B and that the contractual position between the landlord and tenant is, in the main, unaffected thereby. In Scotland it would appear from *Tay Salmon Co.* v. *Speedie* (1) that the law is otherwise.

The compensation in respect of the taking possession of land payable to a tenant where a requisition has taken place is set out in sect. 2 (1) (*a*) of the Act, and it will be observed that the hypothetical tenant undertakes to do all repairs, external and internal. In the present case, the defendants had not undertaken C to do external repairs. The compensation in respect of the requisitioning of goods other than vessels, vehicles and aircraft is set out in sect. 6 (1) of the Act. Sect. 7 provides for the settlement of disputes as to compensation by appropriate tribunals.

Counsel on each side emphasised the hardship which would fall upon their clients whatever my decision should be. In time of war hardships are inevitable, D and I am the last person, I trust, to be unmindful of them. Their alleviation, however, is the concern of Parliament, and I am glad to think that, in this matter, it is an active concern. My duty is to decide the present case on what I conceive to be the existing law applicable thereto. The result of the happenings in this case would appear to be that, in consequence of the orders of requisition referred to, the landlord can no longer give the tenants the use of the house and furniture, at least for the time being, either for themselves or for any subtenants. E The tenants have been deprived of the use of the house and furniture, and the question of compensation is still being negotiated, on the footing of requisition and not of acquisition, though on terms which to the defendants seem quite inadequate to the position in which they find themselves.

In these circumstances counsel for the defendants submitted that the agreement of Aug. 30, 1939, was at an end, because in all the circumstances the doctrine of frustration applied to it. He argued that the facts showed that F the whole purpose of the agreement had been frustrated and the agreement was, therefore, at an end, and the defendants were not liable for any rent after Mar. 7, 1941, although in fact rent due on Mar. 16 and Apr. 16 had been paid after judgment by default had been obtained by the plaintiff. There was no obstacle in law to the application of the doctrine of frustration to a tenancy agreement of this nature. The agreement of Aug. 30, 1939, was not to be regarded as an G agreement creating an estate by demise at all, and *London & Northern Estates Co.* v. *Schlesinger* (2) and *Whitehall Court, Ltd.* v. *Ettlinger* (3), had no application. Counsel for the defendants also referred to *Krell* v. *Henry* (4) and *Taylor* v. *Caldwell* (5).

The language of the agreement of Aug. 30, 1939, is the ordinary language of an agreement made between landlord and tenant for the letting of premises belonging to the landlord. The relevant words of cl. 1 of the agreement are :

> H The landlord shall let and the tenants shall take jointly and severally all that messuage or dwelling house situated and being No. 12 Quay Street in the parish of St. Ives in the county of Cornwall together with the furniture and effects therein at the rent of £3 3*s.* for every week of the said term.

It was submitted by counsel for the defendants that this agreement is somehow to be regarded as divisible, and, although there may be a demise of the house, there is no demise of the furniture, but a contract in respect of the furniture which has been frustrated, and, therefore, the whole agreement is at an end. It was not contested by counsel for the defendants that in the case of a demise of unfurnished premises for a term of years the doctrine of frustration had no application and the lessee was liable for the rent of the premises. He sought to differentiate the present case on three grounds: (i) that the agreement of Aug. 30, 1939, was only to become operative if Great Britain declared war against any power or state. The date of its beginning, therefore, was uncertain and contingent; (ii) that the subject-matter of the agreement was furnished and not unfurnished premises; and (iii) that the period of time for which the agreement was to run when it had once begun was uncertain, being until the cessation of A hostilities, and the agreement was not, therefore, in the same class as an agreement for a term of years.

Counsel for the plaintiff submitted that the doctrine of frustration had no application to an agreement of this kind, which created an estate by demise; there was no fundamental difference between the letting of unfurnished and furnished premises save the implied covenant that the furnished premises were fit for human habitation at the time of the letting; the rent, notwithstanding that B the property demised includes chattels, issues out of the land only, and an injury to the chattel interest would not defeat the demise even to the extent of making the rent apportionable; the fact that the agreement was dependent on a contingency for its duration made no difference, for the agreement had in fact come into operation, nor was the fact that the agreement was for the duration of the war material to defeat the agreement. He further submitted that there C was no frustration in fact. The whole basis of the agreement had not gone. The premises might cease to be requisitioned. Requisition of furniture does not amount to acquisition, and, even if it did, the plaintiff had not agreed to provide specific furniture and could fulfil his agreement with other furniture. He finally submitted that the present case was governed by the decisions in *London & Northern Estates Co.* v. *Schlesinger* (2), *Whitehall Court, Ltd.* v. *Ettlinger* (3) and *Matthey* v. *Curling* (6). D

The first important question, therefore, is whether, as a matter of law, the doctrine of frustration can apply to the agreement of Aug. 30, 1939. In *London & Northern Estates Co.* v. *Schlesinger* (2) it was held that the defendant was liable for the rent of a residential flat. On war breaking out he became an alien enemy and was prohibited from residing in certain specified areas, which included the district in which the flat was situated. In that case, Lush, J., said, at p. 24: E

> But there is, I think, a further answer to the contention. It is not correct to speak of this tenancy agreement as a contract and nothing more. A term of years was created by it and vested in the appellant, and I can see no reason for saying that because this order disqualified him from personally residing in the flat it affected the chattel interest which was vested in him by virtue of the agreement.

The question came up for further consideration in *Whitehall Court, Ltd.* v. F *Ettlinger* (3), where the argument submitted by counsel for the defendants was that there had been frustration. The Earl of Reading, L.C.J., said, at p. 686:

> The second point taken by Mr. Giveen was that there had been a determination of the whole tenancy by reason of the requisition of the flats. It seems to me that that depends upon much the same considerations. It is said that, looking at all the circumstances, treating the case as one would an ordinary contract, and applying the general principles which are not in dispute, I ought to hold the whole tenancy to be G at an end. But I find the same difficulty with regard to this point as I did with regard to the first point.

He then quoted the judgment of Lush, J., which I have read, and continued, at p. 687:

> I think that *dictum* applies to the present case. I can see no reason why the chattel interest which was vested in the tenant by virtue of the two leases was affected merely because he was personally prevented from residing in the flats. If I were dealing with H an ordinary contract I should feel great force in the argument addressed to me by Mr. Giveen, but I can find no authority and no justification for saying that I must apply to the present case the principles laid down in the citations made by Mr. Giveen. The agreements contained in the leases are not only contracts, they also create an estate by demise for a term of years.

Whitehall Court, Ltd. v. *Ettlinger* (3) was expressly approved by the House of Lords in *Matthey* v. *Curling* (6).

Therefore, in this case, with regard to the first ground upon which counsel for the defendants relied, I do not think that the fact that the agreement was one which was only to come into being in the event of war being declared by Great Britain can have any effect on the question which I have to decide. The agreement did come into being, the defendants did enter into possession as tenants of the plaintiff and paid the rent reserved by the agreement. On Mar. 7, 1941, the agreement was in full operation, and had been since Sept. 16, 1939. On that ground, therefore, in my judgment, the defendants fail.

With regard to the second ground, I am asked to say that the law applicable to a demise of unfurnished premises is not applicable to this agreement, because of the words "together with the furniture and effects therein" and the consequences which follow. The premises being furnished and the landlord being the owner of the furniture is said to make a vital difference. I am unable to accept that contention. No doubt in the letting of furnished premises there is an implied term that the premises are fit for human habitation at the date of the letting, as in *Sarson* v. *Roberts* (7), but, apart from that matter, I am unable to draw the distinction between furnished and unfurnished premises for which counsel for the defendants contends. In principle I am unable to see that any distinction arises. In *Newman* v. *Anderton* (8) it was held that the landlord could distrain for rent of ready furnished lodgings. SIR JAMES MANSFIELD, C.J., said, at p. 227:

> But it must occur constantly that the value of demised premises is increased by the goods upon the premises, and yet the rent reserved still continues to issue out of the house or land, and not out of the goods.

Where lands and goods are let at an entire rent and the tenant is evicted from the lands, no apportionment can be made for the goods, as the rent is held to issue from the land also. See *Emott* v. *Cole* (9) and *Williams* v. *Hayward* (10). I am not able, therefore, to take the view that the furniture should be regarded as something to be divorced from the general agreement of Aug. 30, 1939, and, in the absence of any authority directing me to do so, I shall hold that the furnished premises are not outside the decisions which I have referred to, merely because they are furnished premises.

There remains the third ground relied on by counsel for the defendants, namely, that this agreement is for a period of time ending with the cessation of hostilities and, therefore, necessarily indeterminate and uncertain. On that ground he submitted that the rule of law applicable to a demise for a term of years has no application to this agreement. The only authority which was cited on this point was *Great Northern Ry. Co.* v. *Arnold* (11). The headnote to that case reads as follows:

> The plaintiffs in Mar., 1916, informed the defendant that they would let certain premises to him "for the period of the war, the rent payable weekly," and they said that they did not intend that he should be subject to a week's notice. The defendant agreed to these terms and the parties entered into a formal agreement by which the plaintiffs let the premises to the defendant "for the period of the war at a weekly rent of £3 3*s*., payable weekly." In an action by the plaintiffs to recover possession on the footing that the agreement was void for uncertainty as a lease for years and only created a weekly tenancy or a tenancy at will:
>
> *Held*, that even if a lease for years must be for a period of time which was certain or which could be rendered certain, yet as the intention of the parties was that the tenancy should be for the period of the war and as this intention could have been carried out by a lease extending over a long period but terminable at the end of the war, effect must be given to that intention and the plaintiffs could not recover.

I am not sure that this decision is directly in point, but the agreement in that case was held not to be void for uncertainty, and did not create a mere weekly tenancy or a tenancy at will. I find myself unable to hold that, because this agreement is expressed to be for the period of time ending with the cessation of hostilities, it is, therefore, outside the decision in *London & Northern Estates Co.* v. *Schlesinger* (2) and *Whitehall Court, Ltd.* v. *Ettlinger* (3). I think, therefore, that, in law, the doctrine of frustration has no application to this agreement, and, whatever I might have wished to do in the circumstances, I am compelled to hold that the defendants' liabilities under the agreement are unaffected by the orders of requisition of Mar. 7, 1941, and that the plaintiff is entitled in law to recover the rent sued for in this action.

In view of the conclusion to which I have come, it is not necessary to deal at any great length with the doctrine of frustration and its application to the facts of the present case, but, out of respect to the arguments of counsel, to both of whom I am greatly indebted, I will shortly state my conclusions on that part of the case in the event of my being wrong upon the other.

The doctrine of frustration has recently received full consideration in the House of Lords in *Joseph Constantine Steamship Line, Ltd.* v. *Imperial Smelting Corporation, Ltd.* (12), although the main matter for consideration there was concerned with a question of onus of proof. In that case, LORD WRIGHT pointed out, at p. 184, that the fuller and more accurate phrase is "frustration of the adventure or of the commercial or practical purpose of the contract"; and VISCOUNT MAUGHAM pointed out that the doctrine had been considered in at least fifty reported cases, the references to which are collected in HALSBURY'S LAWS OF ENGLAND, HAILSHAM EDN., Vol. 7, at p. 215, to which counsel for the defendants drew my attention and some of which he cited.

In the form in which we know it, the doctrine appears to have originated in the words of BLACKBURN, J., when delivering the judgment of the Court of Queen's Bench in *Taylor* v. *Caldwell* (5). He said, at p. 839:

> The principle seems to us to be that, in contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance.

In the *Constantine* case (12), LORD WRIGHT, after giving the fuller and more accurate phrase which I have quoted, went on to say, at pp. 184, 185:

> This change in language corresponds to a wider conception of impossibility, which has extended the rule beyond contracts which depends on the existence, at the relevant time, of a specific object, as in the instances given by BLACKBURN, J., to cases where the essential object does indeed exist, but its condition has by some casualty been so changed as to be not available for purposes of the contract, either at the contract date or, if no date is fixed, within any time consistent with the commercial or practical adventure. For the purposes of the contract the object is as good as lost. Another case, often described as frustration, is where by state interference or similar overriding intervention the performance of the contract has been interrupted for so long a time as to make it unreasonable for the parties to be required to go on with it. Yet another illustration is where the actual object still exists and is available, but the object of the contract as contemplated by both parties, was its employment for a particular purpose, which has become impossible, as in the coronation cases. In these and similar cases, where there is not, in the strict sense, impossibility by some casual happening, there has been so vital a change in the circumstances as to defeat the contract.

In the present case, although counsel for the plaintiff said that the requisitioning of the premises might cease one day, and it is, of course, impossible to say that the requisitioning will in fact be co-terminous with the duration of the war, nevertheless, in Dec., 1941, the requisition of Mar. 7, 1941, is still in force, and the words of LORD WRIGHT would seem to apply [at p. 184]:

> . . . by state interference . . . the performance of the contract has been interrupted for so long a time as to make it unreasonable for the parties to be required to go on with it.

There are further passages in the speech of LORD WRIGHT to which reference could be made, but I will content myself by citing two from p. 185:

> The doctrine of frustration is intended to achieve a just and reasonable result.

Then, later on:

> However, the results of holding a man to the absolute terms of a contract would often be so unjust, that from early times, as the examples of BLACKBURN, J., in *Taylor* v. *Caldwell* (5) show, the courts set themselves to avoid these results wherever justice seemed to require it. The doctrine of frustration is thus, in the words of LORD SUMNER in *Hirji Mulji* v. *Cheong Yue S.S. Co., Ltd.* (13), at p. 510: "a device by which the rules as to absolute contracts are reconciled with a special exception which justice demands."

One of the submissions made by counsel for the plaintiff was that the parties to the present agreement, from the wording of the agreement itself, realised that the premises might be requisitioned. I can find no support for this in the wording of the agreement, and I think, in the words of LORD WATSON in *Dahl* v. *Nelson, Donkin & Co.* (14), at p. 59:

> . . . they had neither thought nor intention regarding it.

The only other case to which I would make reference is *White & Carter, Ltd.* v. *Carbis Bay Garage, Ltd.* (15). That is the case of a contract dealing with the right to display advertisements where the local authority, acting under the Defence Regulations, had required the obliteration of all place names. MACKINNON, L.J., uses these words, at pp. 635, 636 :

> The question could be tested in this way. If, when the parties were making the agreement, a third party had said, " Supposing there is a war in which this country is involved, and as a result of that the government or the local authority insisted upon painting out all local names in advertisements wherever displayed, with the result that your advertisement of the Carbis Bay Garage at St. Ives becomes futile and ridiculous with the words " Carbis Bay " and " St. Ives " painted out, what is to happen ?" Both sides would have said : " Of course, in that case the contract is at an end. The contractors can no longer display the advertisement and the advertisers can no longer be required to pay for it."

If this is a contract to which the doctrine of frustration applies at all, I am of opinion that the contract has been frustrated and is thereby at an end. There has been, in the words of LORD WRIGHT in the *Constantine* case (12), " so vital a change in the circumstances as to defeat the contract " ; and applying the test of MACKINNON, L.J., in *White & Carter, Ltd.* v. *Carbis Bay Garage, Ltd.* (15), if, at the time of the making of the agreement, a third party had said : " Supposing the war we contemplate actually comes about and as a result of that the government or the local authority take over this furnished house so that you can no longer live in it or allow any subtenant to live in it and the landlord cannot give you possession, what is to happen ? " both sides would then have said : " In that event, of course, the contract is at an end ; you cannot be expected to go on paying rent for the premises when the state has taken them from you for its own purposes, as all your benefits are gone and the whole purpose of the contract has been defeated."

One further matter arises on this. Counsel for the plaintiff argued that the defendants could not rely on the doctrine of frustration in any event, because they had allowed the premises to become vacant and were thus the cause of the requisitioning order by the local authority, who would not have served it had the premises not been vacant. Whether this last statement is really so or not was not proved before me, but I am not satisfied on the evidence before me that the defendants were ever in fault. The *Constantine* case (12) would seem to show that the onus of proof does not lie on the defendants to establish that the circumstances causing the frustration were not brought about by their default or neglect. The onus is on the plaintiff; but, if the evidence raises a presumption of the defendants' default, the onus is on the defendants to destroy that presumption until the evidence is equally consistent with either view. I am not satisfied on the evidence that it was because the premises were empty that the requisitioning order was served, and I am certainly not satisfied that there was any default or neglect on the part of the defendants which disentitled them to rely on the doctrine of frustration, or that the evidence raises any presumption that they were in default.

If, therefore, this is a contract to which the doctrine applies, I find that the contract was frustrated and consequently ended on Mar. 7, 1941, and the claim for rent for May, June and July, 1941, therefore, fails. Since, however, I hold that the doctrine of frustration has no application, for the reasons I have stated, I find in this case for the plaintiff for the amount claimed with costs.

Judgment for the plaintiff for £40 19*s*., *with costs on High Court scale.*

Solicitors : *Spiro & Steele* (for the plaintiff) ; *Chamberlain & Co.* (for the defendants).

[*Reported by* D. K. BELCHER, *Barrister-at-Law.*]

Followed. HAYWARD *v.* PULLINGER & PARTNERS, LTD. [1950] 1 All E.R. 581.

MONK *v.* REDWING AIRCRAFT CO., LTD.

[COURT OF APPEAL (Lord Greene, M.R., and MacKinnon and Clauson, L.JJ.), **December 1, 1941.**]

Practice—Particulars—Action for damages for wrongful dismissal—Particulars of employment and earnings since dismissal—Period claimed by plaintiff as reasonable notice—Claim for particulars before defence—R.S.C., Ord. 19, *r.* 7B.

The respondent, the plaintiff in the action, claimed damages for wrongful dismissal. The service agreement did not provide for a definite period of notice. The employers contemplated making a payment into court. To enable them to decide whether or not to do so, and, if so, what amount they should pay, they asked for particulars as to whether or not the respondent had obtained other, and, if so, what, employment, and for what period and at what salary, and also what period was said by the respondent to constitute reasonable notice. No defence had been delivered :—

Held : (i) the appellants were entitled to the particulars asked for, because the claim was for special damages. There is no rule of practice that such an order for particulars ought not to be made.

(ii) the appellants were also entitled to the particulars before delivery of defence, in order to enable them to decide whether or not to make a payment into court, and, if so, of what amount.

[**EDITORIAL NOTE.** There would seem little difficulty in deciding that the particulars of the earnings of the plaintiff since dismissal and before the expiry of reasonable notice should be given. The plaintiff will, however, be in some little difficulty in giving the particulars of what he alleges is the period of reasonable notice. In general the cases have decided this question upon a very generous interpretation in favour of the employee, and the period of notice allowed, except in cases where there can be shown to be a well-established usage, has usually been in excess of that commonly accepted by employees or granted by the employers. In the case of an employee who is not a menial servant or a weekly wage-earner, the order to give particulars of what is considered to be the period of notice is likely to put the plaintiff in a difficulty, although he can probably solve it by stating what he thinks would be the maximum period the court could allow. This case is important, too, on the question as to the time when the particulars should be given. It is decided that they can be asked for before defence, and, if, therefore, the defendants decide to pay into court, they have the opportunity of making their payment in at the earliest moment and thus, provided their payment is sufficient, of avoiding most of the costs of the action.

As to when Particulars will be Ordered, see HALSBURY, Hailsham Edn., Vol. 25, pp. 275, 276, para. 465 ; and for Cases, see DIGEST, Pleading, pp. 195-197, Nos. 1646-1659. See also YEARLY PRACTICE OF THE SUPREME COURT, p. 319.]

Cases referred to :

(1) *Reid* v. *Explosives Co.* (1887), 19 Q.B.D. 264 ; 34 Digest 104, *777* ; 56 L.J.Q.B. 388 ; 57 L.T. 439.

(2) *Wright* v. *Goodlake* (1865), 3 H. & C. 540 ; Digest, Practice, 479, *1594* ; 34 L.J.Ex. 82 ; 13 L.T. 120.

(3) *Milbank* v. *Milbank*, [1900] 1 Ch. 376 ; Digest, Pleading, 185, *1564* ; 66 L.J.Ch. 287 ; 82 L.T. 63.

Appeal by the defendants from an order of Asquith, J., dated Nov. 14, 1941, refusing to reverse an order of Master Moseley declining to order the plaintiff to give certain particulars of his statement of claim before the defence had been delivered. The facts are fully set out in the judgment of Lord Greene, M.R.

G. O. Slade for the appellants.

Gerald Gardiner for the respondent.

Slade : The defendants believe that the plaintiff has been, and still is, in employment, and they suspect that he has been earning as much as they paid him. The defendants desire to make a payment into court. The defendants ought to have this information, so that they may know what they should pay into court. Also, they are entitled to the particulars as particulars of special damage. In an action for wrongful dismissal, anything beyond nominal damages must be special damages. They are, of course, unliquidated. The measure of damages is well-settled. It is the salary which the employee would receive during the period of a specified notice, or during a reasonable period if there is no specified notice, less the amount earned by him during that period. The plaintiff invites the court to define a reasonable notice. In a claim for special damages, a defendant is entitled to the fullest particulars. *Reid* v. *Explosives Co.* (1) shows that no action will lie in a claim for wrongful dismissal, if the plaintiff has received wages equal to those he would have received but for the wrongful dismissal. *Wright* v. *Goodlake* (2) shows that particulars such as are asked for in this case could formerly have been obtained by interrogatories before plea. As, under present-day practice, interrogatories are not allowed to be administered before defence, the proper method of obtaining the information is by particulars. In *Milbank* v. *Milbank* (3), the court ordered particulars as to the date of a re-mortgage, and also particulars as to the consideration for it. If particulars are ordered in the present case, it may transpire that there never was a cause of action, and in that event an application could be made to strike out the action. Alternatively, it would enable an amount to be paid into court. This course would save the costs and expenses of a trial. The plaintiff would suffer no harm or injustice by giving the particulars asked for.

Gardiner : This appeal raises the question whether, as a matter of principle,
A particulars ought to be given before defence. There is also the question as to whether or not the particulars should be given in the way in which the appellants ask for them. There does not seem to be any reported case which deals with R.S.C., Ord. 19, r. 7B. After the court has decided the questions of liability and *quantum*, the payment into court can be mentioned, and it goes to the question of costs. The defendants ask for the particulars with a view to making a payment into court. Having obtained the particulars, however, the defendants
B may decide not to make a payment into court. In the present case, the defendants ask for particulars of something which has not been alleged. The definition of a reasonable notice has to be determined.

Slade, in reply.

LORD GREENE, M.R. : This appeal by the defendants in the action raises two main questions relating to the particulars which can properly be claimed
C and ordered before defence. The action is one for damages for wrongful dismissal. In addition to a claim to specific sums of wages, there is a claim in para. 8 of the statement of claim to the following effect :

> In breach of the said term of the plaintiff's employment by a letter dated June 14, 1940, the defendants without giving the plaintiff reasonable notice dismissed him from his said employment whereby the plaintiff has suffered damage, in that he has lost the salary which he would otherwise have received.

D The contract was one which admittedly did not provide for any particular length of notice, and, therefore, reasonable notice was required before it could be properly determined. In the claim, the plaintiff claims : "under para. 8, damages." It is to be observed that the damages suffered under that head are in their nature special damage, and, in accordance with the ordinary rule, where a plaintiff is claiming special damage, he must give sufficient
E particulars of his claim. That raises the first point, and, indeed, the most important point, which falls for consideration. The plaintiff in the claim has, his counsel maintains, sufficiently particularised his alleged damage by saying that he has lost the salary which he would otherwise have received. I must confess that I cannot extract from the statement of claim any sufficiently clear statement as to whether he is alleging that the measure of damage is the full salary which he would otherwise have received or whether he is going to say,
F when he comes to trial, that the measure of his damage is to be ascertained by estimating what he would have received if he had not been wrongfully dismissed and by bringing into account sums which he has in fact received, if he did receive them, in some other employment which he obtained. It is to be noticed that there is very often to be found an inaccurate use of language in connection with damages of this character. It is not true to say, although it may be convenient,
G that what must be done is to take the salary which the plaintiff would have earned and give credit for what he has in fact earned in some other employment. What the plaintiff claims in a case such as this is damages. He is not claiming a salary. He is claiming damages. The salary is really one element in ascertaining what the just measure of damage is, and another element in ascertaining the just measure of damage is the salary which he in fact earned in another employment. Nevertheless, the damages claimed are damages, and not, so to
H speak, the balance of an account. It is, therefore, misleading to use the phrases "give credit for" and "bring into account," or phrases of that kind, although there is no particular harm in them provided that it is realised that they are not used in any strict sense at all. What, then, is the position of a plaintiff who claims damages in a case such as this ? It seems to me that he must specify what he is claiming, and in every statement of what he claims by way of special damage there is, it seems to me, necessarily implicit one of two allegations. There is implicit either an allegation that he has not in fact earned any other remuneration during the relevant period or an allegation that he has in fact

earned remuneration in other employment. Any form of pleading or any particulars given which do not bring to the clear knowledge of the defendant which of those two implicit statements is the one on which the plaintiff is going to rely is, in my judgment, embarrassing. The function of particulars in such a case is to bring out clearly by express language which of those allegations is relied upon, and, if it be the latter, sufficient details showing how the figure is arrived at should be given in the particulars. I cannot accept the view, which counsel for the respondent presented, that, in a pleading in this form, he is entitled to stand on the language used and to refuse to elaborate what he is really alleging his damage to be. As I have said, I am unable to ascertain whether he is saying "I earned nothing" or "I earned something which I do not specify." In those circumstances, the defendants ask for particulars as to whether the plaintiff obtained any, and, if so, what, employment, stating (*a*) when, (*b*) with whom, (*c*) date of commencement of service, (*d*) salary and terms of payment, (*e*) nature of employment, and (*f*) whether such contract still exists, and, if not, when it terminated. There are one or two points in that on which I will say a word in a moment, but, having regard to the form of the pleading in this case, it seems to me that the defendants are entitled to get particulars in that form in order to enable them to know what the plaintiff's real claim for damages is.

The next question which arises, and which is really subsidiary to this one, arises out of another claim of the defendants for particulars—namely, a claim for particulars of the period of time claimed by the plaintiff to constitute a reasonable notice. There it will be observed that, if the plaintiff gives the particulars to which, in my opinion, the defendants are entitled under para. 8, in the figures which he shows there will be implicit again an allegation of what at the trial he is going to allege is a reasonable time. It may be that he may think it right to give the particulars under para. 8 in several alternative forms, reflecting alternative views which he proposes to put forward at the trial as to what is a reasonable time. It seems to me, however, that it would be inconvenient to put upon the defendants the burden of unravelling the figures and calculations which are given, and that they are entitled, in order that the whole meaning of the claim as particularised may be brought to light, to the particulars for which they ask in respect of reasonable notice. Therefore, on principle, I come to the conclusion that these particulars of this pleading are particulars which ought to be given.

That does not dispose of the present appeal, however, because another point arises. Particulars are being asked for before delivery of defence, and it is provided by R.S.C., Ord. 19, r. 7B, as follows:

> Particulars of a claim shall not be ordered under r. 7 to be delivered before defence unless the court or judge shall be of opinion that they are necessary or desirable to enable the defendant to plead or ought for any other special reason to be so delivered.

It is pointed out by counsel for the appellants that his right to pay money into court is one which, unless these particulars are ordered at this stage, he will not be able to exercise until a considerably later stage in the action, after expense has been incurred and only after interrogatories have been administered or particulars obtained, and he says that he ought not to be put to expense of that kind when, if the claim had been properly particularised in the first instance, he would have been able to make up his mind whether he would pay money into court, and, if so, what sum. It is said by counsel for the respondent that the case is one in which no order ought to be made under r. 7B. In my judgment, the discretion which that rule gives is one which ought to be exercised in this case. It seems to me, in the first place, that, when a question of payment into court arises, as it does here, one must remember that payment into court is a plea. It used to be pleaded, but, under the present rules, of course, it must not be pleaded. Nevertheless, it is a plea, although it is, so to speak, a secret plea. It always was a secret plea so far as the jury were concerned. It is now a secret plea so far as the judge is concerned. Nevertheless, it remains a plea. It seems to me that, in the present case, the delivery of these particulars is necessary or desirable in order to enable the defendants to plead, because, unless they have them, they are not getting the particulars necessary to enable them to decide whether or not they will pay money into court, and, if so, what amount. Even if that were not the true view, as in my judgment it is, it seems to me that there is in this case a special reason why particulars should be ordered at this stage.

Before leaving the matter, I should say this. Although ASQUITH, J., before whom the matter came, refused to interfere with the master's order, the master having refused to order particulars, he did so in the belief that there was some rule of practice which tied his hands, and which I understand he conceived to exist in relation to the ordering of such particulars of special damage in cases A of this kind, not a rule of practice which related to the other question—namely, the ordering of particulars before defence. He said that, if no such rule of practice had existed, he would have made the order. In my opinion, there is no such rule of practice, and it is right, perhaps, to make the general observation that, when the rules of court confer a discretion on a judge, they give that discretion in accordance with their language. Rules of practice, it is true, grow up and justify themselves as indicating that, in the ordinary case, judicial B discretion will not be exercised in a particular way, but no such rule of practice can be binding where complete discretion is given, and, if a judge considers that an order should be made in the special circumstances of the case before him, rules of practice of that kind are things which he is certainly not bound to follow. The result is that the appeal is allowed, and the order will be made in the terms which I have indicated.

C MACKINNON, L.J.: I agree.

CLAUSON, L.J.: I also agree.

Appeal allowed with costs.

Solicitors: *R. C. Bartlett & Co.* (for the appellants); *Ashby, Rogers & Fournier* (for the respondent).

D [*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

BRAMWELL *v.* BRAMWELL.

[COURT OF APPEAL (Lord Greene, M.R., and Luxmoore and Goddard, E L.JJ.), **January 20, 1942.**]

Husband and wife—Legal proceedings—Claim for possession of house, the matrimonial home—Maintenance order—Husband entitled to deduct sum while wife resided in the house—Whether tenancy created by conduct—Availability.

A husband and wife had made their matrimonial home in a freehold house, the property of the husband. He left his wife and the latter applied to the justices for a maintenance order. The justices made an order granting F her maintenance at the rate of £1 12*s.* per week. The justices intimated that, so long as the wife continued to live in the house, the appellant could deduct 12*s.* from the weekly payment. Two days after the making of the justices' order, notice was given on behalf of the husband requiring the wife to vacate the house. The husband, however, paid the wife £1 per week for some months and then commenced proceedings to recover G possession of the house. On behalf of the wife it was contended that a tenancy had been created by conduct:—

HELD: (i) in the circumstances of this case no tenancy of the house had been created. The husband was merely acting on the suggestion of the justices and had no intention of creating a relationship of landlord and tenant.

(ii) *per* Goddard, L.J.: it is doubtful whether a husband can bring an action for the recovery of land against his wife in the circumstances of I this case.

[**EDITORIAL NOTE.** At common law a tenancy could be created by entry into possession of the premises followed by the payment of rent. It was here sought to be said that the deduction by the husband from the money which the magistrates ordered him to pay to his wife was equivalent to the payment of rent, and that the fact that she remained in possession of the premises was just the same as entry into possession. The Court of Appeal, however, has pointed out that it is a necessary ingredient in the presumption of the creation of a tenancy that there should be an intention to create the relationship of landlord and tenant. It could not be said here that there was any such intention, and the presumption of the creation of a tenancy was, therefore, rebutted.

As to Creation of Tenancy by entry into Possession and Payment of Rent, see HALSBURY, Hailsham Edn., Vol. 20, pp. 124-127, para 137; and for Cases, see DIGEST, Vol. 31, pp. 52-56, Nos. 2003-2028.]

Appeal by the husband from the decision of His Honour Judge Allsebrook given at the Barrow-in-Furness and Ulverston County Court on Oct. 9, 1941. The facts are fully set out in the judgment of Lord Greene, M.R.

Gilbert Dare for the appellant.

Robert Fortune for the respondent.

Lord Greene, M.R.: The appellant is the husband of the respondent, and on Apr. 21, 1941, he issued a plaint in the county court claiming possession of a freehold house which belonged to him. The plaintiff had left his wife, before which they were living together in this house, and on Oct. 21, 1940, the wife obtained from the justices an order for maintenance at the rate of £1 12*s*. per week. It appeared that the justices intimated, although it was not, and, I think, could not be, part of their order, that, so long as the wife continued to occupy the house, the husband could deduct 12*s*. from the £1 12*s*. per week which was ordered to be paid. On Oct. 23, that is, two days after the date of the justices' order, the husband's solicitors wrote to the wife stating that they gave notice that the husband required her to vacate and deliver up to him possession of the premises, together with household furniture and effects therein on or before Monday, Nov. 4. The husband took no immediate steps to recover possession until the issue of the plaint in this action, and meanwhile he continued to pay the wife £1 12*s*. less the 12*s*. which the justices had intimated he might deduct.

The county court judge took the view that the appellant and the respondent by their conduct had created a contract of tenancy between them and that a tenancy existed between them at a rental for the unfurnished house of 12*s*. per week. That is his finding. In my opinion, with all respect to him, that finding cannot possibly stand, as there is no evidence to support it. It is said that the tenancy is to be inferred from the fact that the husband allowed his wife to remain there and that he took advantage of the suggestion of the justices and deducted the 12*s*. a week from the sum which he had been ordered to pay. That and the length of time during which that was done are the only grounds on which it is suggested that a tenancy came into existence. In my opinion, it is quite impossible to infer the relationship of landlord and tenant from those facts. The justices did not purport to create by their order, and could not create by their order, any relationship of landlord and tenant, and it seems to me quite impossible to say, when the husband did no more than take advantage of the suggestion which the justices had made, that he was thereby changing the relationship between himself and his wife with regard to this house and was converting it into something that it was not before, the relationship of landlord and tenant. The fact that the matter went on for a considerable time appears to me to make no difference at all. He was entitled to continue to carry out the suggestion of the justices for as short or as long a time as he pleased, and to say that by carrying it out for so many months he thereby of necessity changed the relationship into one of landlord and tenant seems to me a quite unwarranted suggestion. In these circumstances, therefore, in my opinion, the appeal must be allowed and an order for possession must be made.

Luxmoore, L.J.: I agree.

Goddard, L.J.: I agree. I only want to add one word upon a matter which I raised during the argument and also on a point which counsel for the appellant made as to the effect of treating this as a summons under the Married Women's Property Act, 1882. An action for the recovery of land is the modern equivalent of an action of ejectment. An action of ejectment was a personal action and could only sound in damages. Then it became a mixed action, in which not only damages but the property itself could be recovered, and it is preserved now in the action brought in the High Court, and, I think, in the county court, because a claim for *mesne* profits can be joined with an action for the recovery of the land, and *mesne* profits is only another term for damages for trespass, damages which arise from the particular relationship of landlord and tenant. It is not necessary to decide it in this case, but I have the greatest doubt as to whether a husband can bring an action for the recovery of land against his wife in these circumstances, alleging that she is wrongly in occupation of the land, because, if she is wrongly in occupation of the land and he has a right to eject her, then it seems to me she is a trespasser, and the Married Women's Act, 1882, s. 12 expressly says that a husband cannot bring an action of tort against his wife. There are provisions under which this position can be dealt with. In C.C.R., Ord. 6, r. 4, there is provision for making applications to the court by originating application. Rule 4 provides as follows :

> (1) Any proceedings authorised to be commenced in a county court and not required by any Act or rule to be commenced otherwise, may be commenced by originating application.

And then there are certain provisions in the order with regard to originating applications. One object, no doubt, that the legislature had in providing for these matters to be dealt with by originating application was that it is not always desirable, in the case of disputes between husbands and wives, that they should be dealt with in public when they can be dealt with in chambers, as they are in the High Court or by the county court judge. It seems to me in these matters C.C.R., Ord. 6, should be followed rather than that an action should be brought.

Appeal allowed with costs.

Solicitors : *Hart, Jackson & Sons* (for the appellant) ; *Bell, Brodrick & Gray*, agents for *Pickavance & Heron*, Barrow-in-Furness (for the respondent).

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

Distinguished. *Re* HATCH (*decd.*). [1948] 2 All E.R. 288.

VANDYKE *v.* ADAMS.

[CHANCERY DIVISION (Farwell, J.), **January 13, 21, 1942.**]

Practice—Writ—Service—Substituted service—Defendant a prisoner of war in Germany—Service on solicitor who has acted for defendant—Whether alien enemy—"Enemy"—Trading with the Enemy Act, 1939 (*c.* 89), *s.* 2—*R.S.C., Ord.* 9, *r.* 14B.

The plaintiff had definite information that the defendant was a prisoner of war in Germany or German occupied territory, and it was not possible to serve him in the normal manner. The plaintiff asked for leave to issue a concurrent writ for service out of the jurisdiction, and to make substituted service of a notice of the writ by service of the said notice upon the solicitors, who had hitherto acted for the defendant in this matter ; alternatively he asked for leave to dispense with service under R.S.C., Ord. 9, r. 14B, on the grounds that the defendant was an "enemy" within the meaning of the Trading with the Enemy Act, 1939 :—

HELD : (i) substituted service could not be allowed, since the evidence was insufficient to show that there was a certainty or even any probability that notice of the action would be brought to the defendant's attention. The solicitors had no power of attorney to act for him, nor were they under any duty to communicate with him.

(ii) although sect. 2 of the Trading with the Enemy Act, 1939, might be wide enough to include the defendant as an "enemy," it could not be said, looking at the Act as a whole, that a soldier in His Majesty's Forces detained as a prisoner of war in Germany or German-occupied territory was an "enemy" within the meaning of the Act.

[**EDITORIAL NOTE**. The first point of this case applies well-recognised principles relating to substituted service. The importance of the case lies in the second point. It is shown that the terms of the Trading with the Enemy Act, 1939, s. 2, include in the definition of enemy any person resident in enemy territory. This, upon its literal construction, would include a prisoner of war. The court has, however, found it possible to reject this literal construction and to hold that, looking at the Act as a whole, the definition must be given a narrower meaning which will exclude such a person.

AS TO ENEMY, see HALSBURY, Hailsham Edn., Vol. 1, pp. 447, 448, para. 754 ; and FOR CASES, see DIGEST, Vol. 2, pp. 139-146, Nos. 144-199.]

Cases referred to :

(1) *Porter* v. *Freudenberg*, [1915] 1 K.B. 857 ; 2 Digest 160, *302* ; 84 L.J.K.B. 1001 ; 112 L.T. 313.

(2) *Re an intended action between Churchill & Co., Ltd., and Lonberg*, [1941] 3 All E.R. 137 ; Digest Supp.

Procedure Summons to determine questions of service arising from the fact that the defendant was a prisoner of war. The facts are fully set out in the judgment.

E. M. Winterbotham for the plaintiff.

Farwell, J.: In this summons the plaintiff is claiming leave to issue a concurrent writ for service out of the jurisdiction and to effect substituted service of a notice of the writ by service of the notice upon Messrs. Adams & Adams at an address in London, or, alternatively, an order under R.S.C., Ord. 9, r. 14b, dispensing with the service of the writ of summons on the defendant.

The plaintiff, by a lease dated Apr. 2, 1927, made between a certain Barbara Elizabeth Florence Addenbrooke of the one part and the plaintiff of the other part, became the tenant of 2, Addison Crescent, Kensington, for a term of 21 years from Mar. 25, 1927, subject to the payment of a yearly rent of £300 and the performance of the covenants and conditions on the part of the lessee. Shortly before July 29, 1929, the plaintiff agreed with the defendant to assign to him the lease for the remainder of the term, and, in consideration of the defendant accepting such assignment, the plaintiff agreed to pay the defendant the sum of £550, and he also agreed, as a further part of the consideration, to invest a sum of £300 in the joint names of the plaintiff and the defendant as security for the performance of the covenants and the conditions of the lease, such sum to be paid to the defendant or his personal representative on the expiration of the lease if he should have duly performed such covenants. In the assignment the defendant covenanted to observe the covenant to pay rent and to keep the plaintiff indemnified against any such payment. The assignment itself was dated July 29, 1938. The plaintiff duly invested the sum of £300 in a certain building society which was approved by the defendant and that money stands in the joint names of the plaintiff and the defendant. It appears that at some later date the defendant sublet a portion of the premises at a nominal rent of 10 guineas per annum upon payment of a considerable premium. The rent which became due on Dec. 25, 1939, was not paid by the defendant, nor has he since that date paid any of the rent which have become due. In these circumstances the lessor claimed from the plaintiff payment of the rent, and the plaintiff, being advised that he was bound to pay, accordingly did pay, and has paid in all a sum of over £500 to the lessor in respect of rent of the premises, and no doubt he is still under a continuing liability, so long as the lease remains, to pay the rent and perform the covenants. The plaintiff is claiming in the action primarily to have the sum of £300 standing in the building society in the joint names released to him as some compensation for the money he has to pay as a result of failure by the defendant to observe the covenants of the lease. Now it appears that the defendant was an officer in His Majesty's Army. Comparatively early in the war he was taken prisoner by the Germans and has been ever since and is now detained as a prisoner of war by the Germans either in Germany or in German occupied territory. That being so, personal service upon him is impossible, and the plaintiff desires to obtain service by means of substituted service if he can make out a proper case for that. Now what he is suggesting is that a notice of the writ should be served upon Messrs. Adams & Adams, the solicitors who have acted in the past for the defendant and who acted for him in the matter of the assignment of the lease in question. It appears from the evidence that the solicitors hold no power of attorney. They are merely solicitors who have acted for the defendant in the past. It may be that, if he were able to conduct business in the ordinary way, he would instruct the same solicitors to act for him now; but he is not in a position to give any instructions to solicitors at all, and they, having no power of attorney from the defendant, feel that they naturally are not in a position to accept service. It is said, however, that, if they are served with the notice, as is suggested, they will be able to communicate with the defendant and to inform him of the institution of these proceedings. It is further said that one of the members of the firm is a relative of the defendant and that, through a relation at any rate, the defendant should get to know of the existence of the action, and it is suggested that, in those circumstances, substituted service should be permitted in the way which is suggested.

Now the question when substituted service is permissible was considered in *Porter* v. *Freudenburg* (1) and it has recently been considered in the Court of Appeal in *Churchill* v. *Lonberg* (2). Lord Greene, M.R., in the later case, cited a passage from *Porter* v. *Freudenberg* (1), defining what it is necessary to prove in order to justify substituted service and said at p. 138 :

> The court then laid down considerations which a judge in chambers must have in mind when dealing with applications of this kind, He must satisfy himself as to the practical impossibility of actual service, and then he must satisfy himself " that the method of substituted service asked for . . . is one which will in all reasonable probability, if not certainty, be effective to bring knowledge of the writ or the notice of the writ (as the case may be) to the defendant."

Now in this part of the case the only question I have to determine is whether the evidence is sufficient to satisfy me that the method which is suggested for service is one which will in all reasonable probability, if not certainty, be effective to bring knowledge of the writ to the defendant. It is said that knowledge of the writ will be brought to the defendant because the solicitors who have acted for him in the past will probably communicate with him, and, even if they do not, the relative who is a member of the firm will communicate with him. I am unable to say myself that the evidence satisfies me that there is such a reasonable probability or certainty that the notice of the action will be brought to the knowledge of the defendant. The solicitors are not under any duty to communicate with the defendant. They are not permanently his solicitors, though they have acted as his solicitors in the past. It may be that they would probably write to him about the action. Whether he would get the letter and whether they would write to him are matters of speculation, and I am not able to say that the fact that they were the solicitors who acted for the defendant is sufficient to justify me to coming to the conclusion that this case is within the class of case where substituted service would be allowed. The fact that there is a relative of the defendant in the firm of solicitors does not seem to me to carry the matter any further. It is said that a private letter would probably get to the defendant, and that it is probable that the relation would write to the prisoner about the matter ; but again it is pure speculation and I am unable to say that I am satisfied that there is a reasonable probability, if not certainty, that that method of substituted service will be effective to bring knowledge of the writ or notice of the writ to the defendant. Therefore, I feel bound to come to the conclusion that this is not a case on the first ground, at any rate, upon which I can assent to the means of service desired.

The plaintiff, however, puts his case on another ground. He seeks to make use of a very recent rule, by which service can be dispensed with. The rule in question is R.S.C., Ord. 9, r. 14B, and is in these terms :

> (1) Subject to the provisions of this rule, the court or a judge may dispense with service of a writ of summons or a notice of a writ of summons on any defendant who is an enemy within the meaning of the Trading with the Enemy Act, 1939, as amended by or under any enactment. (2) An order shall not be made dispensing with service on any defendant under this Rule unless (*a*) the court or judge is satisfied that prompt personal service on such defendant is impossible, or if effected could not be proved, and that the case is not one in which an application for an order for substituted service on such defendant ought to be made . . .

So far as para. (2) (*a*) of the rule is concerned, the plaintiff has fulfilled its requirements. Then para. (*b*) provides as follows :

> (*b*) the applicant produces to the court or judge a statement of claims igned by counsel, an affidavit showing that the applicant is entitled on merits to succeed in the action.

I have before me the statement of claim and an affidavit by the plaintiff who says that he is advised that there is no defence to the action. The question, therefore, in this case resolves itself into this : Is the defendant an enemy within the meaning of the Trading with the Enemy Act, 1939 ? Now at first sight at any rate it sounds fantastic to suggest that a soldier of His Majesty's Army who has been taken prisoner and who has been detained as a prisoner in Germany or German occupied territory is an alien enemy. At first sight that strikes one as so absurd as to be fantastic. It is said, however, that the question of an alien enemy is one which depends upon whether the person in question is a alien enemy within the meaning of the Trading with the Enemy Act, 1939, and that by sect. 2 of that Act it is provided that subject to the provisions of that section the expression "enemy," for the purpose of that Act, means, *inter alia*, any individual resident in enemy territory. In this case it is said that here is a man who, although not in any proper sense an enemy at all, is an individual resident in enemy territory and, although he is so resident against his own will and under detention by the enemy as a prisoner, nevertheless the section is expressed in terms so wide, that he comes within the definition of an alien enemy. That being so, it is said that the rule applies in the present case, and service of the writ upon him should be dispensed with. No doubt it is true in one sense to say that the defendant is resident in Germany or German-occupied territory. He is so resident in no sense as a result of his own free will or under anything other than *force majeure*. When one considers the Trading with the Enemy Act as a whole, and the purpose for which it was passed, I cannot bring myself to believe that it A was ever intended that a person, merely because he is detained as a prisoner of war in Germany, is to be termed an enemy within the meaning of R.S.C., Ord. 9, r. 14B. It may be that the language by itself might, if nothing else but one subsection is looked at, be wide enough to include such a person as the defendant. When one considers the whole purpose of the Trading with the Enemy Act, 1939, it seems that it cannot be the result that a person in the position of the defendant, comes within the meaning of the words "an enemy," B even as used in that Act. In my judgment, I cannot hold that a soldier of His Majesty's Army who has the misfortune to be taken prisoner during the war, and who has since been detained as a prisoner in Germany, is an enemy in any sense of the word at all. In the circumstances, I am not prepared to make an order to dispense with service in the present case. I feel that the position of the plaintiff is a most unfortunate one. No doubt, if it is possible to bring the matter C before the courts, he will have a strong case for the relief which he is seeking in the action, but, in my judgment, that is not enough to enable me to come to the conclusion that service in the present case can be dispensed with.

Summons dismissed; no order as to costs. Leave to appeal to the Court of Appeal.

Solicitors: *Coode, Kingdon Cotton & Ward.*

[*Reported by* Irene G. R. Moses, *Barrister-at-Law.*]

D

CROFTER HAND WOVEN HARRIS TWEED CO., LTD., AND OTHERS v. VEITCH AND ANOTHER.

[House of Lords (Viscount Simon, L.C., Viscount Maugham, Lord Thankerton, Lord Wright and Lord Porter), **March 20, 21, 25, 28, April 1, 3, 28, December 15, 1941.**] E

Trade and Trade Unions—Torts arising out of operations of trade unions—Conspiracy—Position at common law—Acts causing loss—Real purpose of combiners—Embargo.

Harris tweed was originally made in the islands of the Outer Hebrides from yarn spun by hand in the islands and woven there in the crofters' cottages. It was thus a hand-produced and an island-produced product. F By 1930 the hand-spinning of wool into yarn had ceased to be commercially practicable, and from that time many of the weavers on the island of Lewis imported yarn from the mainland. There were, however, on the island, five spinning mills, and the yarn spun by these mills was woven by crofters on the island. The millowners alleged that the cloth woven in the island from mainland yarn could be sold at a much cheaper price than that made from the yarn spun in the island, and negotiations had been G carried on with the object of fixing a minimum selling price. 90 per cent. of the workpeople in the mills were members of the Transport and General Workers' Union, and the dockers at the docks on the island were also members of that union. The union were anxious that none but members of their union should be employed in the spinning mills and approached the millowners with the object of securing this, and an increase in wages. The millowners replied that they could not agree to this on account H of the competition of the crofters who wove yarn imported from the mainland. After considerable negotiation the respondents, who were the Scottish Area Secretary of the Union and the Branch Secretary for Stornaway, imposed an embargo at the port of Stornaway, the main port on the island of Lewis, upon all Harris tweed despatched by the crofters who had woven Harris tweed from mainland yarn. The effect of the embargo was to stop the sale of tweed made from mainland yarn and to allow the sale of tweed made from island-spun yarn. The appellants were seven producers in a small way of tweed made from the mainland-spun yarn, and they brought this action against the two union officials claiming that, in imposing the embargo, they had conspired to injure the appellants, since the natural result of the embargo was the destruction of the appellants' businesses. It was, however, found as a fact that the real purpose with which the embargo was imposed was to benefit the employees who were members of the union :—

HELD : the real purpose of the embargo being to benefit the members of the trade union, the fact that it inflicted damage upon the appellants did not make it an unlawful conspiracy which was actionable at law.

[**EDITORIAL NOTE.** It is an actionable wrong for two or more persons to combine together for the purpose of injuring another, if damage results to that other from the combination, and the real purpose of the combination is to injure that other. These words seem to set out in a satisfactory form the proposition of law upon which the decision in this case turns. The length of the opinions given herein seem to show that the point cannot be taken to have been finally determined before the decision in this case, although it is probable that many will agree with LORD THANKERTON that this case is really a question of fact. The real point in the law of conspiracy here discussed has previously been referred to in a great variety of terms. Some judgments have spoken of "just cause" or "justification" for the act done in combination. Others have spoken of the "malice" or "malicious intention" of the combiners. Others again have spoken of "motive." It is here pointed out that whatever term may be used, the matter to be considered is the real purpose of the combination. It is easy to understand and to explain why there should have been so many different terms used in reference to this matter, because it is clear that, in nearly every case, there will be what has been termed "a mixed motive" for the conspiracy ; and the analysis of a mixed motive has always been a difficult subject. It seems to be suggested that the only means of ascertaining the dominant motive in such a case is either to leave the matter to a jury, or for the judge himself to put it to himself as standing in the place of the jury. In most cases, it would seem to be merely a question of individual opinion which is the dominant motive amongst a number of motives, and, in this case, it must be clearly remembered that the court of first instance found as a fact that the dominant motive of the combiners was to benefit the union. The court of appeal in Scotland came to the same conclusion, and, this being a question of fact, it could only in the most exceptional circumstances be overruled in the House of Lords. It is difficult to part from the case without referring to the opinion of LORD WRIGHT. It will be found to contain a very careful analysis of the development of the common law with regard to conspiracy in the last century. It points out how important it is to bear in mind exactly what the common law decided was in the public interest, or, in other words, what was not against public policy. If one remembers the conditions of employment at the beginning of the century, it may seem strange that the judges should so early have taken a view so favourable to the workmen, in that it disregarded to a great extent the loss to employers by the withholding of labour. Such loss was not allowed to defeat the rights of the workmen arising from the fact that they worked under a contract of employment, which, subject to its terms, they were free to determine as and when they chose.

AS TO CONSPIRACY ARISING OUT OF OPERATIONS OF TRADE UNIONS, see HALSBURY, Hailsham Edn., Vol. 32, pp. 522-524, paras. 820, 821 ; and FOR CASES, see DIGEST, Vol. 43, pp. 112-117, Nos. 1171-1214.]

Cases referred to :

(1) *Mogul S.S. Co.* v. *McGregor, Gow & Co.*, [1892] A.C. 25 ; 43 Digest 10, *51* ; 61 L.J.Q.B. 295 ; 66 L.T. 1 ; *affg.* (1889), 23 Q.B.D. 598 ; (1888), 21 Q.B.D.544.
(2) *Bridgewater Case* (prior to 1880), cited in 57 L.J.Q.B. at p. 543 ; 14 Digest 114, *828*.
(3) *R.* v. *De Berenger* (1814), 3 M. & S. 67 ; 15 Digest 1016, *11,416*.
(4) *Sorrell* v. *Smith*, [1925] A.C. 700 ; 43 Digest 113, *1183* ; 94 L.J.Ch. 347 ; 133 L.T. 370.
(5) *Allen* v. *Flood*, [1898] A.C. 1 ; 43 Digest 111, *1164* ; 67 L.J.Q.B. 119 ; 77 L.T. 717.
(6) *Quinn* v. *Leathem*, [1901] A.C. 495 ; 43 Digest 112, *1179* ; 70 L.J.P.C. 76 ; 85 L.T. 289.
(7) *Giblan* v. *National Amalgamated Labourers' Union of Great Britain & Ireland*, [1903] 2 K.B. 600 ; 43 Digest 118, *1226* ; 72 L.J.K.B. 907 ; 89 L.T. 386.
(8) *Bowen* v. *Hall* (1881), 6 Q.B.D. 333 ; 42 Digest 988, *174* ; 50 L.J.Q.B. 305 ; 44 L.T. 75.
(9) *Conway* v. *Wade*, [1909] A.C. 506 ; 43 Digest 120, *1237* ; 78 L.J.K.B. 1025 ; 101 L.T. 248.
(10) *Ware & De Freville, Ltd.* v. *Motor Trade Assocn.*, [1921] 3 K.B. 40 ; 43 Digest 124, *1264* ; 90 L.J.K.B. 949 ; 125 L.T. 265.
(11) *Mulcahy* v. *R.* (1868), L.R. 3 H.L. 306 ; 42 Digest 983, *137*.
(12) *Kearney* v. *Lloyd* (1889), 26 L.R. Ir. 268 ; 42 Digest 986, case *e*.

(13) *R.* v. *Rowlands* (1851), 17 Q.B. 671 ; 14 Digest 115, *844* ; 21 L.J.M.C. 81 ; 18 L.T.O.S. 346.
(14) *Lumley* v. *Gye* (1853), 2 E. & B. 216 ; 42 Digest 987, *169* ; 22 L.J.Q.B. 463.
(15) *Temperton* v. *Russell*, [1893] 1 Q.B. 715 ; 42 Digest 987, *170* ; 62 L.J.Q.B. 412 ; 69 L.T. 78.
(16) *Bradford Corpn.* v. *Pickles*, [1895] A.C. 587 ; 42 Digest 972, *34* ; 64 L.J.Ch. 759 ; 73 L.T. 353.
(17) *Hodges* v. *Webb*, [1920] 2 Ch. 70 ; 43 Digest 121, *1240* ; 89 L.J.Ch. 273 ; 123 L.T. 80.
(18) *Scottish Co-operative Wholesale Society* v. *Glasgow Fleshers' Trade Defence Assocn.* (1898), 35 Sc.L.R. 645 ; 43 Digest 114, case *1184 v.*
(19) *Thorne* v. *Motor Trade Assocn.*, [1937] A.C. 797 ; [1937] 3 All E.R. 157 ; Digest Supp. ; 106 L.J.K.B. 495 ; 157 L.T. 399.
(20) *Thompson* v. *British Medical Assocn.* (*N.S.W. Branch*), [1924] A.C. 764 ; 43 Digest 112, *1173* ; 93 L.J.P.C. 203 ; 131 L.T. 162.
(21) *Gregory* v. *Brunswick* (*Duke*) (1844), 6 Man. & G. 953 ; 42 Digest 972, *32* ; 2 L.T.O.S. 188 ; *on appeal* (1846), 3 C.B. 481 ; (1849), 2 H.L. Cas. 415.
(22) *Vegelahn* v. *Guntner* (1896), 167 Mass. 92.
(23) *R.* v. *Jones* (1832), 4 B. & Ad. 345.
(24) *R.* v. *Parnell* (1881), 14 Cox, C.C. 508 ; 14 Digest 110, case *q.*
(25) *R.* v. *Eccles* (1783), 1 Leach, 274 ; 14 Digest 118, *881.*
(26) *Jones* v. *Randall* (1774), Lofft. 383 ; 1 Cowp. 37 ; 12 Digest 263, *2155.*
(27) *A.-G. of Commonwealth of Australia* v. *Adelaide S.S. Co., Ltd.*, [1913] A.C. 781 43 Digest 12, *68* ; 83 L.J.P.C. 84 ; 109 L.T. 258.
(28) *White* v. *Riley*, [1921] 1 Ch. 1 ; 42 Digest 968, *7* ; 89 L.J.Ch. 628 ; 124 L.T. 168.
(29) *Boots* v. *Grundy* (1900), 82 L.T. 769 ; 43 Digest 117, *1217.*
(30) *Reynolds* v. *Shipping Federation, Ltd.*, [1924] 1 Ch. 28 ; 43 Digest 118, *1223* ; 93 L.J.Ch. 70 ; 130 L.T. 341.
(31) *Brimelow* v. *Casson*, [1924] 1 Ch. 302 ; 43 Digest 115, *1194* ; 93 L.J.Ch. 256 ; 130 L.T. 725.
(32) *Smithies* v. *National Assocn. of Operative Plasterers*, [1909] 1 K.B. 310 ; 43 Digest 115, *1197* ; 78 L.J.K.B. 259 ; 100 L.T. 172.
(33) *South Wales Miners' Federation* v. *Glamorgan Coal Co.*, [1905] A.C. 239 ; 43 Digest 114, *1186* ; 74 L.J.K.B. 525 ; 92 L.T. 710 ; *affg.* S.C. *sub nom. Glamorgan Coal Co.* v. *South Wales Miners' Federation*, [1903] 2 K.B. 545.

APPEAL by the company from a decision of the Second Division of the Court of Session (LORD MACKAY dissenting) affirming a decision of the LORD ORDINARY (LORD JAMIESON). The facts are fully set out in the opinion of VISCOUNT SIMON, L.C.

Hill Watson, K.C., and *C. Cohen* for the appellants.
G. R. Thomson, K.C., and *J. Walker* for the respondents.

VISCOUNT SIMON, L.C. : My Lords, the appellants are seven producers of tweed cloth in the island of Lewis in the Outer Hebrides. Their business is carried on by purchasing yarn, which they give out to crofters for weaving in their own homes, so that the appellants may sell the tweed so woven. The respondent Veitch is the Scottish area secretary of the Transport and General Workers' Union, which is a trade union, and the respondent Mackenzie is the Stornoway branch secretary of the union. The appellants are seeking interdict against the two respondents in order to stop what is called an embargo imposed by their order or inducement upon all yarn arriving for the appellants at the port of Stornoway, which is the main port on the island and is connected by a service of steamers with the mainland, and upon certain tweeds despatched by the appellants from that port. In argument before this House, it was conceded that no issue is involved which might bring into the case any provision of the Trades Disputes Act, 1906. The respondents are sued as individuals and not in any representative capacity. The question is whether the appellants have established that the respondents have committed a delict or tort at common law against them by thus interfering with their trade. It was not suggested that, as regards the law applicable to the present action, there was any material difference between the Scottish law of delict and the English law of tort.

The dockers at Stornoway are all members of the trade union, and as from Jan. 24, 1938, they refused to handle yarn imported from the mainland and consigned to the appellants, and also cloth made by the appellants which the appellants wished to export. This refusal was in accordance with the instructions of the respondent Veitch, which were communicated by him to the respondent Mackenzie, and were passed on by the latter to the dockers, who at once complied. The embargo against the exportation of finished tweeds was raised four days later, but in other respects the embargo continued, both as regards the importation of yarn for the appellants and as regards the exportation of their unfinished tweed, despatched for "finishing" on the mainland, until interim interdict was granted on Feb. 24, 1938. On the trial of the cause in Mar. 1939, the Lord Ordinary (Lord Jamieson) gave judgment for the present respondents and recalled the interim interdict. On appeal to the Second Division, this decision was affirmed (*dissentiente* Lord Mackay). The matter now comes before this House, and we have been much assisted in examining what is undoubtedly a difficult case by the arguments of counsel on each side.

The evidence is voluminous, and gave rise to a large number of questions as to the effect of it and as to the inferences to be drawn from it. For much of this detail I would refer to the full and careful judgments which have been delivered in Scotland. I accept, broadly speaking, the account given by Lord Jamieson, and the majority in the Court of Session, of the facts derived or deduced from that evidence. On one conclusion, however, which is apparently reached by the majority of the Inner House I must express my hesitation later on. For the purposes of laying the basis of fact upon which my view of the legal consequences rests, it is sufficient to summarise the ascertained situation thus. The description "Harris tweed" was originally applied to woollen cloth which was not only woven by hand-looms in the cottages of the Outer Hebrides, but was so woven out of yarn spun by hand in the islands. (The trade-name "tweed" is not, it appears, derived from the river near which the cloth-weaving industry of Galashiels and neighbouring towns is established. It is a transformation, now nearly a century old, of the word "twill.") Moreover, Harris tweed was hand-finished in the islands. It was thus a hand-produced and island-produced product throughout, and in 1911 a company limited by guarantee was registered under the name of the Harris Tweed Association, Ltd., which obtained a trade mark (referred to as the "stamp") under the Trades Mark Act, 1905, s. 62, to apply to Harris tweed which satisfied these conditions. After a time, the hand-spinning of wool into yarn ceased to be commercially practicable, and in 1934 the conditions of the trade mark were varied, with the result that it could apply to tweed hand-woven by the islanders in their own homes out of yarn spun in island spinning-mills, and finished in the island-mills instead of by hand. Five such spinning-mills have been established in Lewis. They do not use weaving machinery, but, by placing their yarn in the hands of the hand-weaving crofters, cloth is produced which the mill-owners, after finishing it, can sell under the stamp. Ninety per cent. of the spinners in the mills are members of the Transport and General Workers' Union, the same trade union as that to which all the Stornoway dockers belong. The percentage of trade-unionists among the weavers in the cottages is much smaller. The officials of the union desired that none but members of their union should be employed, but, when this was asked of the mill-owners in 1935, together with a rise in spinners' wages, the answer of the mills was that this was, in existing circumstances, impossible, and that a reduction in wages was more likely, owing (as was alleged) to the cut-throat competition of independent producers of cloth such as the appellants, who obtained their supplies of yarn from the mainland at a cheaper price than that charged by the mills. Cloth made out of mainland yarn could not carry the stamp though it could be sold as Harris tweed as having been woven in the island.

How far there really was injurious competition may be seriously questioned, but there is no evidence that the union officials did not believe it, and what is clear is that the union official then mainly concerned, Buchan, set himself to assist in establishing a minimum selling price for island cloth, and that he, and after him Veitch, conceived that it would benefit their union members if conditions of collective bargaining could be established in the island between employers and employed. To this end, Buchan in 1935 proposed to Skinner, the secretary of the Mill-Owners' Association, a scheme whereby the trade union could:

> . . . provide definite safeguards to the successful operation of a minimum selling price.

He added:

> . . . the only argument that price-cutters will ever understand and appreciate will

be the joint powers of the employers and this union to put them out of business if they refuse loyally to abide by minimum selling prices as fixed from time to time by the Harris Tweed Producers Association.

Skinner and the Mill-Owners' Association did not wish to avail themselves of Buchan's proposals at that time, and, indeed, throughout would seem to have preferred, if it had been possible, to get a settlement as to prices without trade union pressure. There remained on the side of the trade union a constant desire to secure 100 per cent. trade union membership. A long and complicated A story of discussions and interviews followed, at the end of which the effort to secure by negotiation minimum prices and the use of none but island-spun yarn failed, Skinner informed Veitch that a settlement had not been reached, and an interview between them in Edinburgh took place five days before Veitch gave orders for the embargo. The appellants have strenuously argued that there was a combination between Veitch and Skinner to impose the embargo, and in particular rely on Veitch's letter to Mackenzie of Jan. 19, 1938, requesting B the latter to give instructions to the dockers, and containing the significant sentence:

> This action will complete our deal with the employers and we will have 100 per cent. membership, not only in the mills but also in the weaving section.

My own view is, in accord with that of the Lord Ordinary (with which at least one member of the Inner House, Lord Wark, was disposed to agree), that, C suspicious as the circumstances are, there is not sufficient evidence to establish that Skinner was combining with the respondents to impose the embargo. He was aware of the intention to impose it, and he approved of it, and was apparently willing to concede 100 per cent. membership to the union if his trade rivals were put out of business or compelled to buy yarn from the mills, but I am not prepared to hold that the respondents struck at the appellants because of a bargain so to do between Skinner and themselves. D

Such being the facts of this case as I take them to be, the question to be decided is whether the appellants have proved that the respondents are liable to them for illegal conspiracy. In other words, is it proved that the two respondents combined together " to injure " the appellants in the way of their trade, and that the appellants have suffered damage from the respondents' illegal action ? Conspiracy, when regarded as a crime, is the agreement of two or more persons to effect any unlawful purpose, whether as their ultimate aim or only as a means E to it, and the crime is complete if there is such agreement, even though nothing is done in pursuance of it. (I am omitting consideration of those cases on the borderland of illegality, where the combination was held to amount to a criminal conspiracy because the purpose aimed at, though not perhaps specifically illegal, was one which would undermine principles of commercial or moral conduct.) The crime consists in the agreement, though in most cases overt acts done in F pursuance of the combination are available to prove the fact of agreement. The tort of conspiracy, however, is constituted only if the agreed combination is carried into effect in a greater or less degree and damage to the plaintiff is thereby produced. It must be so, for, regarded as a civil wrong, conspiracy is one of those wrongs (like fraud or negligence) which sounds in damage, and a mere agreement to injure, if it was never acted upon at all and never led to any result affecting the party complaining, could not produce damage to him. The G distinction between the essential conditions to be fulfilled by the crime and the tort respectively are conveniently set out by Lord Coleridge, L.C.J., in his judgment in *Mogul S.S. Co.* v. *McGregor, Gow & Co.* (1), at p. 549 :

> . . . in an indictment it suffices if the combination exists and is unlawful, because it is the combination itself which is mischievous, and which gives the public an interest to interfere by indictment. Nothing need be actually done in furtherance of it. In the *Bridgewater* case (2) referred to at the bar, in which I was counsel, nothing was done H in fact ; yet a gentleman was convicted because he had entered into an unlawful combination from which almost on the spot he withdrew, and withdrew altogether. No one was harmed, but the public offence was complete. This is in accordance with the express words of Bayley, J., in *R.* v. *de Berenger* (3), at p. 76. It is otherwise in a civil action : it is the damage which results from the unlawful combination itself with which the civil action is concerned. . . . Once more, to state the proposition somewhat differently with a view to some of the arguments addressed to me, the law may be put thus. If the combination is unlawful, then the parties to it commit a misdemeanour and are offenders against the state ; and if, as the result of such unlawful combination

and misdemeanour, a private person receives a private injury, that gives such person a right of private action.

There is nothing, I think, in the majority judgments in the *Mogul* case (1) in the Court of Appeal, or in the speeches delivered on the appeal in that case to this House, which conflicts in any way with the above propositions, which, indeed, are now well-established. The appellants, therefore, in order to make out their case, have to establish (*a*) agreement between the two respondents (*b*) to effect an unlawful purpose (*c*) resulting in damage to the appellants. As regards (*c*), there can here be no doubt. Instructing or persuading the dockers at Stornoway to refuse to handle imports of mainland-spun yarn arriving for delivery to the appellants was an interference with the appellants' normal source of supply, which was bound to damage their business. Still more, perhaps, was it an injury to the appellants by these means to prevent the sending of their unfinished cloth to the mainland. Indeed, it is one of the most serious aspects of this case, and an aspect which I deplore, that the action taken against the appellants not merely put pressure on them to adopt new arrangements, but might well destroy their business altogether without offering any *locus poenitentiae*. Whether this consideration affects the ultimate conclusion must be considered hereafter.

I am equally satisfied about (*a*). It was argued that the respondent Mackenzie should not be regarded as acting in combination with the respondent Veitch so as to establish the element of agreement between them in the tort of conspiracy, because Veitch held the responsible position of Scottish area secretary to the union, whereas Mackenzie was only branch secretary for Stornoway This, I think, is an unsound contention. The respective position of the two men in the hierarchy of trade union officials has nothing to do with it. Even if Mackenzie could be regarded as only obeying orders received from his superior, the combination would still exist if he appreciated what he was about. However, his share in the matter was more than this. Mackenzie is the representative of the union in the island of Lewis. He took the principal part in securing that the dockers at Stornoway should not handle the appellants' goods. There is no ground for supposing that he did not approve of the course taken, and he appears to have co-operated willingly. The LORD ORDINARY, after a full and careful hearing, came to the conclusion of fact that :

> . . . the immediate purpose of Mr. Veitch and Mr. Mackenzie was to force producers to come to an agreement regarding the selling price of tweed and the exclusive use of island-spun yarn. The means adopted necessarily inflicted injury on the petitioners.

He went on to hold expressly that Mackenzie was a party with Veitch to the combination, on the grounds which I have indicated above. Points (*a*) and (*c*) are, therefore, conclusively disposed of.

The only difficulty in the case arises under (*b*). What exactly is meant, in this branch of the law, by a combination to effect an unlawful purpose ? LORD CAVE, L.C., in *Sorrell* v. *Smith* (4), when what he called " the famous trilogy of cases in Your Lordships' House," *Mogul S.S. Co.* v. *McGregor, Gow & Co.* (1), *Allen* v. *Flood* (5) and *Quinn* v. *Leatham* (6), were submitted to a close examination in order to extract from them the principles involved, formulated as a result two propositions of law, which he stated as follows, at p. 712 :

> (1) A combination of two or more persons wilfully to injure a man in his trade is unlawful and, if it results in damage to him, is actionable. (2) If the real purpose of the combination is, not to injure another, but to forward or defend the trade of those who enter into it, then no wrong is committed and no action will lie, although damage to another ensues.

It should be observed that these two propositions, as LORD CAVE, L.C., said, were formulated as material for the decision of the case then before the House, and they may not turn out to be either as complete or as easy to apply in some other cases involving widely different circumstances. At any rate, I find it necessary, for the purpose of deciding the present appeal, to enter upon some further analysis.

It seems to me that the subject may be usefully approached by beginning with some preliminary propositions, not in themselves, I think, open to challenge at this time of day. In stating these propositions, I shall try to distinguish between " damage " and " injury," following the stricter diction, derived from the civil law, which more especially prevails in Scottish jurisprudence. So used, "injury" is limited to actionable wrong, while "damage," in contrast with injury, means loss or harm occurring in fact, whether actionable as an injury or not. As BOWEN, L.J., said in the *Mogul* case (1), at p. 612:

> An intent to "injure," in strictness, means more than intent to do harm. It connotes an intent to do wrongful harm.

First, then, apart from the effects of combination, it is clear that, first, if A is damaged by the action of B, A nevertheless has no remedy against B if B's act is lawful in itself and is carried out without employing unlawful means. In such a case, A has to endure *damnum absque injuria*. Secondly, it makes no difference to the above proposition that B in so acting had the purpose of damaging A. A bad motive does not *per se* turn an individual's otherwise lawful act into an unlawful one. Thirdly, if C has an existing contract with A and B is aware of it and persuades or induces C to break the contract with resulting damage to A, this is, generally speaking, a tortious act, for which B will be liable to A for the injury he has done him. In some cases, however, B may be able to justify his procuring of the breach of contract—e.g., a father may persuade his daughter to break her engeagment to marry a scoundrel. (This is not, of course, to say that the scoundrel would not have an action against the daughter for breach.) The father's justification arises from a moral duty to urge C that the contract should be repudiated.

So far, there is, I apprehend, little to dispute about. However, if the act which damages A is not that of a single individual, but is due to a combination of two or more persons, then it is no longer possible to say that motive or purpose is immaterial. If, to use the language of LORD CAVE, L.C., the real purpose of the combination is the inflicting of damage on A, as distinguished from serving the *bona fide* and legitimate interests of those who so combine, then, if damage results to A, the act is tortious. LORD HALSBURY, L.C., observed in the *Mogul* case (1), at p. 38:

> I do not deny that there are many things which might be perfectly lawfully done by an individual, which, when done by a number of persons, becomes unlawful.

Many citations to the same effect might be made from opinions given since then in your Lordships' House. The proposition itself as to a wider range of liability for acts done in combination is now well-established, though the legal reason for it may not be so easy to state. LORD BRAMWELL in the *Mogul* case (1) observed that it had been objected that it was strange that that should be unlawful if done by several which was not unlawful if done by one, and he offered some suggestions as an explanation, at p. 45. The view that the explanation is to be found in the increasing power of numbers to do damage beyond what one individual can do is open to the obvious answer that this depends on the personality and influence of the individual. In the play, Cyrano de Bergerac's single voice was more effective to drive the bad actor Montfleury off the stage than the protests of all the rest of the audience to restrain him. The action of a single tyrant may be more potent to inflict suffering on the continent of Europe than a combination of less powerful persons. When the *Mogul* case (1) was before the Court of Appeal, BOWEN, L.J., observed, at p. 616:

> The distinction is based on sound reasoning, for a combination may make oppressive or dangerous that which if it proceeded only from a single person would be otherwise, and the very fact of combination may show that the object is simply to do harm, and not to exercise one's own just rights.

There is, however, another possible line of explanation which legal history suggests. Conspiracy, like libel, may be a crime. As a crime, it was developed by the Court of Star Chamber, and, on the abolition of that court, the crime as thus developed became a common law misdemeanour. Hence, according to HOLDSWORTH'S HISTORY OF ENGLISH LAW, Vol. VIII, p. 392, just as the courts came to the conclusion that, if the defamation was written, so that the crime of libel had been committed, an action of tort lay at the suit of the injured party (in this instance without the need to allege and prove special damage), so, in the case of conspiracy, an action in the nature of an action on the case would lie for damages at the suit of the party suffering, though here the gist of the action is that damage was inflicted by defendants who combined together for the purpose of inflicting it. However the origin of the rule may be explained, I take it to be clear that there are cases in which a combination of individuals to act in a certain way, resulting in deliberate damage to others, is actionable, even though the same thing, if done by a single individual without any element of combination, would not expose him to liability. In the present case, the evidence did not support an allegation that the defendants, or either of them, had procured a breach of contract, and, if one of them, acting alone, had, without employing unlawful means, induced the dockers to refuse to handle the appellants' goods, I cannot see that any action would have lain against him. Everything turns, therefore, on whether the two respondents were engaged in a combination " to injure " in the sense in which that phrase is employed when liability results. It is to this question that I now address myself.

On this question of what amounts to an actionable conspiracy " to injure " (I am assuming that damage results from it), I would first observe that some confusion may arise from the use of such words as " motive " and " intention." Lord Dunedin in *Sorrell* v. *Smith* (4), at p. 724, appears to use the two words interchangeably. There is the further difficulty that, in some branches of the law, " intention " may be understood to cover results which may reasonably flow from what is deliberately done, on the principle that a man is to be treated as intending the reasonable consequence of his acts. Nothing of the sort appears to be involved here. It is much safer to use a word like " purpose " or " object." The question to be answered, in determining whether a combination to do an act which damages others is actionable even though it would not be actionable if done by a single person, is not : " Did the combiners appreciate, or should they be treated as appreciating, that others would suffer from their action ? " It is : " What is the real reason why the combiners did it ? " Or, as Lord Cave, L.C., puts it : " What is the real purpose of the combination ? " The test is not what is the natural result to the plaintiffs of such combined action, or what is the resulting damage which the defendants realise, or should realise, will follow, but what is in truth the object in the minds of the combiners when they acted as they did. It is not consequence that matters, but purpose. The relevant conjunction is not, " so that," but, " in order that." Next, it is to be borne in mind that there may be cases where the combination has more than one " object " or " purpose." The combiners may feel that they are killing two birds with one stone, and, even though their main purpose may be to protect their own legitimate interests notwithstanding that this involves damage to the plaintiffs, they may also find a further inducement to do what they are doing by feeling that it serves the plaintiffs right. The analysis of human impulses soon leads us into the quagmire of mixed motives, and, even if we avoid the word " motive," there may be more than a single purpose or object. It is enough to say that, if there is more than one purpose actuating a combination, liability must depend on ascertaining the predominant purpose. If that predominant purpose is to damage another person and damage results, that is tortious conspiracy. If the predominant purpose is the lawful protection or promotion of any lawful interest of the combiners, it is nor a tortious conspiracy, even though it causes damage to another person.

It will be observed that the above analysis tends to show that the two propositions of Lord Cave, L.C., in *Sorrell* v. *Smith* (4) are not necessarily exhaustive. He contrasts a combination wilfully to injure a man in his trade with a combination the real purpose of which is, not to injure another, but to forward or defend the trade of those who enter into it. It is possible to imagine a combination the purpose of which does not fall within either of these two classes—a combination, for example, to demonstrate the power of those combining to dictate policy or to prove themselves masters in a given situation. In such a case, the purpose or object might well be neither wilfully to damage a man in his trade, on the one hand, nor to forward or defend trade interests in a situation where they would otherwise suffer on the other. If, for example, the millowners in the present case had promised a large subscription to the trade union funds as an inducement to bribe the respondents to take action to smash the appellants' trade, I cannot think that the respondents could excuse themselves for combining to inflict this damage merely by saying that their predominant purpose was to benefit the funds of the union thereby.

It may well be that in this corner of the law it is not possible to lay down with precision an exact and exhaustive proposition, like an algebraical formula,

which will provide an automatic answer in every case which may arise by substituting the actual instance for a generalisation. There is an interesting passage in the recently published correspondence between O. W. HOLMES, J., of the United States Supreme Court and SIR FREDERICK POLLOCK, which, in discussing some earlier cases, suggests as much: Holmes-Pollock Letters, Vol. I, p. 65. LORD DUNEDIN, I think, had the same view in mind when, in his opinion in *Sorrell* v. *Smith* (4), he referred to the test furnished by [p. 717] "that inner standard of right and wrong." The disclaimer of LORD SUMNER, A
in the same case, of an ability to draw any definite line [p. 742] " between acts, whose real purpose is to advance the defendants' interest, and acts, whose real purpose is to injure the plaintiff in his trade " points in the same direction. The exoneration provided by " justification " or " just cause " to which LORD CAVE, L.C., refers is an alternative way of indicating the limit between combinations which are lawful and combinations which are unlawful (see, for a further illustration, the language of ROMER, L.J., in *Giblan* v. *National Amal-* B
gamated Labourers' Union of Great Britain & Ireland (7), which is another indication of the difficulty in the way of abstract precision.

I am content to say that, unless the real and predominant purpose is to advance the defendants' lawful interests in a matter where the defendants honestly believe that those interests would directly suffer if the action taken against the plaintiffs was not taken, a combination wilfully to damage a man in his trade is unlawful. Although most of the cases have dealt with trade rivalry C
in some form or other, I do not see why the proposition as to the conditions under which conspiracy becomes a tort should be limited to trade competition. Indeed, in its original sense, conspiracy as a tort was a combination to abuse legal procedure: WINFIELD, HISTORY OF CONSPIRACY, Chap. II. I have used the word " directly " without seeking to define its boundaries as an indication that indirect gains, such as the subscriptions in the illustration above, D
would not provide a justification.

In the present case, the conclusion, in my opinion, is that the predominant object of the respondents in getting the embargo imposed was to benefit their trade union members by preventing under-cutting and unregulated competition, and so helping to secure the economic stability of the island industry. The result they aimed at achieving was to create a better basis for collective bargaining, and thus directly to improve wage prospects. A combination with such E
an object is not unlawful, because the object is the legitimate promotion of the interests of the combiners, and because the damage necessarily inflicted on the appellants is not inflicted by criminal or tortious means and is not " the real purpose " of the combination. I agree with LORD FLEMING when he says in his judgment that it is not for a court of law to consider in this connection the expediency or otherwise of a policy adopted by a trade union. Neither can liability be determined by asking whether the damage inflicted to secure F
the purpose is disproportionately severe. This may throw doubts on the *bona fides* of the avowed purpose, but, once the legitimate purpose is established, and no unlawful means are involved, the quantum of damage is irrelevant. I move that this appeal be dismissed with costs.

VISCOUNT MAUGHAM: My Lords, I have had the advantage of reading the opinion of VISCOUNT SIMON, L.C., and, except in one matter which I regard G
as of importance, I agree with his summary of the facts. With the greatest respect, I am of opinion that the embargo is proved to have been imposed in pursuance of a combination between Veitch and the millowners. My grounds for this view are precisely those set out in the opinion of LORD FLEMING in the Second Division, to which I find I cannot usefully add anything. I also find myself in substantial agreement with what VISCOUNT SIMON, L.C., has said as to the law in so far as it relates to combinations resulting in injury to others, H
that being the only subject with which I, for my part, think it necessary to deal on this appeal. If I add some remarks of my own, it is partly because of the great importance of this case and partly as a recognition of the able and candid arguments which were addressed to us. I will add by way of preface that it seems to me beyond dispute that the statement of LORD MACNAGHTEN as to a conspiracy to injure giving rise to civil liability in *Quinn* v. *Leathem* (6), at p. 510, is now well-settled law. I have never myself felt any difficulty in seeing the great difference between the acts of one person and the acts in combination

of two or of a multitude.

It appears from the statement of facts, which is contained in the opinion referred to, that there is a peculiarity in this case which should be remembered. The appellants, who are small producers, carried on their somewhat humble businesses in the isle of Lewis, where they were weaving a tweed called Harris tweed from yarn spun on the mainland. The respondents were officials of the Transport and General Workers' Union, a duly registered trade union. The only shipping services between the mainland and the isle of Lewis are provided by Messrs. David MacBrayne, Ltd. and Coast Lines, Ltd. The ships ply to and from Stornoway. The dockers at that port are all members of the trade union, and it is admitted that they act on the instructions of the respondents, who are, or were, the Scottish area secretary and the Stornoway branch secretary of the trade union. Orders were given on Jan. 20 and Jan. 21, 1938, by the respondents to the dockers at Stornoway to refuse to handle any consignments of yarn from the mainland to the appellants and any consignments of tweed from the appellants to the mainland. These orders were carried out (without any breach of contract), and the business of the appellants was thus brought to a complete standstill. It is evident that the power of the trade union officials in the circumstances which exist in the island is so great that the business and the means of subsistence of everyone who resides there is at the mercy of the trade union officials. If they should so be disposed, an event which I hope is unlikely, a tyranny of the most serious character might follow, unless the case happened to be one in which the court could properly interfere. It accordingly seems to me to be very desirable that the reasons which determine the conclusion of this House on the present appeal should be stated with great clearness.

The LORD ORDINARY (LORD JAMIESON) and some of the Lords in the Inner House have used phrases which seem to suggest that, once it is found that the infliction of injury on the petitioners was not the real purpose or object of the embargo, that is the end of the matter. I must say plainly that I disagree with this view, and I do not think that the decision in *Sorrell* v. *Smith* (4) justifies it. To suppose that it follows from an absence of malice or ill-will that the true motive of the acts done in combination was to further the legitimate interests of the parties to the combination seems to me to be a *non sequitur*. For example, there was a possibility that the respondents were taking the action they did merely to demonstrate the power of the trade union to control the trade of the island in every detail, or, again, because they had been induced by some valuable consideration coming from the millowners on the island to put the petitioners out of business in order to secure for the millowners a complete monopoly in relation to the spinning and finishing of Harris tweed. I will give some other illustrations later. Moreover, there are the cases of mixed motives which might have to be considered.

My Lords, LORD CAVE, L.C., in delivering his judgment in *Sorrell* v. *Smith* (4), remarked as follows, at p. 712:

> . . . I deduce as material for the decision of the present case two propositions of law which may be stated as follows: (1) A combination of two or more persons wilfully to injure a man in his trade is unlawful and, if it results in damage to him, is actionable. (2) If the real purpose of the combination is, not to injure another, but to forward or defend the trade of those who enter into it, then no wrong is committed and no action will lie, although damage to another ensues. The distinction between the two classes of case is sometimes expressed by saying that in cases of the former class there is not, while in cases of the latter class there is, just cause or excuse for the action taken.

I do not think that there is any doubt that these two propositions are sound, and they were accepted as correct by LORD ATKINSON, and also, as I read his opinion in the same case, by LORD SUMNER. In *Sorrell* v. *Smith* (4), in my opinion, no new law was laid down by this House. It was merely, in the view of their Lordships, an unusual illustration of the proposition, decided in the *Mogul* case (1), that a combination to do acts the purpose and object of which is to forward or defend the trade or business interests of the defendants is not actionable even though the necessary effect is to cause damage to the plaintiffs: *per* LORD CAVE, L.C., and LORD ATKINSON, at pp. 715, 716, *per* LORD SUMNER, at pp. 733, 743, and *per* LORD BUCKMASTER, at p. 746. If I correctly understand the opinion of LORD DUNEDIN, he took a somewhat different view from that of the majority, and disputed the accuracy of the opinion, so often expressed and still more often assumed by various judges, that a just cause or excuse must be shown, and that, if the real purpose of the combination is not to forward or defend the trade or the interests of those who enter into it, the defendants, generally speaking, must show some other just cause or excuse for the action taken in combination. Lord Cave, L.C., after stating the two propositions of law above cited, proceeded to classify the more important of the judgments on which he relied for his propositions, in several of which the reference to "just cause or excuse" will be found. I need not repeat these authorities, but I think it is desirable to point out that it is implicit in the *Mogul* case (1), both in the Court A of Appeal and in this House, that the acts done in combination by the shipowners, who were defendants, were done (to use the language of Lord Watson, at p. 42), "with a single view to the extension of their business and the increase of its profits." The headnote to that case, which in my opinion is accurate, is in these terms:

> Held, . . . that since the acts of the defendants were done with the lawful object of protecting and extending their trade and increasing their profits, and since they had not B employed any unlawful means, the plaintiffs had no cause of action.

The opinions of the seven noble Lords who attended are directed to showing that any form of competition in trade is legitimate and lawful—that is, forms a just excuse—provided that illegal means are not used. No one suggested that, if malevolence was not in question, the action must necessarily fail, and I agree with Lord Wright in thinking that malevolence as a mental state is C not the test of liability. It was implicit, as I think, that lawful competition was the true and the necessary answer to the action in *Sorrell* v, *Smith* (4). Moreover, general approval was expressed of the opinions of Bowen and Fry, L.JJ., in the Court of Appeal, at pp. 37, 43, 47, 51, 57. I can see no reason for doubting the correctness of the well-known statements of Bowen, L.J., in the Court of Appeal, at pp. 613, 617. His judgment is essentially devoted to the inquiry whether the acts of the defendants were done "without any just cause D or excuse." If, adopting another mode of approach, it is said that the acts in combination must *in law* be "malicious" if, being acts which necessarily injure the plaintiff, they are done without just cause or excuse, we are reduced to a mere question of words. *Quacunque via*, the acts in combination are unlawful unless there is just cause or excuse. For myself, on this point, which Lord Dunedin describes as "hypercritical," I must say that I prefer the method of Bowen, L.J., in dealing with the matter, approved, as I think it is, by the E majority of the noble Lords who decided *Sorrell* v. *Smith* (4). I must add that I do not think it possible (as Lord Dunedin seems to have thought) that Bowen, L.J., was influenced in using his phrases by *Bowen* v. *Hall* (8), which related to the different case of the inducing of a person under personal contract to break it. Nor do I think that the judgments in *Allen* v. *Flood* (5) would have altered his view, since that case had nothing to do with a question of combination. F

It seems to me, therefore, with the greatest deference to those who perhaps think otherwise, a mistake to hold that combinations to do acts which necessarily result in injury to the business or interference with the means of subsistence of a third person are not actionable provided only that the true or predominant motive was not to injure the plaintiff and that no unlawful means are used. For instance, the object of the combination may be a dislike of the religious G views or the politics or the race or the colour of the plaintiff, or a mere demonstration of power by busybodies. Again, the persons joining in the combination may have been induced so to act by payment of money or by some other consideration. There is, I think, no authority to be found which justifies the view that a combination of such a character, causing damage to the plaintiff, would be lawful. Since there are many cases of combinations which directly result in injury to others, but do not fall within either of those two categories mentioned H by Lord Cave, L.C., one question is whether or not, in the present case, we are not confronted with facts which, admittedly not within the first proposition, are within the second. We may formulate the question thus: "was the real or predominant purpose of the combination to forward or defend the trade or business interests of the trade union and its members and of the millowners?" If the answer is in the negative, it will be necessary very carefully to examine "the real purpose" or "the true motive" (which I think is the same thing) of the combination, and to consider whether there was, in the eyes of the law, a just cause or excuse for taking or directing acts in combination which would destroy the present means of subsistence of the appellants. On this point, if it arises, there is little authority to guide us, but I will add that, when the question of the real purpose is being considered, it is impossible to leave out of consideration the principle that men are in general to be taken as intending the direct consequences of their acts: see the summing up of FITZGIBBON, L.J., in *Quinn* v. *Leathem* (6), at p. 499, which was approved in this House. It may be worth noting that in the days of ERLE, J., there was often no other way of ascertaining the purpose of a conspiracy. I should add that "motive" is clearly not the same thing as "intention," but in many cases the one is the parent of the other, and they are so closely related that they cannot be separated: see, for some interesting remarks on this subject, WILLS ON CIRCUMSTANTIAL EVIDENCE, 7th Edn., pp. 62,-64. If there are mixed purposes or motives the difficulties which arise on the question of fact may be very great, and it may be impossible to answer the question above stated in the affirmative.

It is worth while to note that *Quinn* v. *Leathem* (6) is an example of a mixed motive, for there the defendants, being officials and members of a trade union, combined to call out the union workmen of the plaintiff Leathem if he would not discharge some non-union men in his employ, and also to call out the union workmen of a customer of Leathem, Munce, if he did not cease to deal with Leathem. It is true that there was the finding of the Belfast jury that what the defendants had done was done with malice in order to injure the plaintiff, but it can scarcely have been in doubt that one at least of the motives actuating the defendants was the benefit of their trade union. As LORD LINDLEY remarked, at p. 536:

> That they [the defendants] acted as they did in furtherance of what they considered the interests of union men may probably be fairly assumed in their favour . . . .

The facts as set out in detail in the opinion of LORD BRAMPTON show clearly that the whole dispute between Leathem and the trade union originated in Leathem's refusal to dismiss non-union workmen. It must, however, be assumed from the findings of the jury that the main object or purpose of the defendants was to punish or injure Leathem, and that this was "malicious," whatever the precise evidence of malice may have been. It was never suggested by anyone that, if the defendants' acts were at least partly in furtherance of trade union interests, that would be a defence to the action. *Conway* v. *Wade* (9) may usefully be referred to in this connection.

An obvious difficulty arises at the outset if we accept, as I do (as above stated), the view that the combination was between the respondents and the millowners. The interests of these two groups were very different, and, indeed, they were in some respects conflicting. If it is proved, as the LORD ORDINARY held, that the object of the respondents was to benefit the trade union and its members, and if it is to be inferred that the object of the millowners was to benefit themselves by obtaining a species of monopoly in the matter of milling, is that sufficient to bring the case within the principle of the *Mogul* case (1)? It was argued with force that, accepting the doctrine laid down in *Sorrell* v. *Smith* (4), one must look at the joint object of the parties combining, and, if they have substantially different objects, the decision in the *Mogul* case (1) will not apply. I have carefully considered this point, which is not unattractive, and I cannot find that it has ever been precisely dealt with in any of the cases. On the whole, however, I have come to the conclusion that, following the principle of the *Mogul* case (1), it is sufficient if all the various combining parties have their own legitimate trade or business interests to gain, even though these interests may be of differing kinds. If, indeed, some of these parties were actuated merely by hate or vindictive spite, or by no just excuse at all, I should doubt very much whether the defence would succeed. I think, however, that reasonable self-interest in trade or business is "a just cause or excuse" for those combining, even though each of them has his own axe to grind. For instance, I cannot think that the *Mogul* case (1) would have had a different result if tea merchants had joined in the combination of shipowners, and it is easy to imagine a case where shipowners and railway companies might wish to combine to get business, though their interests were in some respects conflicting. Other examples will occur to everyone with a knowledge of competitive trade. In my opinion, the principle of the *Mogul* case (1) will protect persons who combine for their respective business interests if there is a certain identity of object. Whether they do or not is a question of motive or object, and the circumstances that their business interests are by no means the same is not a ground for holding that the combination is illegal.

My Lords, in my opinion, when it is proved or admitted that the respondents had no personal illwill towards the appellants, the difficulties of this case begin. I do not propose to recapitulate the facts, but it is to be remembered that there are a number of circumstances which might have justified a very adverse view of the respondents' motives. I will summarise the most important of them. First, what was done was not " in furtherance of " or " in contemplation of " a trade dispute. Secondly, as I have said, I accept the view of LORD FLEMING, and, I should add, the view very forcibly expressed by LORD MACKAY, that there was a combination between Veitch and Skinner and some at least of the millowners to procure the embargo. Thirdly, the acts complained of were obviously in the interests of the millowners on the island, since they secured a species of monopoly. Fourthly, Veitch's letter of Jan. 19 to Mackenzie is, I think, only consistent with the view that there was a " deal " between Veitch, Skinner, and some at least of the millowners with regard to the laying on of the embargo, the general understanding being that, if an embargo were to be imposed by Veitch, the millowners would concede the union demand for 100 per cent. union membership in the mills of the island. Fifthly, Veitch apparently accepted as true certain statements of Skinner as to the condition of the industry and as to the effect of the importation of mainland yarn which the least inquiry would have shown to be inaccurate. Sixthly, Veitch's elaborate report to the general secretary of the union at that time as to his grounds for imposing the embargo is so extravagant, abusive and inaccurate in its terms that I find it difficult to understand how it can have been written with a legitimate purpose. It was a carefully considered document, composed between Jan. 14 and Feb. 3. It suggested (untruly) that the appellants were evading the stamp, deceiving the public, ruining the industry, and bringing distress to the Outer Hebrides, that they were " get-rich-quick merchants," who cared nothing about the distress on the islands, that the importation of mainland yarn was " killing the industry," and that they were an " unscrupulous lot " who were importing " blackleg yarn." There was nothing said in the letter about the " deal " with the millowners. Indeed, it was asserted (inaccurately) that in the mills they already had 100 per cent. " organisation." The document was completely misleading, and in fact it misled the general council of the union when it was read on Mar. 8, 1938. Seventhly, it should be observed that no notice was given to the appellants as to the intention to apply the embargo, and no opportunity was given to them to cease using mainland yarn if they were so advised. Lastly, it is a strange feature in the case that one at least of the avowed purposes of the acts of the respondents was to secure the 100 per cent. membership of the union in the mills, whilst the appellants, who were attacked, were completely unable to secure or to influence such a result, since they had nothing whatever to do with the management of the mills, and the result was to be secured, if at all, by the " deal " with the millowners.

My Lords, there are certain explanations offered as regards these facts, and no doubt some other circumstances to be borne in mind, but I must confess that, if I were entitled to form a conclusion simply from the documents and the shorthand notes of the trial, I should find it impossible to hold that the respondents had established that they and the millowners had combined simply or mainly for the purpose of promoting their own interests—that is, those of the trade union and of the millowners respectively. This House, however, is always most reluctant to differ from the findings of the trial judge on a question of fact, and *a fortiori* when the appellate court has come to a like conclusion. The question here is mainly one of the objects or motives of the respondents, both of whom were called as witnesses and elaborately cross-examined. It has been well observed that, if they were, as seems probable from the shorthand notes, both stupid and wrong-headed, the circumstance may afford an explanation of acts and writing which, in the case of persons of greater acuteness, would tend strongly in favour of a sinister motive. The LORD ORDINARY appears to have believed these persons, though he was not very pleased with them as witnesses. The majority of the Inner House agreed with him. I do not feel at liberty to differ.

My conclusion, therefore, must be based on these facts. On the one hand, it is proved that the respondents and the millowners were not actuated by an intention to injure as a predominant motive in their minds. On the other hand, they were acting, or must be taken to have been acting, with the main object of benefiting themselves, in the sense that the respondents were seeking to advance what they conceived to be the interests of their trade union and their members, and the millowners were seeking to obtain an obvious trade advantage for themselves, and no doubt, in a rather general sense, they all had a common interest in the prosperity of the Harris tweed industry. The case, therefore, is brought, though I think with difficulty, within the principle of the *Mogul* case (1), as explained in later cases, and the appeal must fail.

As regards the ultimate result, I must add this warning. The only question before the LORD ORDINARY was as to whether the then petitioners were entitled to have the respondents interdicted from instructing members of the trade union at Stornoway to refuse to load or unload consignments of yarn or unfinished tweeds consigned to or despatched by the petitioners. The original embargo was directed on Jan. 19, 1938, and extended to the loading of finished and unfinished tweeds despatched by the petitioners, but on Jan. 25, 1938, it was modified by permitting the exportation of finished tweeds. An interim interdict was granted to the appellants on Mar. 26, 1938, and the embargo then dropped. When the interim interdict was recalled on Mar. 8, 1939, it appears that the embargo was not re-imposed. The only question on appeal to the Inner House and to this House has necessarily been as to whether the interdict should have been continued by the LORD ORDINARY. On that matter, the courts were bound to consider the propriety of the action of the respondents and the millowners in the light of the views honestly entertained by them at that time as to their respective interests and as to the actions and conduct of the appellants. In so far as those views have since been shown to have been ill-founded, they would not now justify the re-imposition of the embargo. If such a step as that is contemplated, the matter ought to be reconsidered in view of the circumstances and facts as they are now known to exist. My Lords, for the reasons above stated, I concur in the proposed motion.

LORD THANKERTON: My Lords, the appellants are seven out of the original petitioners in a petition and complaint by nine small producers of Harris tweed in the isle of Lewis, presented on Feb. 24, 1938, seeking to have the present respondents interdicted from interference with the consignments of yarn or unfinished tweeds consigned to, or despatched by, the petitioners at the port or harbour of Stornoway. The petition and complaint was dismissed, after proof, on the merits by the LORD ORDINARY (LORD JAMIESON) on Mar. 8, 1939, and his interlocutor was adhered to by the Second Division (LORD MACKAY dissenting) on Dec. 22, 1939, and the reclaiming motion by the nine petitioners was refused, but, in respect of an undertaking by the respondents not to continue the embargo against the petitioners William MacLeod and Donald Campbell, the latter were awarded the expenses incurred by them in the reclaiming motion. The remaining petitioners appeal against these interlocutors.

While the respondents are cited as individuals, they are respectively the Scottish area secretary and the Stornoway branch secretary of the Transport and General Workers' Union at Stornoway, and the terms of the interdict sought for are:

> . . . to interdict prohibit and discharge the respondents from instructing, procuring persuading or inciting, or continuing to instruct, procure, persuade or incite members of the Transport and General Workers' Union at Stornaway, to refuse to load or unload on to or from vessels in the port or harbour of Stornaway consignments of yarn or unfinished tweeds consigned to or despatched by the petitioners, or any of them, or from interfering in any manner or way with the consignment to or despatch by the petitioners, or any of them, of consignments of yarn or unfinished tweeds consigned to or despatched by them at the port or harbour of Stornaway.

In the record, the appellants plead two grounds of action in their first and fourth pleas in law, which are as follows:

> 1. The respondents having illegally conspired together to interfere with and damage the petitioners' legitimate rights to trade as condescended upon, interdict should be granted as craved.

> 4. *Separatim*, and, in any event, the respondents having by their actings wilfully interfered with and obstructed the petitioners' contractual relations and liberty to exercise their trade, and having thereby caused injury to the petitioners, interdict should be granted as craved.

Any evidence bearing on the fourth plea was negligible, and the appellant made no case on it before this House, but confined his contentions to the first plea. The Lord Ordinary says:

> The petitioners aver on record that the laying on of the embargo was the result of a conspiracy between the respondents and representatives of companies owning spinning mills on the island to injure the petitioners' trade and unlawfully force them to use island spun yarn in the manufacture of their tweed. Alternatively, they aver that the respondents were acting in concert for the purpose of injuring their legitimate trade. Their plea is that the respondents conspired together. The plea is not very happily expressed, but in my view it is sufficient to cover the wider conspiracy, and the case was argued on both alternatives.

I may say at once that, in my opinion, the first plea is quite inapt to cover the wider conspiracy, and should have been amended, which could have been done, without difficulty, as the case on the wider conspiracy has been fully dealt with, apparently without objection on this point. The Lord Ordinary held that the narrower conspiracy had been proved in the sense of joint action by the respondents, but he held that the wider conspiracy had not been proved, and that the alleged intent of the respondents to injure the petitioners' trade had not been proved. In the Inner House, the judges of the Second Division held that the wider combination had been proved but (Lord Mackay dissenting) that the intent to injure had not been established. Before your Lordships the appellants confined their case to the wider combination, as regards which they had the favourable decision of the Second Division. The evidence was very fully dealt with in the opinions of the judges, and I find it unnecessary to deal with it in detail.

My Lords, as regards the proof of the wider combination, I am prepared, using the words of the late Lord Justice-Clerk:

> . . . to hold that there was some kind of understanding, more or less defined, between Veitch and Skinner that, if the union took action and imposed an embargo against the importers of yarn, the union in turn would be assisted by the millowners to get their 100 per cent. membership. But I am not satisfied by the evidence that there was any decision taken by Skinner and Veitch that deprived Veitch of the liberty to decide for himself in consultation with his own officials whether and when an embargo should be imposed. I shall, however, take the case on the assumption that a definite arrangement to impose an embargo was reached.

This leaves the crucial question as to whether the appellants have proved that the respondents' intention was to injure the appellants' trade, as to which the appellants have the findings of both the lower courts against them. The reluctance of this House to interfere with such findings, and in particular with the findings of the trial judge, who has had the advantage of seeing the witnesses, which has repeatedly been expressed, is all the stronger in a case such as the present, in which the intention of the respondents, both of whom gave evidence, was in issue. That Veitch, for instance, was stupid or wrong-headed, or acted without making proper inquiries, may be quite consistent with the absence of any intention to injure, and the Lord Ordinary has so found. Indeed, stupidity or wrong-headedness might tend to disprove any such intention. The Lord Ordinary sums up the evidence thus:

> In the present case the immediate purpose of Veitch and Mackenzie was to force producers to come to an agreement regarding the selling-price of tweed and the exclusive use of island-spun yarn. The means adopted necessarily inflicted injury on the petitioners. But was the infliction of injury Veitch's motive? Lord Dunedin in *Sorrell* v. *Smith* (4), at p. 717, suggested a test as follows: "Was such a purpose the real root of the acts that grew from it, or was the true motive of the acts something else, such as, for instance, the furtherance of the defendants' own business?" Applying this test, the answer must be in the negative. There is no evidence that Veitch had evinced any malice or ill will towards any of the petitioners or that he was prompted by a desire to destroy the trade of any persons who were employing weavers and paying them the union rate of wages. The purpose at the root of his action was to advance the position of the union and its members, however mistaken he may have been in the means he adopted to secure that end. It may be that the benefits hoped to be obtained would have been an ultimate and not an immediate consequence of the action taken, but I do not think it would have been any more remote than in the cases of

Sorrell v. *Smith* (4) and *Ware & De Freville, Ltd.* v. *Motor Trade Assocn.* (10).

My Lords, the critical examination of the evidence by the appellants' counsel and his able argument have entirely failed to satisfy me that I am in a position to set aside the conclusion of the LORD ORDINARY. On each point of criticism in regard to which there appeared to be ground for argument, I felt satisfied that a personal observation of the witness under examination would have been a material help to the solution of the point, and this is the very foundation of the reluctance of an appellate court to interfere in such circumstances. In this view of the facts, I find it unnecessary to deal further with the previous decisions on this branch of the law, as there can be no doubt that the appeal fails. However, I desire to refer to one aspect of this case, in order to make clear that, in my opinion, this case does not raise a question of law which is of importance and may come up for consideration in the future, and that is as to what limit is to be placed as to the means by which the pressure is operated in these cases. In the present case, the pressure was applied by means of action by the dockers, who were in no sense employees in, or directly connected with, the trade in Harris tweed, but the employees in this trade were members of the same union, and the interest of the dockers and the trade employees in the union and its welfare were mutual, and I can see no ground for holding that it was not legitimate for the union to avail itself of the services of its docker members to promote the interests of the union. On the other hand, I doubt if it would be legitimate for a union to use a means of pressure with which it had no connection except that which was constituted by a money payment, for instance. However, I have referred to this question only in order to make clear that, in my opinion, it does not arise for decision in this case, and that I express no opinion on it.

LORD WRIGHT: My Lords, I had prepared a statement of the facts of this case, but subsequently I had the opportunity of considering in print the account of the facts which my noble and learned friend VISCOUNT SIMON, L.C., has given in his opinion. That account, which I agree with and adopt, renders superfluous a separate narrative from myself. I should, however, observe that, in regard to the issue whether certain millowners, in particular Skinner, were parties to the combination, I am prepared, like the LORD JUSTICE-CLERK for the purposes of this case, to assume that they were. This view was strongly pressed in argument by counsel for the appellants. It is obviously the assumption which is most favourable to them. LORD MACKAY, in his dissenting judgment, forcibly relied on his conclusion that there was a compact between the respondents and the millowners. On the whole, I think that it is fairer to the appellants to proceed on that assumption. In the end, it does not appear to me to affect the issue. There was clearly, in any case, combination between the two respondents, who were both responsible trade union officials.

The cause of action set out in the appellants' claim is for a conspiracy to injure, which is a tort. The classical definition of conspiracy is that given by WILLES, J., in advising the House of Lords in *Mulcahy* v. *R.* (11), at p. 317:

> A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means.

This must be supplemented by observing that, though the crime is constituted by the agreement, the civil right of action is not complete unless the conspirators do acts in pursuance of their agreement to the damage of the plaintiffs.

The question is, then, what the unlawful acts were with which the respondents were charged, or what the unlawful means were which they employed to do acts otherwise lawful. In other words, what is the legal right of the appellants which is infringed, or what is the legal wrong committed by the respondents? The concept of a civil conspiracy to injure has been in the main developed in the course of the last half-century, particularly since *Mogul S.S. Co.* v. *McGregor, Gow & Co.* (1). Its essential character is described by LORD MACNAGHTEN in *Quinn* v. *Leathem* (6), at p. 510, basing himself on the words of LORD WATSON in *Allen* v. *Flood* (5), at p. 108:

> . . . a conspiracy to injure might give rise to civil liability even though the end were brought about by conduct and acts which by themselves and apart from the element of combination or concerted action could not be regarded as a legal wrong.

In this sense, the conspiracy is the gist of the wrong, though damage is necessary to complete the cause of action. The opposite view had been expressed by Palles, C.B., in *Kearney* v. *Lloyd* (12). He held that the gist of the action was not the conspiracy itself, but was the particular wrongful acts done in pursuance of it, and that the cause of action must exist if the allegation of conspiracy were struck out. Later cases, however, have decisively held the contrary, as I shall show. The rule may seem anomalous, so far as it holds that conduct by two may be actionable if it causes damage, whereas the same conduct done by one, causing the same damage, would give no redress. In effect, the plaintiff's right is that he should not be damnified by a conspiracy to injure him, and it is in the fact of the conspiracy that the unlawfulness resides. It is a different matter if the conspiracy is to do acts in themselves wrongful, as to deceive or defraud, to commit violence, or to conduct a strike or lock-out by means of conduct prohibited by the Conspiracy and Protection of Property Act, 1875, or which contravenes the Trade Disputes and Trade Unions Act, 1927. A conspiracy to injure, however, is a tort which requires careful definition, in order to hold the balance between the defendant's right to exercise his lawful rights and the plaintiff's right not to be injured by an injurious conspiracy. As I read the authorities, there is a clear and definite distinction which runs through them all between what Lord Dunedin in *Sorrell* v. *Smith* (4), at p. 730, calls " a conspiracy to injure " and " a set of acts dictated by business interests." I should qualify " business " by adding " or other legitimate interests," using the convenient adjective not very precisely. It may be a difficult task in some cases to apply this distinction. It depends largely on matters of fact, but also on a legal conception of what is meant by " intention to injure." The appellants contend that there was here an intention to injure, even though it is negatived that the respondents were actuated by malice or malevolence. In substance, what the appellants say is that the issue between the millowners and the yarn importers was one between two sets of employers, in which the men were not directly concerned, that the union's action was an unjustifiable and meddlesome interference with the appellants' right to conduct their own businesses as they pleased, and that the union were pushing into matters which did not concern them. The appellants further say, as I understand their case, that this unjustifiable intrusion was due to the union's desire to secure the assistance of the millowners towards the union's object, which was to get 100 per cent. membership in the textile workers, and thus there was no common object among the two main parties to the combination. Each set had its own selfish object. In effect, it was said, the union were bribed by the millowners to victimise the appellants in their trade by the promise of help in the matter of the union membership, which was entirely foreign to the question of the importation of yarn. These considerations, it was said, constituted " malice " in law, even if there was no malevolence, and prevented the respondents from justifying the injury which they wilfully did to the appellants' trade, because they could not assert any legitimate interest of their union which was relevant to the action taken. Actual malevolence or spite was, it was said, not essential. There was no genuine intention to promote union interests by the stoppage of importation. The interference with the appellants' trade by stopping import of yarn was wilful and ultroneous action on the part of the union, supported by no relevant union interest. It was malicious or wrongful because it was intentionally and unjustifiably mischievous, even though not malevolent.

Before I refer to the authorities, there are some preliminary observations which I desire to make. I shall avoid the use of what Bowen, L.J., in the *Mogul* case (1) described as the " slippery " word " malice " except in quotations. When I want to express spite or ill will, I shall use the word " malevolence." When I want to express merely intentional tortious conduct, I shall use the word " wrongful." As the claim is for a tort, it is necessary to ascertain what constitutes the tort alleged. It cannot be merely that the appellants' right to freedom in conducting their trade has been interfered with. That right is not absolute or unconditional. It is only a particular aspect of the citizen's right to personal freedom, and, like other aspects of that right, is qualified by various legal limitations, either by statute or by common law. Such limitations are inevitable in organised societies, where the rights of individuals may clash. In commercial affairs, each trader's rights are qualified by the right of others to compete. Where the rights of labour are concerned, the rights of the employer are conditioned by the rights of the men to give or withhold their services. The right of workmen to strike is an essential element in the principle of collective bargaining. It is true that under the Combination Act, 1800, it was a criminal offence for workmen to combine together for the purpose of securing higher wages or shorter hours of work, or of controlling employers in the conduct or management of their business. That Act was repealed by the Acts of 1824 and 1825, but these Acts introduced various restrictions on the conduct of strikes. However, as LORD BRAMWELL said in *Mogul S.S. Co.* v. *McGregor, Gow & Co.* (1), at p. 47:

> . . . a combination of workmen, an agreement among them to cease work except for higher wages, and a strike in consequence was lawful at common law; perhaps not enforceable *inter se*, but not indictable.

In *R.* v. *Rowlands* (13) (a criminal case, but the same principles apply in a civil suit), ERLE, J., directed the jury, at p. 686, note (*b*) 2:

> The law is clear that, workmen have a right to combine for their own protection, and to obtain such wages as they choose to agree to demand. I say nothing at present as to the legality of other persons, not workmen, combining with them to assist in that purpose. As far as I know there is no objection, in point of law, to it . . .

He added that, while the law allowed them to combine for the purpose of obtaining a lawful benefit for themselves, it gave no sanction to combinations which had for their immediate purpose the hurt of another. I attach great value to that clear and simple statement, which has not been superseded, but has been confirmed by the more elaborate later discussions. It is clear that this right of workmen cannot be generally exercised without interfering with the employers' free conduct of their own business. ERLE, J., added that either side had the right to study to promote their own advantage and to combine with others for that purpose. His summing up was quoted with approval by BOWEN, L.J., in *Mogul S.S. Co* v. *McGregor, Gow & Co.* (1), at pp. 618, 619, as applying equally to traders and employers and workmen. It was also approved in the same case by FRY, L.J., at p. 625. The same principle is again stated in *Allen* v. *Flood* (5), *Quinn* v. *Leathem* (6), *Ware & De Freville, Ltd.* v. *Motor Trade Assocn.* (10) and *Sorrell* v. *Smith* (4). The language of ERLE, J., is certainly a clear statement of a far-reaching principle. The same idea is more elaborately enunciated by LORD HERSCHEL in *Allen* v. *Flood* (5), at pp. 129, 130:

> I understood it to be admitted at the bar, and it was indeed stated by one of the learned judges in the Court of Appeal, that it would have been perfectly lawful for all the ironworkers to leave their employment and not to accept a subsequent engagement to work in the company of the plaintiffs. At all events I cannot doubt that this would have been so. I cannot doubt either that the appellant [the trade union official] or the authorities of the union would equally have acted within his or their rights if he or they had "called the men out." They were members of the union. It was for them to determine . . . whether they would follow or not follow the instructions of its authorities, though no doubt if they had refused to obey any instructions which under the rules of the union it was competent for the authorities to give, they might have lost the benefits they derived from membership. It is not for your Lordships to express any opinion on the policy of trade unions, membership of which may undoubtedly influence the action of those who have joined them. They are now recognised by law; there are combinations of employers as well as of employed. The members of these unions, of whichever class they are composed act in the interest of their class. If they resort to unlawful acts they may be indicted or sued. If they do not resort to unlawful acts they are entitled to further their interests in the manner which seems to them best, and most likely to be effectual.

This statement was criticised adversely by LORD LINDLEY in *Quinn* v. *Leathem* (6), at p. 537, but, in my opinion, it states the law correctly.

It is thus clear that employers of workmen, or those who, like the appellants, depend in part on the services of workmen, have in the conduct of their affairs to reckon with this freedom of the men, and to realise that the exercise of the men's rights may involve some limitation on their own freedom in the management of their business. Such interference with a person's business, so long as the limitations enforced by law are not contravened, involves no legal wrong against the person. In the present case, the respondents are sued for imposing the "embargo," which corresponds to calling out the men on strike. The dockers were free to obey or not to obey the call to refuse to handle the appellants' goods. In refusing to handle the goods, they did not commit any breach of contract with anyone. They were merely exercising their own rights. However, there might be circumstances which rendered the action wrongful. The men might be called out in breach of their contracts with their employer, and that would be clearly a wrongful act as against the employer, and an interference with his contractual right, for which damages could be claimed, not only as against the contract-breaker, but also against the person who counselled or procured or advised the breach. This is the principle laid down in *Lumley* v. *Gye* (14), which LORD MACNAGHTEN in *Quinn* v. *Leathem* (6) defined to be that [p. 510]:

> . . . a violation of legal right committed knowingly is a cause of action and . . . it is a violation of legal right to interfere with contractual relations recognised by law if there be no sufficient justification for the interference. A

That is something substantially different from a mere interference with a person's qualified right to exercise his free will in conducting his trade. A legal right was violated and needed justification, if it could be justified. This distinction was drawn by the majority of the Lords in *Allen* v. *Flood* (5), who disapproved of the *dicta* in *Bowen* v. *Hall* (8) and *Temperton* v. *Russell* (15) that every person who persuades another not to enter into a contract with a third B person may be sued by that third person, if the object is to benefit himself at the expense of such person. However, in *Allen* v. *Flood* (5), this House was considering a case of an individual actor, where the element of combination was absent. In that case, it was held, the motive of the defendant is immaterial. Damage done intentionally, and even malevolently, to another thus, it was held, gives no cause of action so long as no legal right of the other is infringed. That C I take to be the English rule laid down by this House in *Bradford Corpn.* v. *Pickles* (16) and in *Allen* v. *Flood* (5), though in *Sorrell* v. *Smith* (4), at p.713, LORD CAVE, L.C., doubts the proposition, and says that in general what is unlawful in two is not lawful in one. This, however, seems to be inconsistent with the express rulings in *Allen* v. *Flood* (5). Though eminent authorities have protested against the principle, it must, I think, be accepted at present as the law in England. The precise issue does not arise in this case, which is concerned D with combination or conspiracy. I need not consider whether any qualification may hereafter be found admissible.

Thus, for the purposes of the present case, we reach the position that, apart from combination, no wrong would have been committed. There was no coercion of the dockers. There were no threats to them. They were legally free to choose the alternative course which they preferred. In *Quinn* v. *Leathem* (6), a wide meaning was given to words like "threats," "intimidation" or "coercion," E especially by LORD LINDLEY, but that was not the *ratio decidendi* adopted by the House. These words, as pointed out in WRIGHT ON CRIMINAL CONSPIRACY, are not terms of art and are consistent with either legality or illegality. They are not correctly used in the circumstances of a case like this. In *Allen* v. *Flood* (5) *Ware & De Freville, Ltd.* v. *Motor Trade Assocn.* (10) and *Sorrell* v. *Smith* (4), a more accurate definition was given. I should also refer to the F admirable discussion by PETERSON, J., in *Hodges* v. *Webb* (17). There is nothing unlawful in giving a warning or intimation that, if the party addressed pursues a certain line of conduct, others may act in a manner which he will not like and which will be prejudicial to his interests, so long as nothing unlawful is threatened or done. In the words of LORD BUCKMASTER in *Sorrell* v. *Smith* (4), at p. 747:

> A threat to do an act which is lawful cannot, in my opinion, create a cause of action whether the act threatened is to be done by many or by one. G

No doubt the use of illegal threats or the exercise of unlawful coercion would create by itself a cause of action, but there was nothing of the sort in this case.

The only way in this case in which the appellants can establish a cause of action in tort is by establishing that there was a conspiracy to injure, which would take the case out of the general ruling in *Allen* v. *Flood* (5) and bring it within the exception there reserved by LORD HERSCHELL, at pp. 123, 124: H

> It is certainly a general rule of our law that an act *prima facie* lawful is not unlawful and actionable on account of the motive which dictated it. I put aside the case of conspiracy which is anomalous in more than one respect.

In the same case, LORD WATSON made a similar reservation, at p. 108. LORD MACNAGHTEN, at p. 153, said that the decision in *Allen* v. *Flood* (5) could have no bearing on any case which involved the element of oppressive combination. These reservations were acted upon in *Quinn* v. *Leathem* (6), to which I shall refer later. That the decision in that case turned on conspiracy cannot now be doubted, especially after *Ware & De Freville, Ltd.* v. *Motor Trade Assocn.* (10) and *Sorrell* v. *Smith* (4).

The distinction between conduct by one man and conduct by two or more may be difficult to justify. LORD SUMNER in *Sorrell* v. *Smith* (4) puts the very artificial case of the owner of a large business who gave a small share to a partner and "conspired" with him. For practical purposes, the position there is the same as if he had remained a sole trader. The fact that the sole trader employed A servants or agents in the conduct of his business would not, in my opinion, make these others co-conspirators with him. The special rule relating to the effect of a combination has been explained on the ground that it is easier to resist one than two. That may appear to be true if a crude illustration is taken, such as the case of two men attacking another, but even there it would not always be true—for instance, if the one man was very strong and the two were very weak—and the power of a big corporation or trader may be greater than that of a large B number of smaller fry in the trade. This explanation of the rule is not very satisfactory. The rule has been explained on grounds of public policy. The common law may have taken the view that there is always the danger that any combination may be oppressive, and may have thought that a general rule against injurious combinations was desirable on broad grounds of policy. Again, any combination to injure involves an element of deliberate concert between C individuals to do harm. Whatever the moral or logical or sociological justification, the rule is as well established in English law as I here take to be the rule that motive is immaterial in regard to the lawful act of an individual, a rule which has been strongly criticised by some high legal authorities, who would solve the apparent antinomy by holding that deliberate action causing injury is actionable whether done by one or by several.

A conspiracy to injure involves *ex vi termini* an intention to injure, or, more D accurately, a common intention and agreement to injure. Both "intention" and "injure" need definition. The word "injure" is here used in its correct meaning of "wrongful harm," *damnum cum injuria*, not *damnum absque injuria*. That obviously raises the question of when the harm is wrongful. "Intention" is generally determined by reference to overt acts and to the circumstances in which they are done. It is in this way that an intention to deceive, which is an essential element in the action of deceit, is ascertained. LORD WATSON in *Allen* E v. *Flood* (5), at p. 98, warns against the

> . . . loose logic which confounds internal feelings with outward acts, and treats the motive of the actor as one of the means employed by him.

In *R.* v. *Rowlands* (13), ERLE, J., in the passage I have referred to, at p. 686, seems to have in mind an external object when he distinguishes combinations for the purpose of obtaining a lawful benefit for the combiners from combinations F which have for their immediate purpose the hurt of another. I do not think that ERLE, J., in these words intends a contrast between what is immediate and what is remote. If he so intended, the later authorities would, I think, contradict such a view. A competitive combination of traders to undercut prices may be said to have the immediate result of excluding rivals from the trade, but, if its real object is the ultimate increase of business and profits by the G traders, it is lawful: *Mogul S.S. Co.* v. *McGregor, Gow & Co.* (1). A perfectly lawful strike may aim at dislocating the employer's business for the moment, but its real object is to secure better wages or conditions for the workers. The true contrast is, I think, between the case where the object is the legitimate benefit of the combiners and the case where the object is deliberate damage without any such just cause. The courts have repudiated the idea that it is for them to determine whether the object of the combiners is reasonably calculated H to achieve their benefit. The words "motive," "object," "purpose," are in application the practical matters difficult strictly to define or distinguish. Sometimes mere *animus*, such as spite or ill will, malevolence or a wanton desire to harm without any view to personal benefit, is meant, but motive is often used as meaning purpose, something objective and external, as contrasted with a mere mental state. "Object" is, I think, the most appropriate word. How far malevolence is to be regarded as an essential element in the law of conspiracy has led to differences of opinion, particularly in *Sorrell's* case (4). Proof of malevolent feelings, coupled with proof that the combiners had in view no tangible benefit to themselves, would clearly, I think, be enough to show that the combination was wrongful. It does not follow, however, that malevolence is a necessary element to constitute the tort. LORD CAVE, L.C., in *Sorrell's* case (4) stated the law, at least for purposes of that case, in two propositions, at p. 712:

> (1) A combination of two or more persons wilfully to injure a man in his trade is unlawful and, if it results in damage to him, is actionable. (2) If the real purpose of the combination is, not to injure another, but to forward or defend the trade of those who enter into it, no wrong is committed and no action will lie, although damage to another ensues.

This double proposition seems to me to be substantially complete and accurate, though it is no doubt in need of qualification. For instance, it is limited to trade and does not in terms refer to mixed objects. However, while it seems to me to emphasise the contrast I have found throughout the cases, it does not mention malevolence. I do not think that it differs in substance from the view of LORD DUNEDIN in the same case. At p. 730, he states the contrast between a conspiracy to injure, on the one hand, and, on the other, a set of acts dictated by business interests. When he emphasises that a conspiracy to injure involves *mens rea*, the guilty intention, he does not necessarily mean that malevolence is essential. LORD BUCKMASTER takes the same contrast between the case where the purpose of the combination is the deliberate injury of a third person and that where it is the promotion of legitimate trade interests. LORD SUMNER, however, seems, at least in part of his opinion, to regard proof of actual spite, malevolence or illwill as essential to the cause of action for conspiracy to injure. He draws a parallel from the law of defamation, at p. 737:

> Just as defamatory words uttered on a privileged occasion cease to be words which the speaker is entitled to utter if he is actuated by express malice, so the pursuit of one's own interests at a rival's expense, which pure commercial selfishness would justify, passes the limit of legal right and enters the field of actionable wrongdoing, if for that purity there is substituted independent malevolence towards others.

On the other hand, he says, at pp. 741, 742:

> I incline to agree that the object or purpose of the aggressive action of a combination is the principle thing to be considered.

He adds, however, doubts and qualifications principally in reference to mixed motives. On this question whether malevolence is a necessary element in conspiracy to injure there appears to be some opposition between LORD SUMNER and LORD CAVE, L.C., who not only leaves out that element in stating his two propositions but in express terms says that a motive of spite is not an essential element of the offence. LORD ATKINSON agreed with LORD CAVE, L.C. LORD DUNEDIN does not in terms expressly mention it. He is content to rest upon *mens rea*, a desire to injure. LORD BUCKMASTER agrees generally with LORD DUNEDIN, though in one place he says that the onus is on the plaintiff to prove that the act was spiteful and malicious.

I do not read these opinions as differing on the essential point that, where the acts are *per se* lawful, the presence or absence of intention to injure is the determining feature, and that such an intention is rebutted by a finding that the combiner's real object was to advance their interests. On principle, I am of the opinion that malevolence is no more essential to the intent to injure, the *mens rea*, than it is to the intent to deceive. On practical grounds, also I prefer that view. To leave to a jury to decide on the basis of an internal mental state, rather than on the facts from which intent is to be inferred, may be to leave the issue in the hands of the jury as clay to mould at their will. After all, the plaintiff has to prove actual damage, which can only result from things done. Mere malevolence does not damage anyone. I cannot see how the pursuit of a legitimate practical object can be vitiated by glee at the adversary's expected discomfiture. Such glee, however deplorable, cannot affect the practical result. I may add that a desire to injure does not necessarily involve malevolence. It may be motivated by wantonness or some object not justifiable.

As to the authorities, the balance, in my opinion, is in favour of the view that malevolence as a mental state is not the test. I accordingly agree with the appellants' contention that they are not concluded by the finding that the respondents were not malevolent. It thus becomes necessary to consider the further arguments on which the appellants base their claim to succeed. I approach the question on the assumption that the appellants have to prove that they have been damnified by tortious action. They do not prove that by showing that they have been harmed by acts done by the respondents in combination, these acts being, apart from any question of combination, otherwise within the respondents' rights. It is not, then, for the respondents to justify these acts. The appellants must establish that they have been damnified by a conspiracy to injure—that is, that there was a wilful and concerted intention to injure without just cause and consequent damage. That was the view accepted by LORD DUNEDIN and LORD BUCKMASTER in *Sorrell's* case (4). LORD SUMNER proposes the question without deciding it, but the form in which he states it seems to me to suggest the answer. It is not a question of onus of proof. It depends on the cause of action. The plaintiff has to prove the wrongfulness of the defendant's object. Of course, malevolence may be evidence tending to exclude a legitimate object or to establish a wrongful object.

I have been attempting to define the legal background of the tort, a conspiracy to injure, before I seek to express my opinion on the appellants' contentions. I have not sought to reconcile all that has been said on the question in the authorities. For various reasons, perhaps obvious enough, some due to the earlier combination laws, some perhaps influenced by personal predilections of some judges in the earlier years of this century, reconciliation of all the observations is impossible, but, after all, law does not depend on balancing expressions, as WRIGHT ON CRIMINAL CONSPIRACY wisely observes, at p. 51. I have attempted to state principles so generally accepted as to pass into the realm of what has been called jurisprudence, at least in English law, which has for better or worse adopted the test of self-interest or selfishness as being capable of justifying the deliberate doing of lawful acts which inflict harm, so long as the means employed are not wrongful. The common law in England might have adopted a different criterion, and one more consistent with the standpoint of a man who refuses to benefit himself at the cost of harming another. However, we live in a competitive or acquisitive society, and the English common law may have felt that it was beyond its power to fix by any but the crudest distinctions the metes and bounds which divide the rightful from the wrongful use of the actor's own freedom, leaving the precise application in any particular case to the jury or judge of fact. If further principles of regulation or control are to be introduced, that is matter for the legislature. There are not many cases in which the court has had to consider these problems. Actions of this character are not of everyday occurrence, like actions for negligence. I must, however, refer to the details of certain cases.

I shall first refer to *Quinn* v. *Leathem* (6), decided by this House on appeal from Ireland. In outline, the facts were very simple. Leathem, a butcher, had been employing non-union labour. The policy of the union was that only its members should be employed. Leathem was willing that his men should join the union and offered to pay their fines and entrance money. The defendants, the union officials, refused that offer, and said the men could not be admitted to the union, but must walk the streets for 12 months. Leathem refused to discharge the men. A few months later he was warned that, if he continued to employ non-union men, the men who worked for Munce, one of Leathem's customers, would be called out unless Munce ceased to take his meat from Leathem. Munce thought it more prudent to cease to get his meat from Leathem who lost the benefit of his customer's trade. This was the damage claimed in the action, in which a conspiracy to injure was alleged. I disregard the case of the man Dickie, who was called out in breach of his contract with Leathem. Apart from the savage expressions used by the defendants, and perhaps the desire of the defendants that the men should walk the streets for 12 months and the circumstance that Leathem had offered to satisfy the union's demands, the case might well have been regarded as one in which ordinary measures had been taken to promote the union's interests by excluding non-union labour. In *Ware & De Freville, Ltd.* v. *Motor Trade Assocn.* (10), at p. 68, SCRUTTON, L.J., pointed out the close parallel with *Scottish Co-operative Wholesale Society* v. *Glasgow Fleshers' Trade Defence Assocn.* (18), a striking case of "exclusive dealing" in trade affairs enforced by threats or warnings by the defendants in concert that they would withhold their custom from the salesmen if they sold meat to the plaintiff. The object was to limit competition. The decision in the *Glasgow Fleshers'* case (18) was approved by this House in *Sorrell's* case (4), and also by LORD LINDLEY in *Quinn's* case (6), at p. 539, but there was in *Quinn's* case (6) the special evidence of vindictive purpose. It was thus a question for the jury to decide whether there was an intention to injure or an intention to promote the union's objects, or, perhaps, more exactly, what the predominant object was. FITZGIBBON, L.J., who tried the case, put to the jury the question: "Did the defendants or any two or more of them maliciously conspire to induce the plaintiff's customers or servants named in the evidence, or any of them, not to deal with the plaintiff or not to continue in his employment, and were such persons so induced not to do so?" The jury answered: "Yes." The judge A told the jury that acts done with the object of increasing the profits or raising the wages of any combination of persons such as the society to which the defendants belonged by reasonable and legitimate means were perfectly lawful, and were not actionable so long as no wrongful acts were maliciously—that is to say, intentionally—done to injure a third party. He put the usual and correct alternative of acts done to secure or advance the combiners' own interests or acts intended and calculated to injure the plaintiff in his trade. He told the B jury that intention was to be inferred from acts and conduct proved. There is no report of the summing up as a whole. It is useless to speculate whether the jury might not have properly found that, if the objects or motives were mixed, the predominant motive or object was to advance the union's policy, while the malevolent desire to punish Leathem was subordinate. It was for the jury to decide. They decided against the defendants, and there was evidence to support their verdict. Some may question whether they fully appreciated the actual C interests or objects of a trade union, but this is fact, not law. In the Irish Court of Appeal, where the case is entitled *Leathem* v. *Craig*, ([1899] 2 I.R. 667), the judgment which most appeals to me is that of HOLMES, L.J., which LORD ROBERTSON adopted *in toto* in his opinion in this House, and LORD MACNAGHTEN approved. HOLMES, L.J., said that, if there was illegality in a combination, it must be looked for in the object proposed. He treated the finding of the jury as D decisive.

It seems to me that much of the discussion which has centred round *Quinn's* case (6) merely deals with the issue of fact, and either approves or disapproves of the justness of the jury's finding. However, the decision of the House is of great importance as giving the authority of this House to the principle that a conspiracy to injure gives a cause of action. That rule was well-established, and had been applied in *Temperton* v. *Russell* (15) and approved by this House in E *Allen* v. *Flood* (5). *Quinn's* case (6) was in fact the complement of *Allen* v. *Flood* (5). The latter case gave effect to the rule where there was no combination, the former to the rule where there was combination. Of the six Lords of Appeal who took part in the debate in *Quinn's* case (6), the *ratio decidendi* of five was based upon a conspiracy to injure. I refer to LORD HALSBURY, at p. 505, LORD MACNAGHTEN, at p. 511, LORD SHAND, at p. 513, LORD ROBERTSON, at p. 532, where he adopts the words of HOLMES, L.J., and LORD BRAMPTON, F at pp. 527, 528. The views of these Lords are enough to decide the *ratio decidendi* adopted in this House. LORD LINDLEY, at p. 539, seems to base his opinion on coercion and threats by numbers, but without clearly defining what he means by these neutral terms, which have since been elucidated in this House. I do not think it necessary further to consider the cross-currents of observation which are found in some of the opinions. LORD SHAND sums up his view (and, as it G appears to me, the *ratio decidendi* of the House), very clearly and accurately, at p. 515:

> Their [the defendants'] acts were wrongful and malicious in the sense found by the jury—that is to say, they acted by conspiracy, not for any purpose of advancing their own interests as workmen, but for the sole purpose of injuring the plaintiff in his trade.

So understood, *Quinn's* case does not help the appellants here unless they can get rid of the findings of the courts below. Before I examine the grounds on H which they seek to do this, I ought to refer to some other cases.

One is *Giblan* v. *National Amalgamated Labourers' Union of Great Britain & Ireland* (7), where the jury found that the defendants' acts in preventing the plaintiffs from getting employment were done, in the case of the one, to prevent him from getting or retaining employment, and, in the case of the other, to compel him to pay arrears of defalcations of which he was guilty. The facts were somewhat complicated. As LORD HERSCHELL pointed out in *Allen* v. *Flood* (5), at p. 131, the use of the word "punishment" may be misleading. It may mean mere vindictive vengeance or it may mean an intention to deter others from similarly offending. Equally, the desire to enforce repayment of defalcations may be actuated by either of the same motives, to say nothing of desire to get the money. It is clear that the jury took the view more adverse to the defendants. Much which was said by the Lords Justices in the case would require careful consideration in view of earlier and later decisions of this House. ROMER, L.J., however, wisely observes, at p. 618, that, in determining whether the injurious action is "justified," regard must be had to the circumstances of each case as it arises, and that it is not practically feasible to give an exhaustive definition of the word to cover all cases. The facts in *Giblan's* case (7) were so peculiar that I cannot derive any general guidance from it. I may note in particular that the jury found that the trouble did not arise because the union men objected to work with the plaintiffs. I cannot find any analogy between the facts in that case and the facts as found in the present case.

On the other hand, two later cases show how far the courts have gone in upholding the rights of persons to freedom to pursue their own interests in their trade even at the cost of seriously impeding the freedom in a practical sense of other persons in their trade. Perhaps the most striking case of this nature is *Ware & De Freville, Ltd.* v. *Motor Trade Assocn.* (10), approved by this House in *Sorrell's* case (4) and later applied in *Thorne* v. *Motor Trade Assocn.* (19). The defendants were an association of motorcar manufacturers who adopted a scheme and rules for maintaining fixed prices for their goods. These prices were published. If any person departed from these published prices, his name was put on a stop list, whereupon no member of the association was to supply him. Further, if any person did supply him, that person's name would also be placed on the stop list and he would be similarly pilloried. Persons on the stop list were, however, allowed to purge their offence by paying a fine, if the association accepted it. The plaintiff, a motor dealer who was not a member of the association, had been placed on the stop list in accordance with the scheme. The scheme was a most ruthless and efficient system aimed at securing the mutual benefit of the associated traders, at whatever loss or inconvenience to outsiders. The plaintiff complained that all he wanted was to exercise his lawful freedom to buy and sell cars as he desired. It was contended that the system adopted by the defendants went beyond any previous decision. The defendants, it was submitted, were saying: "If you continue to deal with the plaintiff, you shall not only cease to deal with us, but we shall take steps to prevent others from dealing with you." The Court of Appeal held, however, that no legal wrong was committed, because the defendants had done nothing unlawful, and the combination was not a wrongful conspiracy, because its object was not to injure, but was the lawful object of promoting their business interests, as they understood them, by preventing price-cutting and securing price maintenance. The elaborate system was devised solely with that object. The Court of Appeal rejected the contention that the method adopted amounted to coercion or threats. On this latter topic, much the same opinion was expressed by this House in *Sorrell* v. *Smith* (4), already referred to by me. Apart from the general exposition of the law of civil conspiracy to injure which it contains, it is important in dealing with the present appellant's submissions, because it placed on a wide basis the business interests protection or advancement of which would prevent its being held that the defendants had acted with intention to injure the plaintiff. The defendants were an association of newspaper proprietors who, in the course of a dispute between two rival associations of newspaper dealers, had intervened to support the policy of one association by stopping supplies to the plaintiff, a retail dealer who had adhered to the side of the other. RUSSELL, J., the trial judge, held that the defendants had no justification for interfering with the plaintiffs' freedom of trade, because they had no direct interest in the conflict between the two associations. In the words of LORD SUMNER, at p. 731, the judge's view was that the defendants were well-meaning busybodies who intimidated third parties, and so meddled with the plaintiffs' business in a matter which was no business of theirs because, as he held, they wanted a controlling decision in the dispute. The Court of Appeal and this House reversed the decision of the judge, on the short ground that the real purpose of the newspaper proprietors was to promote the circulation of their papers, and that they did so by lawful means.

I think that this line of reasoning applies here to answer the appellants' contention that the respondents or the union had no direct interest in the importation of yarn. On the facts found, rightly, as I think, they were of opinion that the prosperity of the industry in Harris tweed was jeopardised by the importation. It is not for the court to decide whether this opinion was reasonable or not. It was a genuine opinion. It cannot be said that it was a mere sham intended to cloak a sinister desire to injure the importers. The respondents had no quarrel with the yarn importers. Their sole object, the courts below have held, was to promote their union's interests by promoting the interest of the industry on which the men's wages depended. On these findings, with which I agree, it could not be said that their combination was without sufficient justification. Nor would this conclusion be vitiated, even though their motives may have been mixed, so long as the real or predominant object, if they had more than one object, was not wrongful. Nor is the objection tenable that the respondent's real or predominant object was to secure the employer's help to get 100 per cent. membership of the union among the textile workers. Cases of mixed motives, or, as I should prefer to say, of the presence of more than one object, are not uncommon. If so, it is for the jury or judge of fact to decide which is the predominant object, as it may be assumed the jury did in *Quinn's* case (6), when they decided on the basis that the object of the combiners was vindictive punishment, and not their own practical advantage. A curious instance of mixed motives or objects is taken by ANDREWS, J., in his interesting judgment in the Irish Divisional Court in *Leathem* v. *Craig* (6), at p. 674, from *Kearney* v. *Lloyd* (12), where the defendants were parishioners who had combined to withhold their subscriptions from the incumbent, partly as the jury found, with the intention of promoting the religious interests of the parish and partly with the intention of obliging the incumbent to resign. ANDREWS, J., expressed the view that the former was the main and ultimate object. The case, however, was eventually decided on other grounds.

I may here note that the doctrine of civil conspiracy to injure extends beyond trade competition and labour disputes. *Thompson* v. *British Medical Assocn.* (*N.S.W. Branch*) (20) shows that it may extend to the affairs of a profession, as was expressly stated in that case, at p. 771, in the judgment of the Privy Council. By way of contrast, *Gregory* v. *Brunswick* (*Duke*) (21) may be regarded as a striking illustration of what might be held to constitute a conspiracy to injure. What was alleged was a conspiracy to hiss an actor off the stage in order to ruin him. To what legitimate interests other than those mentioned the general doctrine may extend I do not here seek to define, since beyond question it extends to the present case, whether the object of the action were the prosperity of the industry or the obtaining of 100 per cent. membership. The objects or purposes for which combinations may be formed, however, are clearly of great variety. It must be left to the future to decide, on the facts of the particular case, subject to the general doctrine, whether any combination is such as to give rise to a claim for a conspiracy to injure.

If, however, the object of securing 100 per cent. union membership were operative in inducing the respondents to combine with the employers, it was relied on by the appellants on other grounds as vitiating the combination. It was objected that there could be no combination between the employers and the union, because their respective interests were necessarily opposed. I think that that is a fallacious contention. It is true that employers and workmen are often at variance because the special interest of each side conflicts in the material respect, as, for instance, in questions of wages, conditions of hours of work, exclusion of non-union labour, but, apart from these differences in interest, both employers and workmen have a common interest in the prosperity of their industry, though the interest of one side may be in profits and of the other in wages. Hence a wider and truer view is that there is a community of interest. That view was acted upon in the present case in regard to the essential matter of yarn importation. As to the separate matter of the union membership, while that was something regarded as important by the respondents, it was probably regarded by the employers as a matter of indifference to them. It was, in any case, a side issue in the combination, even from the respondents' point of view. I may add that I do not accept as a general proposition that there must be complete identity of interest between parties to a combination. There must, however, be sufficient identity of object though the advantage to be derived from that same object may not be the same.

The appellants have further contended that the "deal" referred to in the respondent Veitch's letter was a bargain by which the union sold to the employers the dockers' aid in return for the employers' aid in regard to union membership. In other words, the contention was that the respondents or the union were bribed, and were mercenaries, and not interested in the embargo except for the A reward, which was in its nature unrelated to the embargo. The facts, however, were not as the contention assumes, so I need not discuss whether a party to a combination whose interest was merely separate and mercenary could ever be held to have a legitimate interest or justification for harm done in pursuance of the combination. I need merely add a few words on the objection that the embargo was the act of the dockers for the benefit, not of themselves, but of the textile workers. It is enough to say that both sections were members B of the union, and there was, in my opinion, a sufficient community of interest, even if the matter is regarded from the standpoint of the men, as individuals, and not from the standpoint of the respondents, who were the only parties sued. Their interest, however, was to promote the advantage of the union as a whole. In my opinion, the judgment appealed from should be affirmed and the appeal dismissed.

C LORD PORTER: My Lords, the circumstances relevant to be considered in this case extend over a considerable period, and the conclusions to be drawn from them demand a close scrutiny of the evidence. I need not state the facts. That has already been done, but I must set out the inferences which have been drawn from them and consider whether those arrived at by the courts below, and particularly by the LORD ORDINARY, have been shown to be wrong. Apart, D however, from the facts, the arguments have ranged over a wide area of somewhat obscure law, as to which, so far as it is necessary, your Lordships must find a solution. In a matter so difficult, however, I should not feel justified in expressing a concluded opinion upon any matter which is not essential for the determination of the case. I propose, therefore, to state with what accuracy I can the exact findings upon which I think a conclusion of law has to be pronounced.

E It is unnecessary to emphasise the principle, so often recognised by your Lordships, that, in all cases where facts have to be reviewed, it is undesirable that the findings of the courts below should be disturbed by a court of appeal unless it appears that those findings are clearly wrong, and more especially that it is undesirable to do so where the conclusions reached must to a large extent depend upon the demeanour of the witnesses and the impression formed by F a tribunal which has seen them and can judge of their honesty and accuracy. In the present case, the court had to determine the purpose, motive, intention, call it what you will, of Veitch and Mackenzie. I cannot find that the LORD ORDINARY, or, indeed, the Inner House, thought either of them untruthful or dishonest. It would have been possible to judge them to be men who clearly foresaw the injury which their acts would produce and to have intended that injury, or to have thought them muddle-headed, obstinate and prejudiced G but still honestly desirous of doing what they considered beneficial to their trade union and anxious only to promote its interests, even though their acts might be prejudicial to some or all of the employers of the labour which they represented. Both courts took the latter view. One cannot be too logical in these matters, or expect a defender to have an exact apprehension of the consequences of his acts or clearly to appreciate how the methods he adopts for effecting the end at which he aims will work. His action may inevitably cause H injury, yet that may not be his object. The case which is under consideration seems to me to be pre-eminently one in which an appellate tribunal should be guided by the opinion of the judge who saw and heard the witnesses, and I do not find myself qualified to criticise or correct his conclusions as to the purpose which the defenders had in mind in following the path along which they travelled. I should allow myself more latitude in dealing with the question whether there was a combination between the millowners, or some of them, and the two defenders sued, because the material for judgment is, I think, more abundant, and because the Inner House has taken a view contrary, it is true, to that of the LORD

Ordinary, but still one which must be shown to your Lordships to be wrong before it is interfered with.

Having these considerations in mind, I find myself unable to differ from the Lord Ordinary when he concludes that there was no conspiracy to injure, and, if, for my own part, I had to decide the further question whether a combination between millowners and defenders had been proved, I should not feel justified in forming an opinion contrary to his, but in agreement with the opinion already expressed by Viscount Simon, L.C., should not consider this combination established. I am the more emboldened to express this as I think that it has the support in the Inner House of the Lord Justice-Clerk, and that Lord Wark, if he had himself had to determine it, would have been of the same opinion, though undoubtedly Lord Fleming and Lord Mackay take the other view. The Lord Justice-Clerk thought, however, that there was some kind of understanding, more or less defined between Veitch and Skinner, to the effect that, if the union took action and imposed an embargo against the importers of yarn, the union in turn would be assisted by the millowners to get their 100 per cent. membership, and I understand some of your Lordships to agree that the wider combination has been established. I am therefore prepared to treat the case upon that footing. If the meaning of a combination to injure were plain, and if a finding that it had not been proved were enough, the view that there had been no combination to injure would be conclusive of the case. However, as both the meaning of the phrase and the question whether a mere absence of intention to injure is all that is required to absolve the defenders from liability are both in dispute, it is first of all necessary to state exactly what I believe the finding of the Lord Ordinary to have been. It is, I think, set out succinctly in the following paragraph:

> In the present case the immediate purpose of Veitch and Mckenzie was to force producers to come to an agreement regarding the selling-price of tweed and the exclusive use of island-spun yarn. The means adopted necessarily inflicted injury on the petitioners. But was the infliction of injury Veitch's motive? Lord Dunedin in *Sorrell* v. *Smith* (4), at p. 717, suggested a test as follows: "Was such a purpose the real root of the acts that grew from it, or was the true motive of the acts something else, such as, for instance, the furtherance of the defendants' own business?" Applying this test, the answer must be in the negative. There is no evidence that Veitch had evinced any malice or ill will towards any of the petitioners or that he was prompted by a desire to destroy the trade of any persons who were employing weavers and paying them the union rate of wages. The purpose at the root of his action was to advance the position of the union and its members, however mistaken he may have been in the means he adopted to secure that end. It may be that the benefits hoped to be obtained would have been an ultimate and not an immediate consequence of the action taken, but I do not think it would have been any more remote than in the cases of *Sorrell* v. *Smith* (4) and *Ware & De Freville, Ltd.* v. *Motor Trade Assocn.* (10).

There is ample evidence for this finding, and, although Veitch's testimony was at times confused and inconsistent, its effect was a matter for the judge. I find no attack upon the substantial honesty of this witness either by him or by the Inner House, though the lack of consideration shown is severely critised by both.

The views of the Inner House are not dissimilar. I may quote from the Lord Justice-Clerk and from Lord Fleming. The former says:

> Moreover, there are a number of circumstances that point to Veitch having acted in good faith. He was a trusted and responsible official. He had no quarrel with any of the petitioners. There is nothing to suggest that he had ill will towards anyone. I regard the suggestion that he was out to ruin the importers as entirely ill-founded. His letter to Mackenzie of Jan. 28 shows that he was prepared to meet them and discuss the position. There is not the slightest trace of personal ill will or spite. I doubt if he knew any of them personally. The attainment of 100 per cent. trade union membership was the declared policy of his trade union. From 1935 onwards the officials of the union had made it clear that they regarded price-cutting as something that would be hurtful to the interests of the workers in the industry, and that they would not hesitate to take direct action to prevent it. I attach the greatest weight to the fact that Veitch instructed an embargo against Macdonald, the largest, or one of the largest, millowners in the island—there is no suggestion that this was a conspiracy to injure—as showing that he genuinely believed that price-cutting would be gravely prejudicial to the interests of his men. Also it had been represented to Veitch by Skinner, particularly in his letter of Jan. 6, that the continued importation of yarn was responsible for the reluctance of many yarn-purchasers to bind themselves to a price agreement and that the price

of yarn as affected by the importation would "seriously affect" their ability to maintain existing wage rates. There is no suggestion that the dockers were coerced or intimidated into taking action. They were consulted, and were unanimous in their decision, presumably because they were satisfied as to where their true interests lay.

Taking all these facts together, I find it impossible to draw the conclusion that Veitch was acting with an intent to injure. On the contrary, I am satisfied, and I hold in fact, that he was acting in the honest belief that the step was justified in furtherance of the interests of his own members and the industry as a whole.

A Later, LORD FLEMING said:

Then there is the circumstance that both the parties had the same interest in the matter. To exclude mainland yarn would give the island millers a monopoly of the supply of yarn, and Veitch's view was that the prohibition of mainland yarn would be to the benefit of the workers in the industry.

Again, he said:

B I feel satisfied that Veitch held sincerely and strongly the view that the continuance of unrestricted importation of mainland yarn would, sooner or later, prove harmful to the members of the union, and that, in the absence of an agreement between the millowners and the importers, the best policy for the union to adopt was to exclude it from the island if it could. Macrae, who knew the whole history of the industry, and was interested in it because it involved the welfare of many members of his congregation, also held this view, and I do not think it can be said to be an unreasonable view. At all events, it cannot be said that it was so unreasonable as to justify an inference that there C was some other ulterior reason for Veitch's decision. What lay at the root of the opposition to the importation of mainland yarn on the part of Veitch and Macrae seems to have been the idea that the whole process of making wool into Harris tweed should be retained as far as possible as an island monopoly for the benefit of the workers on the island. The exclusion of mainland yarn would not only give the island a monopoly of the whole process of manufacture, but would also tend to make the practice of price-cutting more difficult. All tweed manufactured on the island would qualify for D the stamp, and would not have to face competition from Harris tweed woven in the island but from yarn not spun on the island. If, as I think, Veitch sincerely held views of that kind, I find it difficult to attribute his actings to anything else than a *bona fide* desire to advance the interests of the members of his union.

The reasoning of LORD WARK does not differ from that of his brethren. His conclusion is expressed as follows:

Taking the respondents in turn, I begin with Mackenzie. I cannot find anything E in the evidence to show, or even to suggest, that he was inspired by any motive other than the desire to forward what he *bona fide* believed to be the interests of the members of his union. The same is true of Veitch. There is no evidence that I can find of any ill will against any of the petitioners. It does not appear that he had ever met any of them. His sole concern with them, in my view, was to prevent them from acting in such a way as would, in his honest opinion and belief, injure the interests of the members of the union, and, in my judgment, his only motive in acting as he did was to advance these interests, or at least to prevent injury to them. I cannot doubt, upon the evidence, F that Veitch honestly believed that a continuance of the importation of mainland yarn would bring down tweed prices, and, with them, the wages of the spinners and weavers.

As I am discussing the case on the footing that there was a combination to which Skinner at least, and possibly also some of the millowners, were parties, I omit to stress the still stronger view expressed by LORD FLEMING as to Mackenzie's activities:

G The latter was throughout a mere servant, his function being in the main limited to carrying out Veitch's instructions and doing routine work. The grounds for holding him guilty of any intention to injure are much weaker than in Veitch's case.

I have quoted somewhat fully from the opinions expressed, because, having regard to the arguments addressed to your Lordships, I think it necessary to ascertain exactly what purpose the courts below imputed to those who have been held to have combined. Both, I think, found that the stoppage of the H importation of mainland yarn was effected because Veitch and Mackenzie, at any rate, thought it in the interest of their workers to do so. Both also, I think, believed each of the defenders to hope that the manufacturers, millowners and non-millowners, would come to an agreement amongst themselves, and, when that hope failed, put the strongest pressure they could upon the dissentient employers by refusing to handle their material, whether in the shape of yarn or the finished or unfinished product. The immediate purpose of the combination, in this view, was to prevent the importation of mainland yarn and to bring about an agreement amongst the employers to use only that spun upon the island, the motive of the defenders being thereby to prevent the danger of competition, which they feared might cause a diminution of wages, and to bring about a state of affairs in which a 100 per cent. membership of the union would be attained in the ranks of the spinners and of the weavers, while the motive of the millowners was to increase their profits and perhaps to eliminate competition in spinning.

No doubt the result of the embargo was necessarily to injure those against whom it was exercised, but that was not found to be its purpose. Its object, A as found by the Lord Ordinary, was to further the defenders' own legitimate business, and, if that was their intention, I should not consider them participants in an actionable conspiracy, even though the inevitable result of the action which they took would be to ruin the importers of mainland yarn.

This is the view of HOLMES, J., in *Vegelahn* v. *Guntner* (22), when he says:

> The fact that the immediate object of the act by which the benefit to themselves is to be gained is to injure their antagonists does not necessarily make it unlawful any B more than when a great house lowers the price of certain goods for the purpose and with the effect of driving a smaller antagonist from the business.

These observations are no less weighty though delivered in a dissentient judgment They were approved by LORD CAVE, L.C., in *Sorrell* v. *Smith* (4), at p. 714, and by SCRUTTON, L.J., in *Ware & De Freville, Ltd.* v. *Motor Trade Assocn.* (10), and are in conformity with the principles expressed in *Mogul S. S. Co.* v. C *McGregor, Gow & Co.* (1), which preceded it, and are supported by the view of the majority of your Lordships' House in *Allen* v. *Flood* (5), which was decided two years later. In the latter case, LORD HERSCHELL, speaking of the former, said, at p. 140:

> In that case the very object of the defendants was to induce shippers to contract with them, and not to contract with the plaintiffs, and thus to benefit themselves at the expense of the plaintiffs, and to injure them by preventing them from getting a D share of the carrying trade. Its express object was to molest and interfere with the plaintiffs in the exercise of their trade. It was said that this was held lawful because the law sanctions acts what are done in furtherance of trade competition. I do not think the decision rests on so narrow a basis, but rather on this, that the acts by which the competition was pursued were all lawful acts . . .

The general proposition has been summed up by SCRUTTON, L.J., in *Ware & De Freville, Ltd.* v. *Motor Trade Assocn.* (10), at p. 67: E

> I take *Allen* v. *Flood* (5) and *Bradford Corpn.* v. *Pickles* (16) to decide that an act otherwise lawful, though harmful, does not become actionable by being done maliciously in the sense of with a bad motive or with intent to injure another. . . . I take the *Mogul* case (1) as deciding that a combination to do acts, the natural consequence of which was to injure another in his business, was not actionable if those acts were not otherwise unlawful, such as assaults, or threats of assaults, and were done in furtherance of the trade interests of those combining. I understand *Quinn* v. *Leathem* (6) to decide F that a combination to injure another in his trade and business, not in furtherance of the trade interests of those combining, but out of spite against the person injured, is actionable.

This is a summing up of the principles to be deduced from the so-called trilogy of cases upon conspiracy—namely, *Mogul S. S. Co.* v. *McGregor, Gow & Co.* (1), *Allen* v. *Flood* (5) and *Quinn* v. *Leatham* (6)—and I think that it is a correct one. It has since received support from the reasoning upon which your Lord- G ships' House decided *Sorrell* v. *Smith* (4). If this be their result, *Mogul S. S. Co.* v. *McGregor, Gow & Co.* (1) and *Allen* v. *Flood* (5) are consistent and easily comprehensible. More difficulty is to be found in explaining *Quinn* v. *Leathem* (6). Why should a combination to injure be actionable, whilst action taken by a single person for that purpose, and for that purpose only, is permissible ?

In *Sorrell* v. *Smith* (4) LORD CAVE, L.C., thought the point an open one, and LORD SUMNER considered it at least not free from doubt, but the view that a H combination to do acts injurious to others is actionable, whereas the act of a single individual is not, is, I think, supported by the greater weight of authority. LORD FIELD and LORD HANNEN in the *Mogul* case (1) certainly were of this opinion, and in *Allen* v. *Flood* (5) LORD WATSON, at p. 108, LORD HERSCHELL, at p. 129, LORD MACNAGHTEN, at p. 153, LORD SHAND, at p. 168, and LORD DAVEY, at p. 172—who, with LORD JAMES, constituted the majority of the House—all indicated that a conspiracy to injure might give a good cause of action, where similar action on the part of an individual would not. In

Ware & De Freville, Ltd. v. *Motor Trade Assocn.* (10), Scrutton, L.J., finds difficulty in accounting for the difference. One not uncommon explanation is that a combination may exert undue pressure where one person will not, but it is not very satisfactory. In the first place, it is not necessarily true, and, in the second, to exert pressure is not unlawful. There is an earlier question, however. Whether there be combination or not, it may be a criminal offence and an actionable wrong to induce another to do what is unlawful, or to do what is lawful by unlawful means. The phraseology is first to be found in *R.* v. *Jones*, (23), and has again and again been repeated both in criminal and in civil cases, though in the former it may be a limitation and not a definition. In criminal cases, Fitzgerald, J., puts the principle in *R.* v. *Parnell* (24) in the following words, at p. 513:

> Conspiracy has been aptly described as divisible under three heads:
> (1) Where the end to be attained is in itself a crime;
> (2) Where the object is lawful but the means to be resorted to are unlawful;
> (3) Where the object is to do injury to a third party or to a class, though if the wrong were inflicted by a single individual it would be a wrong but not a crime.

In *Mogul S. S. Co.* v. *McGregor, Gow & Co.* (1), Lord Watson says, at pp. 41, 42:

> I apprehend that in order to substantiate their claim the appellants must show either that the agreement was unlawful or that illegal methods were resorted to in its prosecution.

In the definition of Fitzgerald, J., even the third heading postulates the existence of a civil wrong, and in recent times I do not think that it has been held criminal merely to combine to injure a third party, provided no unlawful means are used or contemplated, and it is doubtful whether such a combination ever was criminal: Wright on Criminal Conspiracy (1873), p. 41. It is true that in certain classes of case—e.g., where masters and workmen or trade are concerned—it was at one time held criminal to agree not to sell under fixed prices or not to work under certain prices (*R.* v. *Eccles* (25)), but the doctrine is not one to which, apart from statutory prohibition, any court to-day is likely to subscribe. There may, however, be combinations which are criminal, though entered into for purposes which would not be criminal if done by an individual, but, whether this be so or not, it is now established that a conspiracy the object of which is to injure a third person is an actionable wrong. *Quinn* v. *Leathem* (6) and *Sorrell* v. *Smith* (4) in your Lordships' House are sufficient authority for this proposition. Why it has been so held is not, I think, clear. That such a combination may be actionable had, as I have indicated, already been recognised by at least five of the members of your Lordships' House who were amongst the majority in *Allen* v. *Flood* (5), and has again been recognised in *Sorrell* v. *Smith* (4). The point is now too well-established to be the subject of controversy.

In the view of Lord Dunedin as expressed in *Sorrell* v. *Smith* (4), a conspiracy to injure is a criminal offence, and, therefore, either the object aimed at was illegal or the means used (Lord Dunedin uses both expressions) were illegal. It may be so, or it may be, as Lord Sumner suggests, that a combination to injure is a form of intimidation, or, again, it may be that the doctrine is a survival of the view formerly held as to the illegality of combinations to raise wages or interfere with trade, or of the more paternal view expressed on a different matter by Lord Mansfield in *Jones* v. *Randall* (26), at p. 385:

> Whatever is contrary *bonos mores et decorum* the principle of our laws prohibits and the King's court, as the general censor and guardian of the public manners, is bound to restrain and punish.

In any case, it is undoubted law.

Whether it is necessary that the object of the defenders should be solely to gain an advantage for themselves or whether their motives may be mixed, provided the main or substantial motive is their own gain, is not so clear. Lord Dunedin in *Sorrell* v. *Smith* (4) apparently thought it enough that the dominating motive should be to benefit oneself. On the other hand, in *Mogul S. S. Co.* v. *McGregor, Gow & Co.* (1), Lord Hannen, at p. 59, raises the question as to what would happen if the evidence had shown that the object of the defendants was a malicious one—namely, to injure the plaintiffs—whether the defendants should be benefited or not, but, since in that case, as in this, their sole motive was to secure certain advantages for themselves, he leaves the question unanswered. In the *Mogul* case (1), LORD WATSON says, at p. 42:

> If the . . . combination had been formed, not with a single view to the extension of their business and the increase of its profits, but with the main or ulterior design of effecting an unlawful object, a very different question would have arisen . . .

In *A.-G. of Commonwealth of Australia* v. *Adelaide S.S. Co., Ltd.* (27), LORD PARKER, at p. 797, speaks of

> the right of combining with others in a common course of action, provided such common course of action is undertaken with a single view to the interests of the combining parties and not with a view to injure others. A

In *Sorrell* v. *Smith* (4), at p. 742, LORD SUMNER expresses himself as not prepared to admit that the addition of personal animosity to a desire to benefit oneself makes actionable that which, without the animosity, would not be so, but confesses himself unable to say at what point the intention to injure overweights the scale so as to render the confederates liable for the damage which they do B in spite of the private advantage which they hope to obtain. The answer may be that given by LORD DUNEDIN in *Sorrell* v. *Smith* (4)—namely, that one must judge broadly, as a jury would judge, and so determine the predominant purpose. After all, the task is no more difficult than that which faces them in every criminal case—namely, to determine whether there is *mens rea* or not. Nevertheless, if I thought that, in the present case, the object of the parties C to the combination was to ruin the appellants, even though each hoped thereby to gain an advantage for himself, I should desire to consider the matter further before deciding that the respondents were not liable. However, I do not think that such a case has been proved. The LORD ORDINARY and Inner House have not so found. The direct objects were to force an agreement and to stop the importation of mainland yarn, both of which, as found by the courts below, were honestly believed to be of direct benefit to the defendent's trade union. No D question of indirect purpose is in issue. The result of the action taken might be to ruin the importers of mainland yarn, and it might be recognised that this was a possible, or even a probable, outcome, but that was not the purpose of those who combined. Each desired only to further his own interests.

If this view of the facts prevails, and if it is recognised, as I think it must be since the decision in the *Mogul* case (1), that men are entitled to pursue their advantage even though the natural and inevitable result be the ruin of others, E the pursuers' case is at an end, but, in deference to the forcible arguments addressed to us on behalf of the appellants, and in view of the difficulties of the subject, I must add some further observations and qualifications to the views I have expressed. One of the difficulties in the law of actionable combination is to decide what purposes are to be looked at in determining whether or not the combination is illegal. This problem is perhaps touched upon by LORD F CAVE L.C., in *Sorrell* v. *Smith* (4), at p. 714, when he speaks of the purpose of a threat being to forward trade interests, and not wilfully and ultroneously to injure the trade of another, by which I think he means not wilfully to injure the trade of another save for the purpose of forwarding one's own. In other words, is it enough that the substantial object of the defenders was not to injure the pursuer, or must they go further and must it be established in some way, either by positive evidence on behalf of the defenders or by lack of G evidence on behalf of the pursuer, that they were following some interest of their own? In *Sorrell* v. *Smith* (4), LORD SUMNER left the question open, though he suggests that the defenders must not be intermeddling busybodies. LORD DUNEDIN took the view that it was enough if they did not set out to injure the pursuer, and regarded evidence that their own advantage was involved merely as tending to prove that their object was not to injure. LORD CAVE, L.C., did not in terms deal with the question, but the framework of his first proposition, H which I quote below, suggests that the defenders must have their own end to gain.

It is, I think, true to say that in all the cases which have dealt with this subject the contrast is drawn between a desire to injure on the one hand and the pursuit of the defenders' interests on the other. Nowhere, except in the opinion of LORD DUNEDIN in *Sorrell* v. *Smith* (4), is the mere fact that the defendant's object was not found to be a desire to injure held to exonerate them from liability. It is, I think, always added that their purpose was to gain an advantage for themselves. LORD SUMNER, indeed, asks, at p. 739, what other motive there can be in such a matter beyond selfishness and malice, except, indeed, mere irresponsible wantonness. So far, however, no case has decided, and it has not been necessary to decide, whether or not confederates who have combined, not for the purpose of doing an injury, but with no object of their own to gain, are liable to those against whom they have combined. The present case, like those which preceded it, does not require a solution of this problem. Throughout the defenders acted in what they believed to be the interest of their trade union. Assuming, however, that the defenders would only be justified in pressing their own selfish aims, is every personal advantage which accrues to them by reason of their action a sufficient excuse, or is something more intimately and directly connected with their business interests required, something which will help their trade or improve the position of their trade union ? Must it be something, as SCRUTTON, L.J., says in *Ware & De Freville, Ltd.* v. *Motor Trade Assocn.* (10), at p. 71, " intended to secure the interests of the confederates in their trade by reasonable and legitimate means " (by which I understand him to mean by lawful means) ?

That business in this connection is not confined to trade has been insisted upon in *Allen* v. *Flood* (5), and in *Bradford Corpn.* v. *Pickles* (16), the principle was said not to be confined to rights of property, but to be equally applicable to the exercise by an individual of his other rights. The quotation most frequently made in this connection is the well-known passage in the opinion of LORD CAVE, L.C., in *Sorrell* v. *Smith* (4), at p. 712 :

> I deduce as material for the decision of the present case two propositions of law which may be stated as follows :
>
> (1) A combination of two or more persons wilfully to injure a man in his trade is unlawful, and if it results in injury to him is actionable.
>
> (2) If the real purpose of the combination is not to injure another, but to forward or defend the trade of those who enter into it, then no wrong is committed and no action will lie, although damage to another ensues. The distinction between the two classes of case is sometimes expressed by saying that in cases of the former class there is not, while in cases of the latter class there is just cause or excuse for the action taken.

This statement of principle is, I think, apt to be used as if it resolved the many difficulties in a difficult department of the law. Too often it is forgotten that LORD CAVE, L.C., himself introduced it by saying that he deduces "as material *for the decision of the present case* two propositions of law." The italics are mine. In that case, the combination was, not to injure, but to forward or defend, the trade of those who had entered into the combination, as in this it was to increase the membership of the trade union and protect the wages of its members, and the statement of LORD CAVE, L.C., does not seek to comprehend all circumstances.

Cases in which the action of the confederates is to compel the plaintiff to pay a debt, as in *Giblan* v. *National Amalgamated Labourers' Union of Great Britain & Ireland* (7), have been held not to be within the principles, perhaps on the grounds stated by BUCKLEY, L.J., at p. 619, that the intent was to prevent the plaintiff from obtaining or retaining employment in order to compel him to pay a debt due from him, " and from this the intent to injure." plaintiff.

However, what of the case where the defendants desire neither their own business advantage nor the injury of the plaintiff—e.g., where they combine to compel him to subscribe to an extraneous charitable fund ? No answer to this question has yet been given, and perhaps it is enough for the purposes of the present case to say that the benefit is sufficiently direct if it be to increase the effective strength of a trade union, and to quote *Hodges* v. *Webb* (17), at p. 89, and *White* v. *Riley* (28) as illustrating this conclusion.

The broad proposition was put by PHILLIMORE, J., in his dissenting judgment in *Boots* v. *Grundy* (29) in a way which will comprehend most cases. He said at p. 773 :

> If a number of persons because of political or religious hatred, or from a spirit of revenge for previous real or fancied injury, combine to oppress a man and deprive him of his means of livelihood for the mere purpose of punishment, I think the sufferer has his remedy. If the combination be to further their own prosperity, if it be constructive, or destructive only as a means to being constructive, the case is otherwise.

It was argued, however, that, where there is a combination of persons such as masters and workers who are apt to be opposed in trade disputes, and when they are joined in an endeavour, on the one hand, to eliminate competition, and, on the other, to gain 100 per cent. trade union membership, the only common object must be to injure, since the masters could rid themselves of competitors only by injuring their opponents, and the workmen could obtain a 100 per cent. trade union membership only from masters with whom they were agreed, and, therefore, could not attain their object until all others were driven out of the trade. The only common object, therefore, was to injure, though each party to the combination might have a separate ultimate aim of his own which would promote his own interests.

An argument against the right of a combination of employers acting in conjunction with a trade union to refuse to employ anyone not possessed of that trade union's ticket was urged before Sargant, J., in *Reynolds* v. *Shipping Federation, Ltd.* (30), a case in which a combination of masters and trade union officials agreed that only members of a particular trade union should be employed on the ships of the federation. The judge rejected the argument, and said, at pp. 39, 40:

> Indeed, a decision in favour of the plaintiff would lead to a strange anomaly. For many years past no one has questioned the right of a trade union to insist, if they are strong enough to do so, under penalty of a strike, that an employer or a group of employers shall employ none but members of the trade union. And the result of any such effective combination of workmen has, of course, been to impose on the other workmen in the trade the necessity of joining the union as a condition of obtaining employment.
>
> Here the employers, instead of being forced against their will into employing union men only, have recognised that advantages may arise from adopting such a course voluntarily, and have accordingly made an agreement with the trade union to that effect. The incidental result to the other workmen in the trade is the same as if the employers had yielded against their will instead of agreeing voluntarily. But I fail to see that workmen who are unwilling to join the trade union have any greater reason to complain of a violation of legal rights in the second case than in the first.

In that case, the action was against the masters' federation, the trade union, its president and one of its representatives. It is true that the complaint came from the members of another trade union and not from another set of employers, but, if the argument is sound, as I think it is, it cannot be confined to one class of confederates and be held inapplicable to another.

In the present case also, masters and workmen combined. The common object was, not to injure, but to promote agreement between, the two sets of employers, even though incidentally the immediate effect of the common purpose might be to bring a measure of injury upon the masters who were not millowners, but the ultimate aim was to protect and improve the interests of those who combined. The injury was but a step to an end. The combination was, therefore, not to injure, but was to defend, the interests of the parties to it, and it becomes unnecessary to consider a case of mixed motive where the object was in part to injure and in part to benefit those who have combined, and equally unnecessary to lay down the principles applicable to a case where the object is neither to injure nor to promote the interests of the parties but is some extraneous good or evil object with which they are not directly concerned. Apart from these considerations, however, I am not myself prepared to accept the view that the joint object of the parties combining is necessarily alone to be looked at. Each party may well have its own private end to gain. The joint aim may, at any rate, be no more than a desire for prosperity or peace in the industry, and yet the combination may be justified. If, however, one of the parties had no purpose but to vent his own vindictive spite, and if the other knew of, and countenanced, that purpose by giving his assistance to the malicious acts of the first, it may be that the other would then be a participant in the wrong planned by the first to which he gave his assistance.

I have so far dealt with the proposition of Lord Cave, L.C., as first stated, but he put it in an alternative form—namely, was there just cause or excuse for the action taken? So framed, it furnished, as he intended it to furnish, a test for the solution of the case which he was considering, but it was not, nor did it purport to be, a general formula for universal use. As Lord Dunedin pointed out in the same case, there is an earlier question: "Is there any wrong to be justified?" If the defendants have done no injury, they do not require justification. The alternative proposition suggests that action which is necessarily injurious to the interests of others is in itself actionable unless it is defensible on some ground. It is true that the alternative method of approach is sometimes helpful in ascertaining whether the purpose of the combination is to injure others or to promote the interests of those in combination, but I should not myself regard it as the same question, or decisive of the rights of the parties. The true position is, I think, that some proceedings are not actionable because neither the end is wrongful nor the means are wrongful, but there are others in which either the end is wrongful or the means are wrongful and yet those acting in combination are excused because they have just cause for what they have done. To induce the breach of a contract which may lead to immorality (*Brimelow* v. *Casson* (31)) or of a contract which is an infringement of the right of the breaker (*Smithies* v. *National Assocn. of Operative Plasterers* (32)) have been held to be justified. These, however, are only examples, and afford little assistance in determining the circumstances which will constitute sufficient justification. I doubt whether it is possible to define those circumstances. Perhaps one cannot safely go further than the statement to be found in *Glamorgan Coal Co.* v. *South Wales Miners' Federation* (33), *Smithies* v. *National Assocn. of Operative Plasterers* (32) and *Conway* v. *Wade* (9), *per* LORD LOREBURN, at p. 511, that they are not matters for definition, but call for a consideration of the individual circumstances of each case.

Whatever the limits within which just cause or excuse are confined, this class of case is, I think, an exception to the general rule that a combination to do what is unlawful or to do what is lawful by unlawful means is actionable, and is not an alternative expression of the principle itself. It may, indeed, be more meritorious to induce the breach of a contract *contra bonos mores* than merely to pursue one's own selfish ends, but the one requires justification in law and the other does not. I have ventured to add these observations, not because the questions raised in them demand solution in the present case, but in order to show the limits of the present decision, and lest it should be thought that the decision is authority for wider and more comprehensive principles than the actual circumstances require. For my own part, I am content, following the opinions of the LORD ORDINARY and the Inner House, to say that, whatever the effect of their action might be, the confederates, millowners and defenders, had a common object of benefiting themselves, and not of injuring the plaintiffs, and so must succeed in their defence.

Solicitors: *Ince, Roscoe, Wilson & Glover*, agents for *Dove, Lockhart & Smart* Edinburgh, and *Newlands & Warner*, Glasgow (for the appellants); *Pattinson & Brewer*, agents for *Allan McDougall & Co.*, Edinburgh, and *M. D. Peden*, Glasgow (for the respondents).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

Re R. W. JOHNSON, LTD.

[CHANCERY DIVISION (Simonds, J.), **December 15, 1941.**]

Emergency Legislation—Adjustment of liabilities—Protection order—Petition for compulsory winding up of company—Protection order made two days before petition due to be heard—Jurisdiction to stay petition—Liabilities (War-Time Adjustment) Act, 1941 (*c.* 24), *s.* 3 (2).

A private company which was being voluntarily wound up failed to satisfy a judgment debt for arrears of rent, and the judgment creditors petitioned for a compulsory winding-up order. The petition was due to be heard in the companies court on Dec. 15, and on Dec. 13 the liquidators in the voluntary winding up applied to the registrar of the county court of the district for a protection order under the Liabilities (War-Time Adjustment) Act, 1941, s. 3. The registrar made the protection order, notwithstanding that the application was made *ex parte*, without any notice being given to the petitioning creditors:—

HELD: once a protection order was in force, the court had no jurisdiction to continue with the compulsory winding-up proceedings.

[**EDITORIAL NOTE.** There are cases where, once the High Court has seisin of a matter by reason of proceedings being commenced therein, it is not possible to pursue the matter in an inferior court. In this case, it is held, however, that, upon the proper construction of the Act, the only course open is to stay the proceedings on the petition in the High Court.

FOR THE LIABILITIES (WAR-TIME ADJUSTMENT) ACT, 1941, see BUTTERWORTHS EMERGENCY LEGISLATION SERVICE, Statutes Supplement, No. 9, p. 12).

WINDING UP PETITION presented by the judgment creditors against R. W. Johnson, Ltd. The facts are fully set out in the judgment.

Lindsay Jopling for the petitioning creditors.

One of the liquidators in the voluntary winding up appeared in person on behalf of the company.

SIMONDS, J.: In this case, I have to deal with a curious state of circumstances arising out of the Liabilities (War-Time Adjustment) Act, 1941. On Nov. 27, 1941, a petition was presented by the landlords for the compulsory winding up of R. W. Johnson, Ltd. The petitioners, who were judgment creditors for £204 and costs, obtained leave under the Courts (Emergency Powers) Act, 1939, to proceed to enforce their judgment. The company is a private company, in which all the shares belong to two persons, Joseph Hotchin and Dorothy Kate Hotchin, the issued share capital being £3,502. On May 16, 1939, a declaration of solvency was made, pursuant to the Companies Act, 1929, s. 230, and, by a resolution dated Feb. 17, 1940, the company went into voluntary liquidation, one Percy Hubert Christmas being appointed liquidator.

The judgment upon which the petition is founded was obtained in an action commenced on July 22, 1941, judgment in which was obtained on Aug. 8, 1941. The winding-up petition was presented on Nov. 27, 1941, and on Dec. 13, 1941, an application was made by one of the present liquidators to the Croydon County Court. The registrar of that court made an order under the Liabilities (War-Time Adjustment) Act, 1941. The application was made *ex parte*, without any notice to the petitioning creditors. It was not founded upon any written statement of the position, but was apparently the result of some communications which passed between a representative of the company and the liabilities adjustment officer appointed under the Act for this area. The registrar thought fit, knowing that the matter was coming before the Chancery Division today, to make a protection order, and then sent notice of his order to a person whom he described as the "chief master of the companies court."

On the petition coming before me today, application was made on behalf of the company that all proceedings might be stayed under the Act. It is contended that it is a matter in which I have no jurisdiction, and that it is incumbent upon me to stay the proceedings. If that is the result, I cannot help thinking that the time is ripe for making some rule or regulation under the Act to prevent such an abuse of the process of the court occurring again. The Liabilities (War-Time Adjustment) Act, 1941, s. 3 (1), provides as follows:

> An application may be made to the court for the adjustment and settlement under this part of this Act of the affairs of any person, on the ground that, owing to war circumstances, (*a*) he is unable to pay his accrued debts or will be unable, after payment of his accrued debts (if any), to meet, as they fall due, any future liabilities in respect of obligations already incurred; or (*b*) is in such a position that, if he were required to pay his accrued debts and to meet, as they fall due, any such future liabilities as aforesaid, he would have no reasonable prospect of preserving or recovering his business, or would otherwise lose his means of livelihood; and any such application may be made (i) by the debtor; (ii) by any creditor who is prevented, by reason of the provisions of reg. 4 or para. (2) of reg. 6 of the Defence (Evacuated Areas) Regulations, 1940, from commencing or prosecuting any proceedings or exercising any remedy in respect of a debt which would be a provable debt; or (iii) in a case where the debtor has been granted and is still enjoying relief under sect. 1 of the Courts (Emergency Powers) Act, 1939, by any creditor who has a debt which would be a provable debt.

The court mentioned in that subsection is the companies court of the district. Sect. 3 (2) provides as follows:

> Where it appears to the court that a *prima facie* case has been made out as to the matters specified in para. (*a*) or para. (*b*) of the last foregoing subsection, the court may make an order, to be known as a "protection order" . . .

The county court registrar has made a protection order. The subsection continues as follows:

> . . . and while any such order is in force, (*a*) any proceedings against the debtor or his property in respect of any provable debt and any proceedings against the debtor

> for the recovery of possession of land or of goods let under a hire-purchase agreement shall be stayed, and shall not be further prosecuted except with the leave of the court and subject to such restrictions and conditions as it thinks fit, but the court before which any such proceedings were pending may allow costs already incurred by the creditor and any such costs may, for the purposes of proceedings under this Part of this Act, be added to the debt; (*b*) no proceedings shall be commenced, and no remedy shall be exercised, against the debtor or his property in respect of any provable debt, and no proceedings for the recovery of possession of land or of goods let under a hire-
> A purchase agreement, being land or goods in the debtor's possession at the date of the order, shall be commenced, and no remedy by way of re-entry upon any such land or taking possession of any such goods shall be exercised, against the debtor, except with the leave of the court and subject to such restrictions and conditions as it thinks fit; (*c*) for the purposes of any application for leave to exercise against the debtor or his property any of the rights or remedies for the exercise of which leave is required under sect. 1 of the Courts (Emergency Powers) Act, 1939, the court shall be deemed
> B to be the appropriate court within the meaning of that Act, and shall have power to vary any restrictions or conditions upon which leave to exercise any such right or remedy was granted before the making of the protection order.

Sect. 3 (4) provides as follows:

> Where a bankruptcy petition has been presented against the debtor and a receiving order has been made and the proceedings under the petition have not been stayed under the Courts (Emergency Powers) Act, 1939, s. 1 (5), or under this Part of this
> C Act, the court shall not entertain an application under this section.

That makes it reasonably clear that the proceedings in that subsection are proceedings in bankruptcy. So far, the Act has dealt only with natural persons. It is made applicable to private companies by sect. 15 (1). Sect. 15 (2) provides as follows:

> An application shall not be made by a company for the adjustment and settlement of the company's affairs under this Part of this Act unless a special resolution within
> D the meaning of the Companies Act, 1929, has been passed by the company resolving that the application be made.

Sect. 15 (3) provides that certain conditions must prevail:

> No application for the adjustment and settlement of a company's affairs under this Part of this Act shall be entertained unless the court is satisfied that the principal object of the company is to carry on a business for profit, and that the object of the application is to enable the company to carry on or recover that business; and the
> E court shall, in considering whether it is practicable and proper to deal with the affairs of a company under this Part of this Act, have regard to the constitution and history of the company and the means of the members and officers thereof.

Subsects. (4) and (5) are not material, and subsect. (6) provides as follows:

> In relation to a company, this Part of this Act shall have effect as if (*a*) the references to bankruptcy or bankruptcy proceedings or a bankruptcy petition were references to the winding-up of the company or, as the case may be, a winding-up petition; (*b*) the
> F references to the Bankruptcy Act, 1914, s. 33 (1), were references to the Companies Act, 1929, s. 264 (1), (2) (3); (*c*) the reference to the Bankruptcy Act, 1914, s. 54, were a reference to the Companies Act, 1929, s. 267; (*d*) the references to a receiving order were references to an order for the compulsory winding-up of the company which had not previously commenced to be wound up voluntarily; (*e*) the references to the debtor in sect. 10 (3) and sect. 11 (2) of this Act included references to the officers of the company, and as if the first reference to a debtor in sect. 19 of this Act were con-
> G strued as a reference to any officer of the company.

It is to be observed that sect. 20 (3) provides as follows:

> Any court before which are pending any proceedings in respect of a debt or liability which would be a debt provable in liabilities adjustment proceedings, may stay the proceedings (*a*) on the ground that the debtor or defendant is availing himself of the services of a liabilities adjustment officer with a view to arriving at a scheme of arrangement with his creditors . . .

H Thus, if in this case the company had proceeded no further than communications with the liabilities adjustment officer, then today it would be in the discretion of this court to say whether proceedings in this winding up should be stayed. If I had a discretion, I should refuse to stay these proceedings, but the result of sect. 3 is that, where there is a protection order in force, made by the registrar of the county court on the information which might be available, it is incumbent on me to stay the proceedings in this winding-up petition.

That seems to be the result of sect. 3, and I cannot see any way out of it. I have no option but to stay the proceedings. If I had jurisdiction to deal with the petition, I would not, on the evidence, have exercised my discretion in favour of the company. It appears that, under sect. 20 (4), I can transfer these proceedings to the county court and it seems desirable that I should avail myself of that power. Accordingly, I will direct that proceedings in this winding up shall be transferred to the judge of the Croydon County Court.

Costs to date of petitioners to be costs in the winding up, but costs incurred in respect of the hearing of the petition to be added to their debt. If the winding up continued, costs to be costs in the winding up.

Solicitors: *Tamplin, Joseph Ponsonby, Ryde & Flux* (for the petitioners).

[*Reported by* Irene G. R. Moses, *Barrister-at-Law.*]

R. *v.* WATTAM.

[Court of Criminal Appeal (Viscount Caldecote, L.C.J., and Humphreys and Asquith, JJ.), **October 24, 1941.**]

Criminal Law—Evidence—Photographs—Reference by police constable to book of photographs—Identification—Prejudice of prisoner.

During the cross-examination of a police constable, reference was made to a photograph of the accused which he had seen in a book of photographs used for the purpose of identifying the person who had committed the crime. The question of identification was a critical one in the case. In summing up, the judge emphasised that the jury must not think that the book in question was a collection of photographs of convicted persons or known thieves, and that the probability was that many of the photographs were those of quite respectable people. No application for a fresh trial was made after the police constable had given his evidence, but, on appeal, it was contended that the trial had been vitiated by the reference to the photograph :—

Held: in view of the judge's clear direction to the jury, it could not be assumed that the prisoner had been prejudiced by the reference to the photograph, and the conviction ought not to be quashed on that ground.

[**EDITORIAL NOTE** The fact that the police constable had seen the book of photographs might have suggested to the jury that there was a previous conviction against the prisoner or that he was suspected to be a person of bad character. Any suggestion that there has been a previous conviction against the prisoner is scrupulously excluded, and for that reason the reference to the photographs was suggested to be objectionable, although it was not found necessary to quash the conviction in this case.

As to Quashing Conviction on the Ground of Misreception of Evidence, see HALSBURY, Hailsham Edn., Vol. 9, pp. 276, 277, para. 403; and for Cases, see DIGEST, Vol. 14, pp. 521-526, Nos. 5856-5908.]

Cases referred to:

(1) *R.* v. *Firth*, [1938] 3 All E.R. 783; Digest Supp.; 26 Cr. App. Rep. 148.
(2) *R.* v. *Peckham* (1935), 154 L.T. 275; Digest Supp.; 25 Cr. App. Rep. 125.

Appeal against a conviction and sentence of seven years' penal servitude by Croom-Johnson, J., at Leeds Assizes, on charges of shopbreaking and of stealing a number of furs to the value of approximately £3,000. Leave to appeal was given by Oliver, J. The facts are fully set out in the judgment of the court delivered by Viscount Caldecote, L.C.J.

C. G. L. Du Cann and *R. H. Blundell* for the appellant.

R. E. Seaton for the Crown.

Viscount Caldecote, L.C.J. [delivering the judgment of the court]: The facts given in the evidence by the prosecution can be very shortly stated. The shop from which the furs were stolen was in Sheffield, and entry into the premises was effected by means of a key. Police constable Harrop gave evidence that on Mar. 27 he saw a car at about 10 p.m. outside this shop, and that he saw the appellant come from the premises and jump on to the footboard of the car. He says that he shone his lamp on the car, and was able to get such a view of the appellant as to enable him to identify the appellant as the man who was being charged before the jury.

It is said, and this has been fully argued by counsel before us, that the trial was vitiated by reference being made to a photograph of the appellant in the evidence of a police constable. The question of identification was a critical one in this case. The reference to the photographs occurred in the course of the cross-examination of Police Constable Harrop by counsel for the defence. Harrop was asked when he saw the man of whose face he caught a glimpse on Mar. 27. The answer was :

> When I looked at photographs produced to me at 10 a.m. on Friday, March 28, When did you see the face ? At the court of summary jurisdiction.

Two or three questions later, he again mentioned the fact that he had seen a photograph of this man between June 10 and Mar. 27, and thereupon counsel for the defence asked the witness to forget the photographs and to direct his attention to the question as to when he had last seen the appellant. That was all that was said about the photographs until the judge came to sum up. There was no application by counsel for the defence, immediately after Harrop had given his evidence, that the jury should be discharged and a fresh trial begun. Nothing more was said about it. When the judge came to sum up, he mentioned, when he was going through the evidence, the answer given by Harrop as to having been shown some photographs, and then gave a direction to the jury which seems to us to be as clear and as emphatic as could possibly be the case. He said :

> Remember that the suspicions of the policeman at Sheffield had been aroused on that night, and that the next morning he was looking at a book of photographs to try and identify this man. You must not assume that he was looking at any kind of book of photographs. Books of photographs of perfectly respectable people are supplied, and they are very often used for these purposes. You must not assume that there is anything untoward in the policeman consulting a book of photographs. Let me be quite frank with you. You must not assume against the accused man that it was a book of photographs of convicted persons or known thieves or anything of that sort. Detective officers have their own methods of going to work and of trying to identify people.

As is well-known, photographs are used, and can properly be used, in proceedings. There is an improper way of using photographs and there is a proper way of using photographs, and the judge directs the jury in these clear terms that they must not assume that there was anything untoward in the fact that the police constable had seen the man's photograph in a book of photographs. We are far from satisfied that the original mention of the photographs would have had any effect at all upon the jury. A jury is probably much more likely to direct attention to the broad issues in the case than to any points such as this, which might appeal to a person versed in the practice of the criminal courts, but would not be so obvious to a juryman. However, whether or not the mention of a photograph had any effect on the mind of a juryman, the judge did everything to correct any improper inferences.

We have been referred to *R.* v. *Firth* (1) and to an earlier case, *R.* v. *Peckham* (2) as to the proper procedure to be followed where evidence has been wrongly admitted. In *R.* v. *Firth* (1), it was laid down that there are three elements which must be found in a case before the Court of Criminal Appeal will quash a conviction obtained after the receipt of evidence which was irregular. LORD HEWART, L.C.J., said at p. 786 :

> There are three elements : (1) statements with regard to a prisoner's record, and statements of that kind inadvertently made from the witness-box ; (2) statements of that kind to the prejudice of the prisoner ; and (3) in these circumstances an application by the counsel for the prisoner for the trial to be begun again before another jury.

That was only repeating what was said by the court in *R.* v. *Peckham* (2), where LORD HEWART, L.C.J., twice stated the condition necessary to be satisfied —namely, that an application by counsel for the prisoner for the trial to be begun again before another jury must be made. We should be going far beyond the decision in that case if we were to say, in the circumstances of this case, that the conviction must be quashed, and we think that this objection must fail.

Appeal dismissed.

Solicitors : *Sidney Torrance & Co.*, agents for *J. Levi*, Leeds (for the appellant) ; *Director of Public Prosecutions* (for the Crown).

[*Reported by* IRENE G. R. MOSES, *Barrister-at-Law.*]

Re FORSTER'S SETTLEMENT, FORSTER *v.* CUSTODIAN OF ENEMY PROPERTY IN ENGLAND.

[CHANCERY DIVISION (Morton, J.), **December 16, 1941**].

Settlements—Discretionary trust for application of money during lifetime of named person—Money unapplied under the trust remaining in hands of trustee at death of named person—Whether applicable under discretionary trust—Trading with the Enemy Act, 1939 (*c.* 89), *s.* 7 (1).

A post-nuptial settlement gave the husband a determinable life interest, and, in the event of that interest being determined, the income of the trust fund became subject to a discretionary trust, the beneficiaries under that trust including the wife, any after-taken wife and the issue of the husband of any existing marriage. The husband was first married in 1909, the settlement was made in 1919, and there was no issue of the first marriage, which was dissolved by a divorce decree in 1924. The husband was married again in 1927, and of that marriage there were three children, all infants at the date of the hearing of the summons. In 1935, a receiving order in bankruptcy was made against the husband. This event determined his life interest under the settlement and brought into operation the discretionary trust. The husband died on May 31, 1941, and had not obtained a discharge from the bankruptcy. The trustee had received before the death of the husband £103 1*s.* 11*d.*, income of the trust fund, which he had not applied under the discretionary trust. He also received, after the death of the husband, £93 16*s.*, income of the trust fund apportionable to the period before the death of the husband. The summons asked whether these sums, which at the time of the husband's death, had not been applied to any beneficiary under the discretionary trust, might still be applied under that trust, or whether no such application could be made after the death of the husband. The settlement also contained a power of advancement in favour of any child of the husband of any marriage, but with the consent of the " husband and wife " or of the survivor of them if living. By the usual definition in the parties of the settlement, the first wife, who was a party, was described as " hereinafter called the wife." The first wife, after the divorce, had married an Austrian subject, and, at the time of the summons, was believed to be in enemy or enemy-occupied country, but it was not known for certain whether she was still alive or not :—

HELD : (i) the sums in the hands of the trustee were still applicable under the discretionary trust, although no such application of them had been made during the lifetime of the husband.

(ii) upon the proper construction of the settlement, the power of advancement could not be exercised without the consent of the first wife, who could not, in the circumstances, be presumed dead. The consent could not be given by the Custodian of Enemy Property, nor could the court dispense with the consent.

[**EDITORIAL NOTE.** A discretionary trust has long been a familiar clause in settlements, and since the abolition of restraint upon anticipation has been more and more used to secure the benefits of the settlement to the intended beneficiaries, especially as a safeguard against the results of bankruptcy. In very recent times it has been used as a safeguard against the reduction in the value of investments during the war, and is now one of the most common clauses in settlements of property. The decision here concerns the duration of the discretionary trust. The suggestion is that such a trust for the application of income during the life of a named person comes to an end upon the day of the death of that person. If this reasoning was applied in all its strictness, money in the hands of the trustee on that day and which he had not in fact applied under the discretionary trust and thus earmarked it for the benefit of one of the beneficiaries under the trust, would be money which could not be applied under the trust, because the trust had come to an end before it was so applied. The court has fortunately seen its way to avoid so strict a construction of the clause, and has decided that such moneys are applicable under the trust, and also that moneys which are received by the trustee after the death of the named person, but which are income apportionable to a period before the death, are also applicable under the trust. The result is, therefore, that all moneys received by trustee in respect of the period covered by the life of the named person, no matter when they are received by the trustee, can be applied by him under the trust. A further question in the case concerned the consent to an advancement. The person to give the consent was at the commencement of the war in enemy territory and little had been heard of her since then. However, sufficient had been heard to suggest that she had been alive at some time since the commencement of the war, and there was, therefore, no possibility of presuming her death. It was first suggested that the Custodian of Enemy Property could give the required consent. This suggestion was easily rejected. The court also rejected a further suggestion that the court could make an order that the consent could be dispensed with. In this connection it is unfortunate that the court has not dealt with the wide powers given to it by the Trustee Act, 1925, s. 57. The inclination of the court in previous cases has been to construe this section liberally, and it might well have been thought that the dispensing with the consent, in the circumstances of this case, was within the meaning of the section. It is true that the section speaks about conferring a power upon the trustees. Here it was not a question of conferring a power, but of dispensing with a consent to the exercise of a power, and the settlors had thought fit to make such consent a condition of the exercise of this power. For the moment it must be assumed that the circumstances of this case are beyond the powers given by the section; but *Re Beale's Settlements Trusts*, [1932] 2 Ch. 15; Digest Supp., would seem to point to a more equitable result.

AS TO ADVANCES, see HALSBURY, Hailsham Edn., Vol. 29, pp. 776, 777, para. 1083; and FOR CASES, see DIGEST, Vol. 28, pp. 252, 253, Nos. 1084-1087.]

Cases referred to:

(1) *Re Jenkins, Williams* v. *Jenkins*, [1915] Ch. 46; 44 Digest 1234, *10664*; 84 L.J.Ch. 349.

(2) *Burrell & Kinnaird* v. *A.-G.*, [1937] A.C. 286; [1936] 3 All E.R. 758; Digest Supp.; 106 L.J.K.B. 134; 156 L.T. 36.

(3) *Re Cooper, Cooper* v. *Slight* (1884), 27 Ch.D. 565; 4 Digest 175, *1632*; 51 L.T. 113.

(4) *Holdsworth* v. *Goose* (1861), 29 Beav. 111; 40 Digest 706, *2399*; 30 L.J.Ch. 188; 4 L.T. 196.

(5) *Eisdell* v. *Hammersley* (1862), 31 Beav. 255; 5 Digest 742, *6410*; 6 L.T. 706.

(6) *Badham* v. *Mee* (1831), 7 Bing. 695; 5 Digest 741, *6400*; 9 L.J.O.S.C.P. 213.

(7) *Hole* v. *Escott* (1838), 4 My. & Cr. 187; 5 Digest 741, *6401*; 8 L.J.Ch. 83.

(8) *Alexander* v. *Mills* (1870), 6 Ch. App. 124; 40 Digest 706, *2396*; 40 L.J.Ch. 73; 24 L.T. 206.

(9) *Klug* v. *Klug*, [1918] 2 Ch. 67; 21 Digest 75, *512*; 87 L.J.Ch. 569; 118 L.T. 696.

ADJOURNED SUMMONS to determine the construction of certain provisions of a settlement. The terms of the settlement and the facts are fully set out in the judgment.

Geoffrey Cross (for the plaintiffs, the infant children of the husband).

The Solicitor-General (*the Rt. Hon. Sir William Jowitt, K.C.*) and *H. O. Danckwerts* for the first defendant, the Custodian of Enemy Property.

J. Pennycuick for the second defendant, the trustee of the settlement.

MORTON, J.: The first question which I have to determine on this summons turns upon the construction of a settlement dated July 9, 1919. The settlement was made between three persons (thereinafter called the settlors) of the first part, Eric Leigh Douglas Forster (thereinafter called the husband) and Albinia Mathilde Forster, his wife (thereinafter called the wife) of the second part, and the two trustees of the settlement of the third part. One of the two original trustees died on Apr. 14, 1930, and the surviving trustee is the second defendant to this summons. The first recital in the settlement is a recital of an order of this court which I need not read. The second recital is:

> And whereas with a view to the settlement intended to be hereby made the settlors have on or before the execution of these presents paid to the trustees the sum of £10,000 (each of the settlors contributing the said sum in equal shares) And whereas these presents have been approved by the judge as appears by the signature of the Master in the margin hereof.

The operative part so far as material is as follows. Clause 1 is as follows:

> The settlors with the approbation of the husband and wife hereby direct and the trustees hereby agree with the other parties hereto that the trustees shall and will stand possessed of the said sum of £10,000 so paid to them as aforesaid upon the trusts and subject to the powers and provisions hereinafter declared concerning the same.

Then in cl. 2 there is a trust for the investment of the £10,000 which I need not read. Clause 3 is as follows:

> The trustees shall stand possessed of the said sum of £10,000 and the investments for the time being representing the same (hereinafter called the trust fund) and the annual income thereof upon the trusts following (that is to say): (i) Upon trust to pay the annual income of the trust fund to the husband during the residue of his life or until he does or attempts to do or suffers any act or thing or until any event happens (other than an advance under the power of advancement hereinafter contained) whereby if the same income were payable to him absolutely during his life he would be deprived

of the right to receive the same or any part thereof in any of which cases as well as on the death of the husband (which first happens) the trust hereinbefore declared for payment to him of the said income shall determine.

Subclause (ii), which is the sub-clause upon which the question which I have to determine really turns, is as follows :

> If the trust aforesaid shall fail or determine in the lifetime of the husband [that event happened] then upon trust during the residue of his life to apply the annual income to the trust fund for the maintenance and support or otherwise for the benefit of all or any one or more exclusively of the other or others of the husband and the wife or any after-taken wife of the husband and the children or more remote issue of the husband by any marriage for the time being in existence as the trustees in their absolute discretion without being liable to account for the exercise of such discretion think fit or if there shall be no wife or issue of the husband in existence then for the maintenance support or otherwise for the benefit of all or any one or more exclusively of the other or others of the husband and the person or persons who would under the Statutes for the Distribution of Effects of Intestates have become entitled to the trust fund if the husband had actually died possessed thereof and intestate . . .

Pausing there, it seems to me that there is a trust to apply the annual income during the residue of the life of the husband for the benefit of either one class or the other ; one class is the husband and wife or any after-taken wife of the husband and the children or more remote issue of the husband by any marriage for the time being in existence, and there is another class in the event of there being no wife or issue of the husband in existence. In carrying out that trust the trustees are given a discretion as to the manner in which the fund shall be distributed amongst the members of the class, but they are bound, so far, to apply the whole of the income for the benefit of the members of the class. Then the clause continues :

> . . . provided that the trustees may at the like discretion during the subsistence of the said discretionary trust from time to time discontinue any of the said payments or application of income and accumulate any income not applied for the purposes aforesaid by investing the same and the resulting income thereof in any of the investments hereinafter authorised and shall add the accumulation to the trust fund so nevertheless that the accumulations so made or any part thereof may be applied from time to time during the subsistence of the said discretionary trust by the trustees at their absolute discretion without being liable to account as aforesaid as if the same were income for the current year.

That proviso gives the trustees a discretion, during the period therein mentioned, to discontinue application or payment of income and to accumulate any income not applied for the purposes aforesaid. I need not read subclauses (iii) and (iv) as nothing turns upon them. Subclause (v) is as follows :

> And after the death of the husband upon trust to pay the annual income of the trust fund to the wife if she survives him during the residue of her life without power of anticipation during any coverture.

I pause there to say, that having regard to the definition of the wife contained in the settlement, it is clear that the person who becomes entitled to the annual income of the trust fund after the death of the husband is Albinia Mathilde Forster, assuming that she survives Eric Leigh Douglas Forster. The materiality of that observation will become clear later. Then cl. 4 provides as follows :

> And after the death of the survivor of the husband and wife the capital and income of the trust fund shall be held [subject to a power, which was not exercised, for the husband to appoint in favour of children or remoter issue] and in default of and until and subject to any such appointment in trust for all or any of the children or child of the husband by any marriage who attain the age of 21 years or being female marry under that age and if more than one in equal shares.

There follows in subclause (iii) a power of advancement which is not, I think, material for the present purpose. Clause 5 is as follows :

> If there shall not be any child of the husband by any marriage who attains a vested interest under the trust hereinbefore declared in default of appointment then subject to the trusts and powers hereinbefore contained the trust fund and the income and statutory accumulations (if any) of the income thereof or so much thereof as shall not have become vested or been applied under any of the trusts or powers affecting the same shall after the death of the wife and such failure of children as aforesaid be held in trust for the husband absolutely.

Clause 6 I need not read ; it contains a power to the husband to make any appointment in favour of an after-taken wife, but that power of appointment was never in fact exercised.

Eric Forster married his first wife, Albinia Mathilde Thomas, on Oct. 1, 1909. The settlement was executed, as I have said, on July 9, 1919. There was no issue of that marriage. On May 5, 1924, a decree of divorce was made absolute on the petition of Eric Forster. On Nov. 11, 1927, Eric Forster married again a wife who survived him, May Winifred Forster. There were three children of that marriage, born respectively in 1928, 1931 and 1935. On Nov. 20, 1935, a receiving order in bankruptcy was made against Eric Forster. By reason of that event the trust declared by cl. 3 (ii) of the settlement came into operation, and from the date of the receiving order down to the date of Eric Forster's death the trustee of the settlement paid the whole of the annual income of the trust fund to May Winifred Forster under the discretionary trust. Eric Forster never obtained his discharge in bankruptcy. He died on May 31, 1941, intestate, leaving May Winifred Forster and his three infant children him surviving. The trust fund produced a gross income of approximately £497. At the date of the death of Eric Forster there stood in the name of the second defendant, as sole trustee of the settlement, £103 1*s.* 11*d.*, which represented income of the trust fund received by the trustee before the death of Eric Forster and not yet actually applied by him under the discretionary trust. Since the death of Eric Forster the trustee has received further income of the trust fund, of which £93 16*s.* is apportionable to the period prior to the death of Eric Forster. The trustee says, in para. 8 of his affidavit :

> I wish to apply both the said sums for the benefit of the widow and children of Mr. Forster if I have power to do so.

In 1930 Albinia Mathilde, the first wife of Eric Forster, married Baron Schneider, who was then an Austrian subject. Enquiries have been made by the trustee of a sister and of a cousin of Baroness Schneider as to her present whereabouts. Neither of these relatives has heard from the baroness for some time and, so far as they know, the baroness, if alive, is now resident either in Germany or Austria. At some date the baroness and her husband were trying to reach Czechoslovakia, but the two relatives to whom I have referred do not know the address of the baroness, if she is still living. The baroness, if alive, would be an enemy within the meaning of the Trading with the Enemy Act, 1939, and the Custodian of Enemy Property for England is a defendant to this summons and is represented by the Solicitor-General and Mr. Danckwerts. The evidence is that Mrs. May Winifred Forster has no means of her own and she and her children subsist entirely on the income of the trust fund. In those circumstances one can well understand the desire of the trustee to apply both the sums in question for the benefit of the widow and children of Eric Forster, if he has power to do so.

The first question asked by the summons is whether these two sums of £103 1*s.* 11*d.* and £93 16*s.*, to which I have already referred, or either of such sums, are now (i) applicable by the trustee under the discretionary trust, (ii), payable to the defendant the Custodian of Enemy Property, or (iii) to be added to the capital of the trust fund. Counsel for the plaintiffs (who are the three infant children of Eric Forster), points out that if there had been an ordinary life interest in favour of Eric Forster there would be no doubt that his estate would be entitled to each of the two sums in question—as regards the second sum, by virtue of the operation of the Apportionment Act. He suggests that the next tenant for life could not possibly claim either of these sums, and the Custodian has not felt able to contend that the sums in question form part of the income payable to Baroness Schneider, assuming that she survived her husband. Counsel for the plaintiffs then says that the trustee now has a discretion either to apply these sums for the benefit of the widow and children of Eric Forster, or to accumulate them. As regards the words " during the residue of his life to apply" and " during the subsistence of the said discretionary trust to accumulate," he submits that the latter phrase cannot refer only to accumulations to be carried out during the life of Eric Forster and he submits that by analogy it must be possible for the trustee to exercise the discretionary power to apply income for the benefit of the widow and children of Eric Forster after the death of Eric Forster. He suggests that either both of these powers are exercisable or neither of them is exercisable, and that if neither power is exercisable there will be a *hiatus* in the dispositions made by the settlement, because it will not be possible to accumulate this income. He suggests that it is possible to read the discretion as a discretion exercisable even after the death of Eric Forster in regard to income which accrued, or is deemed to accrue, by reason of the Apportionment Act, during the life of Eric Forster.

I first propose to consider what is the income to which the trust declared in cl. 3 applies. It seems to me clear that the income to which this trust applies includes the two sums mentioned in the first question asked by the summons. In the ordinary case of a trust to pay the income of a fund to a beneficiary during his life, there is no doubt that all income received by the trustees during the life of the beneficiary belongs to him, and there is no doubt that, by reason of the operation of the Apportionment Act, the proper proportion of any income received after his death, that is to say, the portion attributable to the period during which he was alive, forms part of his estate ; and it seems to me that by parity of reasoning the two sums in question are sums which are subject to the trust declared by this clause. In the present case, there is no doubt as to who are the beneficiaries amongst whom the trustee may, in his discretion, distribute this fund. The position is that the trustee has not exercised, and does not desire to exercise, even if he is still at liberty to do so, the discretionary power to accumulate given to him by the proviso. It is unnecessary to determine whether that discretionary power to accumulate still exists after the death of the husband and whether the trustee could, if he thought fit, accumulate and invest the two sums in question as an addition to capital. I incline, however, to think that he could not do so. I think the words " during the subsistence of the said discretionary trust," where they secondly occur in the clause, clearly refer only to the lifetime of the husband. I think that is made clear by the words " as if the same were income for the current year." Those words would be quite inapt as applied to a period after the husband's death ; and I incline to the view that the same words, where they occur earlier in the clause, should be given the same meaning. However, as I have said, in view of the attitude adopted by the trustee it is unnecessary to express a concluded opinion upon that point. The position is, therefore, that there are moneys in the hands of the trustee which are the subject of a trust for distribution amongst certain persons. The trustee is desirous of making such a distribution and, in my view, he is perfectly at liberty to do so.

Two cases were cited to me in regard to this question, but the industry of counsel has not resulted in the finding of any case in which the point has previously been decided. The first case to which I was referred was *Re Jenkins* (1). In that case Sargant, J., dealt with questions which arose in regard to certain moneys at the beginning of the period of a discretionary trust. I cannot find that it affords any assistance to me in the present case. The other case to which I was referred was *Burrell and Kinnaird* v. *A.-G.* (2). I was referred in particular to certain observations of Lord Russell of Killowen at pp. 297, 298. The document which had to be construed by the House of Lords in that case differs so materially from the document which I have to construe that I can derive no assistance from those observations in the present case.

For these reasons I propose to declare that both of the sums mentioned in para. 1 of the summons are now applicable by the trustee under the discretionary trust and are not payable to the Custodian of Enemy Property.

I must now consider question 2 which is as follows :

> Whether, in view of the fact that it is uncertain if the above-named Albinia Mathilde Forster, the first wife of the above-named Eric Leigh Douglas Forster deceased, who was divorced by him and subsequently married Baron Schneider is alive or dead, and that if she is alive her whereabouts is unknown, the defendant Harold Gaye Michelmore as trustee of the said settlement has power to make advances for the benefit of the plaintiffs out of the capital of the trust fund under cl. 4 (iii) of the settlement without the consent of the said Baroness Schneider.

Clause 4 (iii) of the settlement, which it was unnecessary to read for the purposes of my decision on question 1, is in the following terms :

> The trustees may at any time or times but with the consent in writing of the husband and wife or of the survivor of them if living raise any part or parts not exceeding together one-half of the presumptive or vested share of any child or other issue of the husband by any marriage under the trusts aforesaid and may pay or apply the same for his or her advancement or benefit as the trustees think fit.

It is plain from the definition of the wife which is contained in the settlement that the Baroness Schneider, notwithstanding that she was divorced by Forster and has remarried, is, if she is still alive, the person described in that clause as the wife; and this unfortunate position arises, that *prima facie* the trustee cannot exercise this power of advancement in favour of the plaintiffs without the consent of a lady who is not their mother, who is, so far as is known, in enemy territory, and is married to an Austrian baron. There is no doubt, on the evidence, that advancement either is at the moment, or may in the near future be, very urgently required, and I have to examine whether there is any ground upon which the consent of the baroness may be dispensed with. As it will be necessary in the course of my judgment to refer to the Trading with the Enemy Act, 1939, s. 7, I think it will be convenient if I now read the relevant portion of that section. That section provides as follows:

> (1) With a view to preventing the payment of money to enemies and of preserving enemy property in contemplation of arrangements to be made at the conclusion of peace, the Board of Trade may appoint custodians of enemy property for England, Scotland and Northern Ireland respectively, and may by order—(*a*) require the payment to the prescribed custodian of money which would, but for the existence of a state of war, be payable to or for the benefit of a person who is an enemy, or which would, but for the provisions of sect. 5 (4) of this Act, be payable to any other person; (*b*) vest in the prescribed custodian such enemy property as may be prescribed, or provide for, and regulate, the vesting in that custodian of such enemy property as may be prescribed . . .

I can omit para. (*c*).

> (*d*) confer and impose on the custodians and on any other person such rights, powers, duties and liabilities as may be prescribed as respects: (i) property which has been, or is required to be, vested in a custodian by or under the order, (ii) property of which the right of transfer has been or is required to be so vested, (iii) any other enemy property which has not been, and is not required to be, so vested, or (iv) money which has been, or is by the order required to be, paid to a custodian.

I can omit (*e*) and (*f*). The subsection concludes as follows:

> and any such order may contain such incidental and supplementary provisions as appear to the Board of Trade to be necessary or expedient for the purposes of the order.

By the Trading with the Enemy (Custodian) Order, 1939, the Board of Trade in exercise of the powers conferred upon it by the section to which I have just referred, made the following order:

> 1 (1) any money which would, but for the existence of a state of war, be payable to or for the benefit of a person who is an enemy, and any money which is to be deemed for the purposes of the Act to be money which would, but for the existence of a state of war, be so payable, shall be paid to the Custodian.

In the present case no vesting order has been made in regard to the life interest of the baroness, but by reason of the order which I have just read no money can be paid to her in respect of that life interest. I may add that the Board of Trade and the Custodian, as one would expect, have shown every desire to assist in this very hard case so far as they properly can, and their attitude, as expressed by their counsel, may be summarised as follows: the Board of Trade is prepared to make any order which may properly be made and which would facilitate the Custodian giving his consent so as to enable an advance to be made to these children, and the Custodian will give such consent so far as he may lawfully do so.

In the first place it is, I think, clear, on the evidence as it stands at present, that I cannot presume the death of the Baroness Schneider. I must proceed on the footing that she is alive; there is no evidence to the contrary, and in fact there are letters in evidence which indicate that her relatives think she is probably alive. Counsel for the plaintiffs, however, submits that her consent is unnecessary, or will become unnecessary, if a vesting order is made. He relies upon *Re Cooper* (3). The facts of that case were as follows. Eliza Cooper, who died in Jan., 1884, by her will, dated in 1883, gave all her property to trustees upon trust for conversion and investment; and directed her trustees to stand possessed of the trust funds upon trust as to one moiety thereof to pay the income to James Cooper during his life, and after his death in trust for William James, and declared that the trustees might raise any part or parts not exceeding one half of the share of the said William James, under the trusts thereinbefore declared, and apply the same for his advancement or benefit, subject to the consent in writing of the said James Cooper during his life. James Cooper had been adjudicated bankrupt in February, 1882, and was still undischarged. The trustees were desirous of exercising their power of raising a part of the share of William James (who was an infant) for his advancement or benefit. James Cooper was willing to consent; and the only question was whether he could, notwithstanding his bankruptcy, give such consent. Counsel for the plaintiff submits that the Custodian is now, or will be if a vesting order is made, in the same position as the trustee in bankruptcy in *Re Cooper* (3), I think there is much force in that contention, but, in my view, *Re Cooper* (3) in no way supports the contention put forward by counsel for the plaintiffs that the consent of the baroness can be dispensed with. In the course of his judgment. Kay, J., referred to *Holdsworth* v. *Goose* (4) and *Eisdell* v. *Hammersley* (5) in the following terms, at p. 568 :

> In a later case of *Holdsworth* v. *Goose* (4) a power of sale over settled estate was given to trustees, at the request and by the direction of the tenant for life. The tenant for life became bankrupt, and it was held that the power was not extinguished, but that with the assent of the tenant for life and his assignees, a perfect title could be made under the power ; thus determining the very point which was left uncertain in *Badham* v. *Mee* (6) and *Hole* v. *Escott* (7). Then in the case of *Eisdell* v. *Hammersley* (5) a power was given to trustees to sell realty with the consent of the tenant for life was held exercisable after his bankruptcy with the consent of the tenant for life, and of all persons who had become interested in his estate.

It is to be observed that in neither of the two cases to which the judge is there referring was it held that the consent of the tenant for life could be dispensed with. Kay, J., then refers to *Alexander* v. *Mills* (8), and says, at pp. 568, 569 :

> In the later case of *Alexander* v. *Mills* (8), where the trustees of a settled estate had a power of sale to be exercised at the request and direction of a tenant for life, who was also entitled to the ultimate reversion in fee, and who had made an absolute conveyance of all his interest for value, it was held by the Court of Appeal, reversing the decision of Romilly, M.R., that the power of the tenant for life to consent was not extinguished by the absolute alienation of his life estate, and could still be exercised with the concurrence of the alienee.

Kay, J., concludes his judgment by saying, at p. 569 :

> I am clear that, although the exercise of the power would be for the benefit of the child, who has nothing whatever to do with the bankruptcy proceedings, yet without the consent of the trustee in bankruptcy, acting with the sanction of the Court of Bankruptcy, the trustees of the will cannot be allowed to exercise that power.

I think it is impossible to read that judgment without seeing that Kay, J., took the view that the consent of the bankrupt himself was necessary, notwithstanding his bankruptcy. It is true that the position in that case was, in a sense, the converse of the position in the present case, because in *Re Cooper* (3), James Cooper, the bankrupt, was willing to give his consent, whereas in the present case, although the Custodian would raise no objection to the exercise of the power, it is impossible, for the time being, to find the baroness. It seems to me that not only *Re Cooper* (3), but *Holdsworth* v. *Goose* (4), *Eisdell* v. *Hammersley* (5) and *Alexander* v. *Mills* (8), all indicate that the consent of the baroness in the present case is still required.

Counsel for the plaintiffs next contended that the court could authorise the advance on the authority of *Klug* v. *Klug* (9). The head-note of that case is as follows :

> Under a will, and in the events which happened, one third of the testator's residuary estate was held in trust for his daughter, a married woman, for her life without power of anticipation and after her death for her issue, with a gift over in default of her issue for her sons and their issue respectively. The will empowered the trustees to raise not more than a moiety of the vested share for the time being of any of the testator's said children and to apply the same for the advancement or benefit of such children in such manner as his trustees should think fit. Owing to the circumstances of her birth and to the increased cost of living caused by the war, the daughter was unable to pay the legacy duty, which was at the rate of 10 per cent., on her settled share out of her income, and applied to the trustees for assistance. On a summons by the trustees the court was of opinion that the trustees could, in the exercise of their discretion under the power of advancement, raise and pay the duty out of the *corpus* of the settled share, and left them to decide whether they would so exercise their discretion. One of the trustees was willing to exercise their discretion in aid of the daughter, but the other trustee, the testator's widow, declined to exercise it because her daughter had married without her consent : Held, that the court, in the exercise of its control over the discretion of the trustees, could direct the trustees to raise out of the *corpus* of the settled share a sum sufficient to pay the duty.

In the course of his judgment, Neville, J., said at p. 71 :

> [The letters of the mother] show, in my opinion, that she has not exercised her discretion at all. What, then, ought the court to do when one trustee very properly desires to

exercise his discretion under the power for the benefit of a beneficiary and his co-trustee will not exercise her discretion ? I think that in such circumstances it is the duty of the court to interfere and, in the exercise of its control over the discretion given to the trustees, to direct a sum to be raised out of the capital sufficient to pay off the mortgage of £250 and two remaining instalments of the legacy duty, and that is the order I now make.

In my view, *Klug* v. *Klug* (9) does not assist the plaintiffs. The position in the present case is not that of a trustee refusing or failing to exercise a discretionary power. The position is that the parties to the settlement thought fit to provide that a particular discretion conferred upon the trustee should not be exercised without the consent of a particular person. I do not think that the court can say that, notwithstanding this provision in the settlement, the power shall be exercised without the consent of such person, and I do not think that *Klug* v. *Klug* (9) is any authority for saying that the court can take this course.

The possibility was also discussed of the Board of Trade making an order conferring power upon the Custodian to give the necessary consent. Nothing that I say in regard to that matter has any bearing on the question whether the Board of Trade could or should confer other powers on the Custodian, for instance, powers exercisable by a tenant for life under the Settled Land Act, 1925, who is an enemy. But I do not think that the conferring of such a power as this on the Custodian comes properly within the terms of sect. 7. It is to be observed that the section begins :

> With a view to preventing the payment of money to enemies and of preserving enemy property in contemplation of arrangements to be made at the conclusion of peace . . .

If such a power as is suggested were conferred upon the Custodian in this case, it would really be a power conferred for the purpose of enabling him to diminish the capital, and, consequently, the income, of the fund to the income whereof an enemy within the Act is entitled. Both counsel who appeared for the Custodian felt some doubts as to whether such a power could properly be conferred upon the Custodian, and expressed their doubts in their arguments, although the Custodian was willing to assist in any possible way ; and I confess that I share those doubts.

Declaration that both sums mentioned in the first question are applicable by the trustee and are not payable to the Custodian of Enemy Property and that the trustee has no power to make advances for the benefit of the plaintiffs out of capital under cl. 4 (3) *without the consent of the wife so long as she is living.*

Solicitors : *Smith & Hudson*, agents for *Harold Michelmore & Co.*, Newton Abbott (for the plaintiffs and second defendant) ; *The Solicitor to the Board of Trade* (for the first defendant).

[*Reported by* IRENE G. R. MOSES, *Barrister-at-Law.*]

R. *v.* ROBERTS.

[COURT OF CRIMINAL APPEAL (Humphreys, Wrottesley and Croom-Johnson, JJ.), **January 15, 16, 1942.**]

Criminal Law—Murder—Reduction to manslaughter—Negligence—Direction to jury—Criminal Appeal Act, 1907 (*c.* 23), *s.* 5 (2).

The appellant, who was convicted of the murder of a girl by shooting her with a service rifle, pleaded accident as his defence. On appeal the principal contentions on his behalf were that the judge had misdirected the jury in that (i) in his summing up he had omitted to refer to the evidence of certain witnesses ; (ii) he had refused to admit the evidence of the appellant's father as to what the appellant said to him after his arrest ; (iii) he had omitted to tell the jury that they should return a verdict of manslaughter if they came to the conclusion that the death of the girl was due to the appellant's criminal negligence. As to the third contention, it was a possible view of the facts that, if the girl's death was not due to an accident, as the defence contended, it was the result of gross negligence on the appellant's part :—

HELD : (i) it was within the discretion of the judge to omit reference to the evidence of certain witnesses, and every judge must be left to sum up a case in his own way, so long as he does not misdirect the jury in law or in fact.

(ii) the evidence of the appellant's father was inadmissable since it was not made contemporaneously with the fatal act.

(iii) where, on the facts, it is possible that a jury might return a verdict of manslaughter, it is the duty of the judge to direct them as to such a verdict, notwithstanding that, having regard to the facts, a verdict of manslaughter is improbable. Since the judge had not directed the jury on this point, the court exercised its jurisdiction under the Criminal Appeal Act, 1907, s. 5 (2), substituted a verdict of manslaughter and sentenced the appellant accordingly.

[**EDITORIAL NOTE.** The question of the direction to the jury where there is a defence of manslaughter was recently considered in the House of Lords in *Mancini* v. *Director of Public Prosecutions* [1941] 3 All E.R. 272; Digest Supp. The question here considered, however, was not touched upon in that case. Here a possible defence, which, though mentioned, was not really argued at the trial, was that the killing was not intentional, but the result of criminal negligence. If the facts make such a defence possible, it is here decided that it must be dealt with in the summing up and its effect properly explained to the jury, though the defence do not rely upon it.

As to Manslaughter, see HALSBURY, Hailsham Edn., Vol. 9, p. 441–446, para. 759; and for Cases, see Digest, Vol. 15, p. 798, Nos. 8630–8638.]

Cases referred to:

(1) *R.* v. *Hughes* (1857), Dears. & B. 248; 15 Digest 770, *8245*; 26 L.J.M.C. 202; 29 L.T.O.S. 266; 7 Cox C.C. 301.

(2) *R.* v. *Weston* (1879), 14 Cox C.C. 346; 15 Digest 798, *8632*.

(3) *R.* v. *Prince*, [1941] 3 All E.R. 37; Digest Supp.

Appeal by Frederick Thomas Roberts from a conviction of murder at Winchester Assizes. The facts are fully set out in the judgment of the court delivered by Humphreys, J.

J. D. Casswell, K.C., and *Munro Kerr* for the appellant.

J. G. Trapnell, K.C. and *Platts Mills* for the Crown.

Humphreys, J. [delivering the judgment of the court]: In this case the appellant was convicted at the Winchester Assizes by a jury after a trial presided over by Singleton, J., of the murder of Nina Eileen Woods, and he now applies for leave to appeal against that conviction.

The murder was alleged to have been committed by shooting the girl with a rifle. The defence set up at the trial was accident in the fullest sense of that term, in that it was alleged that the discharge of the gun was accidental and not designed. The evidence for the prosecution showed that the appellant was a man of 25 years of age. He had been walking out with Nina Woods for some time. She was a girl of about 17 years of age who lived next door to the place where the appellant was living. Last September she gave up the appellant and began walking out with another man named Hugg. There was evidence that a week before Sept. 21, which was the day upon which the girl died, there had been a tiff between herself and the appellant, as the result of which they had not spoken for a week, and that on Sept. 21 the appellant (who was evidently very fond of the girl and very distressed on account of her having altered her views with regard to him) remarked to persons in a public-house that that evening they would hear of a murder having been committed in Porchester (the place where they were living and where he was speaking). On the same day he was speaking about suicide, going so far as to say he had actually loaded a rifle, which he properly possessed as a member of the Home Guard, and which he was allowed to keep, and that he had gone the length of making preparations to shoot himself, but he had not the courage to do it when the time came, and so forth. He was, therefore, obviously distressed and was anticipating that there might be murder done that evening. He left those persons in the public-house and went to his home where he wrote a note to the girl asking her to meet him. He also spoke to Hugg about meeting the girl. Hugg had no objection to his meeting her at all and said so, and the information was given to the appellant that the girl and Hugg would in fact be at a particular address that evening. In spite of that, having written a letter to the girl and sent it to her, the appellant went himself to meet the girl before she had arrived at the address indicated, and when he came upon her she was with Hugg and actually reading the note which he had sent to her. There was some conversation and discussion then which made it clear that the girl refused to give up Hugg and refused to agree to the appellant's suggestion that Hugg should go away and leave them there. On the contrary, she said she wished Hugg to remain there. The appellant then left them, and those two proceeded to a house, No. 36, Carberry Drive. In the meantime the appellant went back to his bedroom where an incident occurred of which no explanation was given, the only evidence about it being his own. He said that, while he was changing his clothes, or was in the bedroom for some purpose, he noticed his rifle in the corner. He proceeded to load it with a cartridge and to fire it out of the window for some reason or other, but why he did it, he did not know. Then it occurred to him that he would go and keep the appointment, if that be the right expression to use, which hda been made for him that evening. Taking the rifle with him, and taking a quantity of ammunition with him for the rifle, he left the house and proceeded to the house where the girl and Hugg were at that time.

Just at 6 o'clock the persons in No. 36, Carberry Drive were the deceased girl, who was with Mrs. Hancock, who lived there, in the kitchen washing up the tea things, several men in the sitting room or dining room of the house, one of whom was Hugg, another of whom was Hancock, the owner or the occupier of the house and the husband of Mrs. Hancock, and there was Gaterell, a middle aged man, the father-in-law of Hancock, and Lawrence, another son-in-law of Gaterell. There may have been others. The appellant arrived and knocked at the door. He asked to see Nina, and, the door being opened to admit him and left open, the deceased girl went out to speak to him, as he desired.

Now what happened after that is given in evidence by first of all Gaterell. He said this :

> I heard a shout and then a scream. I rushed out as quick as I could into the hall. When I got there the door was shut. Looking through the glass panels of the front door, I saw [the appellant] standing there outside with the rifle pointing towards the door, held like this . . .

The witness indicated a position with the butt near his hip. The appellant seemed to have had one hand on the trigger and one on what the witness called the butt of the rifle. At that time the girl who had been shot was in the act of falling down in the little short passage between the dining room door and the front door. Gaterell, who seems to have been the first person to reach the door after the shot, goes on :

> Of course, I would not open the door. I shouted out for someone to rush round to the back, and that diverted his attention, and then I opened the door and rushed out, and I grabbed his hand which was on the butt of the rifle, the trigger hand, and threw the barrel towards the wall so that he could not shoot anybody. We had a bit of a struggle. He said : " Look out, there are five or six more shots in this," and then Lawrence came. Lawrence struck the appellant twice, with the result that I was able to take the rifle away from him, [the appellant] meanwhile struggling to retain the rifle. After the rifle had been taken away from him, [the appellant] said that he loved the girl and that he had to do it.

What the appellant said was this. He agrees that he went to the house in order to speak to the girl, and that the girl came out to speak to him. He said to her words to this effect : " I want to speak to you for a few minutes. If you do not listen to me I will shoot myself on the doorstep. While I was speaking I loaded the gun in her presence. She said : ' Don't be silly, Fred ; I will see you some other time ; I am busy now washing up,' and she turned back to go into the house As she was going in she just touched the door with her hand and it half closed. It was never shut all the time. I went to follow her to call her back, and as I was going in I was holding the rifle with the upper band with the barrel facing in the air. I went to follow her, to call her back, and as I was going in I jerked the rifle forward and caught it." He then indicated that he had been holding the rifle by the fore part of the barrel with the butt on the ground, that he had jerked it upwards in order that he might transfer his grip of it, by that one act, to a point which would be just in front of the trigger. That would be the natural place for him to hold the rifle if he was going to walk with it because of the balance of the rifle. He said that, holding it with one hand and chucking it (I think that is probably the word which was used) in the way he described, he was pushing the door open with one hand. Then he was asked :

> And then what happened ?
> There was a loud explosion and then I heard the girl scream, twice, I think it was.

> Did you mean that gun to go off ?
> No.

Then he agrees that the men came out and caught hold of him, and there was a struggle and the gun was taken away from him.

After that incident the accused made various statements ; most of them were statements of a possibly ambiguous nature, but they were these. To Lawrence he made a statement in these circumstances. Lawrence was the man who had knocked him down, or, at all events, hit him twice and was still using him pretty roughly, for which no one would blame Lawrence. The accused said to him words to the effect : " You need not do that ; I have done nothing." Lawrence indignantly answered : " Done nothing ! You have killed the girl." His answer is said to have been : " I could not do that ; I love her too much." Obviously, that is not a matter which can be taken as a serious statement of fact. He was not denying that he had killed the girl. He was making the sort of exclamation which one would expect from a man in those circumstances whether he was guilty or not. He made the statement to which I have already referred to Gaterell, and, when he was charged by the inspector at the station with this murder, he made a statement to the effect : " I did not wilfully murder her ; I took the gun to frighten her more than anything "—a statement which is obviously ambiguous and not in the least inconsistent with his having been guilty of murder. It might well be that, having taken the gun to frighten her by a threat of suicide, and having failed to frighten her, he then intended to and did shoot her. There was one statement which he made which was important because it was reduced into writing and signed by him then and there. The evidence was that, within five minutes of the occurrence, Police Constable Baldwin was on the scene, and, having got some information, he approached the appellant and said to him : " I understand you know something about this matter. What can you tell me about it ? " and, according to that officer, who was undeniably accurate in the matter, the answer of the accused was :

> I had the loaded gun, and she said she did not love me, so I shot her. She said she did not want to see me again.

The police officer at once wrote that down in his notebook. It was either read to him or it was read by the accused, and the accused then and there signed that statement as the statement he desired to make. That was a very important statement in this case.

Those facts appear to this court to show that there was against this man upon his trial obviously a very awkward and difficult case of murder, and that there were a number of circumstances which were quite inconsistent with his defence of accident—the statements beforehand that people could expect to hear of a murder that night ; the act of taking the gun at all when he was going to see this girl and dispute with her as to whether he should be taken on as her young man again or not ; the loading of the gun with live cartridges then and there in her presence ; the leaving of the safety catch off and then going into the house as, according to his own story, he intended to do with that loaded rifle in that dangerous condition. Those things might have been thought to be quite inconsistent with his story of accident. There was, therefore, evidence upon which the jury could, upon a proper direction, find him guilty of murder, as they did.

I now come to the grounds of appeal. They consist first of all in an allegation of misdirection by the judge in his summing-up, in that he did not mention to the jury, in the course of his summing-up, the statement made to Lawrence to which I have referred and which was given in evidence, and, secondly, the statement made to the inspector and proved by him on arraignment. It is correct to say that the judge did not mention those two matters. The reason he did not do so was because he did not refer to the evidence of Lawrence or to the evidence of the inspector at all, so far as Lawrence was concerned, to say that he was called. The jury had the statements before them. They had the whole of the evidence before them, and they had, just before the summing up, comments upon those matters from counsel for the defence, and from counsel for the prosecution. It is incredible that they could have forgotten them or that they could have misunderstood the matter in any way, or thought, by reason of the fact that the judge did not think it necessary to refer to them, that they were not to pay attention to them. We do not think there is anything in that point at all. A judge, in summing up, is not obliged to refer to every witness in the case, unless he thinks it necessary to do so. In saying this, the court is by no means saying that it might not have been more satisfactory if the judge had referred to the evidence of the two witnesses, seeing that he did not think it necessary to refer to some of the statements made by the accused after the occurrence. No doubt it would have been more satisfactory from the point of view of the accused. All we are saying is that we are satisfied that there was no A misdirection in law on the part of the judge in omitting those statements, and it was within his discretion. Every judge must be left to sum up a case in his own way so long as he does not misdirect the jury in law or in fact. We think that there is no reason to interfere with the verdict in this case on account of his failure to mention those matters.

The second of the grounds of appeal is put in this way :

> That the learned judge was wrong in law in refusing to admit the evidence of the B appellant's father as to the statement made to him by the appellant after his arrest.

That relates to a statement alleged to have been made by the accused to his father after his arrest and while he was in custody. The father, naturally, was allowed to see his son. In our view the judge was perfectly right in refusing to admit that evidence, because it was in law inadmissible. It might have been, and, perhaps, by some judges would have been, allowed to be given on the ground that it was the C evidence which the defence desired to have given, was harmless, and there was no strenuous opposition on the part of the prosecution. Such evidence might have been allowed to be given, but the judge was perfectly entitled to take the view which he did, that in law that evidence was inadmissible. The law upon the matter is well-settled. The rule relating to this is sometimes put in this way, that a party is not permitted to make evidence for himself. That law applies to civil cases as well as to criminal cases. For instance, if A and B enter into an D oral contract, and some time afterwards there is a difference of opinion as to what were the actual terms agreed upon and there is litigation about it, one of those persons would not be permitted to call his partner to say : " My partner a day or two after told me what his view of the contract was and that he had agreed to do " so and so. So, in a criminal case, an accused person is not permitted to call evidence to show that, after he was charged with a criminal offence, he told a number of persons what his defence was going to be, and the reason for the rule E appears to us to be that such testimony has no evidential value. It is because it does not assist in the elucidation of the matters in dispute that the evidence is said to be inadmissible on the ground that it is irrelevant. It would not help the jury in this case in the least to be told that the appellant said to a number of persons, whom he saw while he was waiting his trial, or on bail if he was on bail ; that his defence was this, that or the other. The evidence asked to be F admitted was that the father had been told by his son that it was an accident. We think the evidence was properly refused. Of course, if the statement had been made to the father just at the time of the shooting, that would have been a totally different matter, because it has always been regarded as admissible that a person should be allowed to give in evidence any statement accompanying an act so that it may explain the act. It was put by counsel for the appellant that the statement might be admissible on the ground that the accused had been G asked in cross-examination, and it had been suggested to him in cross-examination that this story of accident was one which he had recently concocted. If any such question had been put, undeniably the evidence would have been admissible as showing it was not recently concocted, because the accused had said so on the very day the incident occurred. The answer is that no such question had been put, and no suggestion made, to the accused.

The last ground, and the important ground in this case, is this. It is said that H the judge was wrong in law in holding that it was not open to the jury to return a verdict of manslaughter, and in so directing them. The first point which counsel for the Crown took upon that was that the judge had not so ruled, bu had merely said to the jury that he himself did not see that there was room for verdict of manslaughter in this case. Upon referring to the shorthand note, we find it impossible to take that view of the matter. We think it is quite clear—it is not necessary to refer to the passages in detail—that the judge was directing the jury on the law, and was directing them on the verdicts open to them. Counsel for the accused, in his address to the jury, had said that in his view there were three possible verdicts, and, without inviting the jury to find his client guilty of manslaughter, because he was asking them to find him not guilty on the ground of accident, he did say that, if they were unable to find him not guilty, they should find him guilty of manslaughter. The judge said that the case for the prosecution was that this was a case of murder or nothing, and he added :

> That, members of the jury, is my view of the case. You are responsible for all questions of fact. I have to direct you upon the law, and my view of this case is that, if the shooting was intentional and a deliberate shooting of the girl is proved, that amounts in law to murder. If that is not proved, if there be any real doubt of it, or if it was an accident, the verdict should be one of not guilty. You will bear in mind that counsel for the accused himself, in his first address to you, said that no question of provocation arose here—nothing of that kind. He did suggest that there might be a middle course, that is, manslaughter, if there was proved to be some gross negligence on the part of the accused, but, as I have said to you already, I take the view, and direct you that if you come to the conclusion that the shooting was accidental, that is, if it is not proved that the shooting was deliberate, then your verdict ought to be one of not guilty, and not one of guilty of manslaughter.

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In our view that is a direct and clear direction in law to the jury, and it was so understood, to the effect that it was open to them to return a verdict of murder or not guilty, and that it was not open to them to consider the question of manslaughter.

We then have to consider : Was that a right or a wrong direction ? The matter is by no means easy. The law is quite clear. Upon any indictment for murder, it is open to the jury to find a verdict of not guilty of murder, but guilty of manslaughter, if there is evidence upon which they can so find, and only if there is such evidence ; and if in any case the jury find the facts are proved which would constitute murder, if there was in addition the malice which is the essential part of murder, but they negative the malice, it may be said as a general proposition that the jury may in such a case return a verdict of manslaughter. Manslaughter is the unlawful killing of a person. Murder is the unlawful killing of a person with the addition of malice, which in such a case as this may be said to amount to an intention to kill or injure.

C

D

The matter was put very clearly in a case which is referred to in ARCHBOLD, CRIMINAL PLEADING, 30th Edn. The case referred to is *R.* v. *Hughes* (1). I am now reading the extract from ARCHBOLD'S CRIMINAL PLEADING. I will refer in a moment to the case itself. This is what ARCHBOLD says, at p. 902 :

E

> Where an act of omission or commission, in itself lawful, is at the same time dangerous, it must appear, in order to render an unintentional homicide from it excusable, that the party, whilst doing the act, acted without gross negligence, in that he used such a degree of caution as to make it improbable that any danger or injury should arise from it to others ; if not, the homicide will be manslaughter at the least, the doctrine being well established that an act or omission arising from culpable neglect of duty and having a fatal result is manslaughter, and if done by design or of malice prepense would be murder.

F

Those latter words are a quotation, and a correct quotation, from the judgment in *R.* v. *Hughes* (1), decided in 1857 by a very strong court presided over by LORD CAMPBELL, C.J. The question in the case was this. The prisoner had, as part of his duty, to place a stage over the mouth of a shaft for persons working in a mine. He omitted to put the stage there, as the result of which a truck full of bricks fell into the shaft and killed somebody. What he was doing, of course, was perfectly lawful. He had done no unlawful act at all ; but he had omitted to do what it was his duty to do. WATSON, B., stated as follows :

G

> I left it to the jury whether the accident happened by negligence of the prisoner, and whether that negligence arose from an act of omission or commission. They found that the death of deceased arose from negligent omission on the part of the prisoner in not putting the stage on the mouth of the shaft. Thereupon I directed a verdict of guilty.

H

In giving the judgment of the whole court, after consideration, LORD CAMPBELL, C.J., used the language which I have just quoted from ARCHBOLD. He said :

> . . . there is no authority for the position that without an act of commission there can be no manslaughter ; and on the contrary, the general doctrine . . .

and he then stated the doctrine which I have just quoted from ARCHBOLD.

This court sees no reason whatever to doubt the accuracy of that statement. What constitutes murder being by design and of malice prepense constitutes manslaughter when arising from culpable negligence.

There are other authorities which were cited to us, particularly a case of *R.* v. *Weston* (2), which is a very strong case, but in regard to which it may be said that there was an unlawful act on the part of the accused person, who shot the man, he said, in self-defence, because the man was attacking him and he was in fear of his life, and, therefore, it was necessary for his own protection that he should shoot him. The jury, however, negatived that, their answer to a question which was put to them being that, in the circumstances, the gun was
A unnecessarily levelled at the deceased, but they added " without any intention of discharging it, and that it went off accidentally." COCKBURN, C.J., said, at p. 352 : " That would amount to a verdict of manslaughter. Do you intend that." The jury said : " Yes." Then COCKBURN, C.J., said : " On the ground that, though the prisoner had no intention of discharging the gun, yet that his levelling it at the deceased was, under the circumstances, unnecessary." I think it might be added that one may substitute for the word " unnecessary "
B the word " unlawful," because levelling a gun at a person is unlawful.

In this case, the appellant at the trial was not asked any question at all as to how this gun came to be discharged. It has been agreed at the bar that it is nonsense to say that a service rifle can go off of its own accord ; it can only go off by a heavy blow being administered to it, or possibly by its being dropped on hard ground, or, in the ordinary case, by the trigger being pulled. In this
C case neither of the first two things happened. *Ex concessis*, therefore, it must be that it was discharged by the finger of the accused being put on the trigger. Whether or not that was the case, we do not know, because he was never asked the question whether his finger was on the trigger, but we take it that it must have been so. His case was that whether or not his finger was on the trigger, it was certainly on it without his design or intention. We have to ask ourselves, on the facts of this case, was it open to the jury to bring in a verdict of manslaughter.
D In our view, as a matter of law, it was open to the jury. It seems to me upon the facts of this case, that the jury might have taken this view : " We are not satisfied that the prisoner intended to discharge the rifle, but we do find that he was doing a highly dangerous act in loading the rifle, leaving the safety catch off and chucking up the rifle as he described, and it was owing to that dangerous and negligent act that the deceased was killed. I think counsel for the Crown agreed—certainly the court is of opinion—that that was a view
E open to the jury as a matter of law, and a verdict returned in those terms would have amounted to a verdict of manslaughter.

Now it was quite true that the judge in this case was acting, as he believed, in the interests of the prisoner in withdrawing from the jury any charge of manslaughter and saying : " Unless you are satisfied this was a deliberate act, you ought to acquit him altogether ; " but, in spite of that fact, the prisoner was entitled, as a matter of law, to have the jury properly directed as to what
F verdicts were open to them to return. In our view they were misdirected, because manslaughter was a verdict open to them as a matter of law, and they were prevented from considering that verdict or returning it. Was it open to them on the facts to return a verdict of manslaughter ? Counsel for the Crown has said, with good reason, if I may say so, that no reasonable jury could come to such a conclusion. The court may be disposed to take much the same view, but
G we cannot dive into the mind of the jury and say what they would have done if it had been left open to them. We may take the view, and we are disposed to take the view, that it is extremely unlikely in this case that the jury would have returned a verdict of manslaughter, seeing, as we know, that they regarded this as a deliberate act. We cannot, however, say that it is certain that the jury would have returned a verdict of murder, if manslaughter had been open to them. In *R.* v. *Prince* (3) it was said that a very slight misdirection, or an
H omission of a direction, had occurred in the summing up of the judge who directed the jury, and the court came to the conclusion that the judge had not given to the jury the proper direction. In that case VISCOUNT CALDECOTE, L.C.J., said, at p. 41 :

> The direction being, therefore, in our view, insufficient, we think it impossible that the verdict of murder should stand.

There the court thought its duty was to apply a section which is much more appropriate in the present case, in our view, than it was in *R.* v. *Prince* (3)—the Criminal Appeal Act, 1907, s. 5 (2), which is as follows:

> Where an appellant has been convicted of an offence and the jury could on the indictment have found him guilty of some other offence, and on the finding of the jury it appears to the Court of Criminal Appeal that the jury must have been satisfied of facts which proved him guilty of that other offence, the court may, instead of allowing or dismissing the appeal, substitute for the verdict found by the jury a verdict of guilty of that other offence, and pass such sentence in substitution for the sentence passed at the trial as may be warranted in law for that other offence, not being a sentence of greater severity.

The decision of this court is that the verdict of murder in this case cannot stand and we substitute for it a verdict of manslaughter, and we pass upon the appellant, in respect of that very serious conviction for manslaughter, a sentence of 10 years' penal servitude. A

Appeal allowed ; sentence for manslaughter substituted.

Solicitors : *G. H. King & Franckeiss*, Portsmouth (for the appellant) ; *Director of Public Prosecutions* (for the Crown).

[*Reported by* IRENE G. R. MOSES, *Barrister-at-Law.*] B

Re DRAGES, LTD.

[CHANCERY DIVISION (Bennett, J.), **January 26, 1942.**]

Companies—Alteration of memorandum of association—Business closed for duration of war except for collecting of hire-purchase debts—Desire to use liquid resources to carry on trust investment business—" Conveniently or advantageously combined with the business of the company"—Companies Act, 1929 (*c.* 23), *s.* 5 (1) (*d*). C

The memorandum of association of a company set out as its principal object the carrying on of the business of house furnishers. It carried on this business under the hire-purchase system, and, owing to the indifferent success of this system of trading, the company had ceased to enter upon any new business and was concerned only with the collection of the outstanding instalments due under its hire-purchase agreements. The company desired to recommence trading after the cessation of hostilities, but proposed to use its available capital until then in carrying on a trust investment business. The company petitioned the court to confirm an alteration in its memorandum of association, contending that a trust investment business could be advantageously combined with its present business within the meaning of the Companies Act, 1929, s. 5 (1) (*d*) :— D E

HELD : the court could not confirm the alteration, since the facts showed that, for the time being, it had ceased to trade, and therefore there was no business being carried on with which the business of a trust investment company could be combined. F

[**EDITORIAL NOTE.** Many companies, suffering from the effect of dislocation of business during the war, may want to consider the possibility of altering the objects clauses in their memorandum of association. The present decision, though necessarily largely based on the facts, may be found helpful as showing the nature of the case which will have to be shown in order that the application may be successful.

AS TO THE ALTERATIONS OF THE OBJECTS OF A COMPANY, see HALSBURY, Hailsham Edn., Vol. 5, pp. 456-459, paras. 741, 742 ; and FOR CASES, see DIGEST, Vol. 9, pp. 649-653, Nos. 4293-4321.] G

PETITION for the confirmation of an alteration in the memorandum of association of a company with respect to its objects. The facts are fully set out in the judgment.

M. L. Gedge for the company.

BENNETT, J. : This is a petition of a company called Drages, Ltd., for the confirmation of an alteration in the memorandum of association by the court under the Companies Act, 1929, s. 5. The company was incorporated in 1926 with a memorandum of association, the principal object of which gives it power to carry on the business of house furnishing. For many years, it has carried on its business on the hire-purchase system, but, as is stated in para. 7 of the petition, " without conspicuous success." H

In 1936 the company entered into an agreement with George Hopkinson, Ltd., which carries on a similar business, whereby that company took over its business and collected the outstanding hire-purchase debts on its behalf. The contract between the two companies contained a provision which enabled George Hopkinson, Ltd., to terminate the agreement. Para. 12 of the petition states :

> As a result of the outbreak of war and the evacuation of a large number of people from the London area, George Hopkinson, Ltd., found that the business at Oxford Street fell off so substantially that, in spite of further concessions made by the company, George Hopkinson, Ltd., had no alternative but to close down. Thereupon, under the A terms of the agreement, the goodwill reverted to the company.

The present position of the company is stated in para. 13 of the petition :

> The present position of the company is that it has cash available amounting to approximately £321,300 (apart from investments valued at £119,360), which, in the opinion of the directors, is more than sufficient to enable the company to recommence trading activities. This course, however, is not at present open to the company since, apart from difficulties arising in the supply of goods consequent upon the provisions of the Limitation of Supplies Orders, present conditions are not conducive to the sale of B furniture or the granting of credit under hire-purchase agreements. The directors are satisfied that, with the return of normal conditions, the company has a very sound chance of a profitable future, and they are by no means doubtful that the prestige enjoyed by the company has been impaired by reason of its ceasing trade for the war period.

That being the present position of the company, the extension or alteration which the company desires to make to its memorandum of association is an C extension or alteration to enable it, with the cash available, to carry on a trust investment business. Under the memorandum of association as it stands, the company has power to invest and deal with its money. If the company utilises that power, however, and, as a result of investing its money, invests it in a way which results in a capital profit, it is apprehended that the company may become liable to income tax in respect of the profit which it makes. The company D desires to escape from that liability by taking to itself, with the sanction of the court, power to carry on the business of a trust investment company, a company carrying on such a business not being liable, as I understand it, to pay income tax in respect of capital profits or appreciation of investments.

The court's power to sanction the alteration of a company's memorandum of association is conferred by the Companies Act, 1929, s. 5 (1). That section permits the company, with the sanction of the court, to alter the provisions of E its memorandum of association to enable it

> (*a*) to carry on its business more economically or efficiently ; or (*b*) to attain its main purpose by new or improved means ; or (*c*) to enlarge or change the local area of its operations ; or (*d*) to carry on some business which under existing circumstances may conveniently or advantageously be combined with the business of the company ; or (*e*) to restrict or abandon any of the objects specified in the memorandum ; or (*f*) to sell or dispose of the whole or any part of the undertaking of the company ; or (*g*) to F amalgamate with any other company or body of persons.

The company relies on para. (*d*) of sect. 5 (1), and says that the case is one in which it can carry on advantageously or conveniently a trust investment business with the business which it is now carrying on. The answer to the argument seems to me to be this. At the moment the company is not carrying on any business at all. It is not trading. It is suggested that the collection of outstanding book debts in respect of its past trade is a business which the G company is carrying on. I do not take that view of the matter. I think, on the contrary, that para. 13 of the petition shows that the company has, at the moment, ceased to trade. The alteration of the memorandum of association is desired solely for the purpose of enabling the company not to come under a liability for income tax, if it is fortunate enough to make capital profits as a result of the investment of the cash which it is now unable to employ. I do H not think that there is any business being carried on by the company with which the business of a trust investment company could either conveniently or advantageously be combined. For these reasons, I think that the company has not brought itself within the provisions of the section, and the petition is therefore dismissed.

Solicitors : *Harris, Chetham & Cohen.*

[*Reported by* IRENE G. R. MOSES, *Barrister-at-Law.*]

INLAND REVENUE COMMISSIONERS *v.* ROLLS ROYCE, LTD

[King's Bench Division (Lawrence, J.), **October 9, 10, 1941**.]

Revenue—National defence contribution—" Income received from investments or other property "—Royalties in respect of licence to manufacture patented aluminium alloy—Deduction of cost of alloy purchased—Finance Act, 1937 (c.54), *Sched. IV, r.* 7.

The respondent company took out a patent in respect of an aluminium alloy and then granted to another company a licence to manufacture the alloy in consideration for the payment of a royalty of a given sum for every pound manufactured. There was a minimum royalty payable under the licence, which, it was provided, should not be payable in the event of the respondent company ceasing to manufacture articles made out of the alloy. The Revenue contended that the royalty payments received by the respondent company in respect of the licence were not " income received from investments or other property " within the meaning of the Finance Act, 1937, Sched. IV, r. 7, and were to be brought in for the purpose of National Defence Contribution; or, alternatively, that the respondent company, in arriving at its profits for the purpose of National Defence Contribution, was entitled to deduct only the cost of the alloy less the amount of the royalty :—

Held : (i) the royalty payments constituted " income received from investments or other property " within the meaning of the Finance Act, 1937, Sched. IV, r. 7.

(ii) the grant of the licence to use the patent was something completely distinct and separate from the purchase of the alloys, and the respondent company was entitled to charge against its profits the sum actually paid for the alloys in arriving at its profits for the purpose of National Defence Contribution.

[**EDITORIAL NOTE.** Manufacturers often find it necessary to ensure a supply of their raw materials by methods giving them greater security than long-term contracts. The usual means employed for this purpose have been the creation of subsidiary companies, or the acquiring of interests in companies supplying the raw materials. In this case, the manufacturer chose the latter course and acquired shares and debentures in the company supplying the raw material. The question was whether the income from these shares and debentures was ordinary trading profit of the manufacturer or income received from investments. The court has taken the latter view.

As to Computation of Profits for National Defence Contribution, see HALSBURY, Vol. 28, pp. 489-492, paras. 1022-1027.]

Cases referred to :

(1) *Inland Revenue Comrs.* v. *Gas Lighting Improvement Co., Ltd.* (1923), 129 L.T. 481 ; Digest Supp. ; 12 Tax Cas. 503.

(2) *Inland Revenue Comrs.* v. *Sangster,* [1920] 1 K.B. 587 ; Digest Supp. ; 89 L.J.K.B. 673 ; 122 L.T. 374 ; 12 Tax Cas. 208.

(3) *Inland Revenue Comrs.* v. *Anglo-American Asphalt Co.* (1941), National Defence Contribution Leaflets, No. 2.

(4) *Westcombe* v. *Hadnock Quarries, Ltd.* (1931), 16 Tax Cas. 137 ; Digest Supp.

(5) *Cadbury Bros., Ltd.* v. *Sinclair* (1933), 103 L.J.K.B. 29 ; Digest Supp. ; 149 L.T. 412 ; 18 Tax Cas. 157.

Appeal by the Crown from a decision of the Special Commissioners. The facts are fully set out in the judgment.

The Attorney-General (*Rt. Hon. Sir Donald Somervell, K.C.*) and *Reginald P. Hills* for the appellants.

J. Millard Tucker, K.C., and *J. S. Scrimgeour* for the respondents.

Lawrence, J. : In this case, I agree with the commissioners. The question is whether royalties received by Rolls Royce, Ltd., are " income received from investments or other property " within the meaning of the Finance Act, 1937, Sched. IV, r. 7, which deals with national defence contribution. The facts of the case are that two of the research workers of Rolls Royce, Ltd., discovered an alloy of aluminium. A patent was taken out by the company for that invention or discovery, and it granted to another company, which is called High Duty Alloys. Ltd., a licence for the manufacture of aluminium alloys in accordance with those patents. The licence provides that High Duty Alloys, Ltd., shall pay to Rolls Royce, Ltd., so much for every pound of aluminium alloy made in accordance with the letters patent which shall be sent away from the factory of High Duty Alloys, Ltd., or any other place where the same may be made. That licence agreement does not provide that Rolls Royce, Ltd., shall purchase any of these aluminium alloys from High Duty Alloys, Ltd., but it undoubtedly contemplates that they will, because it provides that, if, at any time after the expiration of 5 years from the commencement of the licence, Rolls Royce, Ltd., shall have ceased for a period of not less than three calendar months to manufacture for sale articles made out of, or made partly out of, any of the alloys, and shall during the same period continuously have manufactured and sold articles made out of metal or alloys at no time the subject of the licence, the minimum royalty payable under the licence shall cease.

The Crown contends that these royalty payments are not " income received from investments or other property " within the meaning of r. 7, and, therefore, must be brought in for the purpose of national defence contribution. They say that they are ordinary business receipts. In the alternative, they say that, if they are wrong on that, then Rolls Royce, Ltd., is not entitled, for the purpose of national defence contribution, in arriving at its profits, to deduct what it actually pays for these aluminium alloys when it purchases them from High Duty Alloys, Ltd., but is entitled to deduct only the cost of those aluminium alloys less the amount of the royalty. On the first point, as to whether this was income received from investments or other property, the Attorney-General distinguished *Inland Revenue Comrs.* v. *Gas Lighting Improvement Co., Ltd.* (1), and he also distinguished it from *Inland Revenue Comrs.* v. *Sangster* (2). I think that, in so far as he dealt with it, he relied on *Inland Revenue Comrs.* v. *Anglo-American Asphalt Co.* (3). In my opinion, *Inland Revenue Comrs.* v. *Gas Lighting Improvement Co., Ltd.* (1) is an authority which is very much in favour of the respondent's view. It was there held that a company which refined and distributed petroleum and had invested some of its money in a petrol-selling company and in another oil-producing company, the shares and debentures in which were acquired for the purpose of securing a supply of crude oil to the company which had made the investments, had made investments within the meaning of the Finance (No. 2) Act, 1915, which has a provision similar to that in Sched. IV, r. 7, except that it does not include the words " or other property." VISCOUNT CAVE, L.C., said in that case that it was clear that the section with which they were there dealing must refer to investments connected with the business, and that he saw no reason why they should not include an investment of part of the business capital in an outside security, though made with the object of forwarding the trading operations for which the business was constituted. It was clear in that case that the investment had been made for the purpose of forwarding the company's trading operations, because it was made for the purpose of securing a supply of crude oil. The principle of that case seems to me to be very closely applicable to the present. *Sangster's* case (2) is a clear authority that a patent is property, and that a royalty payable under a licence to use a patent is income from property.

I think that the *Anglo-American Asphalt Co.* case (3) is altogether distinguishable from this case, because there the agreement was so framed, as I attempted to show in my judgment, that it was impossible to dissect the royalty from the other trading considerations with which the agreement dealt, and connect it with the licence to use the patent. I am therefore of opinion that the royalties in question in this case do constitute income received from investments or other property within the meaning of Sched. IV, r. 7, and that they none the less fall within those words, because Rolls Royce, Ltd., doubtless had in mind, in granting the licence to use this patent, that it would assist them in their business by enabling them to buy back the aluminium alloys which were made under the patent. So much for the first point.

On the second point, the Attorney-General contends that the case is on all fours with *Westcombe* v. *Hadnock Quarries, Ltd.* (4). Counsel for the respondents, on the other hand, relies upon *Cadbury Bros., Ltd.* v. *Sinclair* (5), in which a trading company was using, for the purpose of its trade, land which had been exempted by the Act of 1660, and it was held that it was entitled to deduct for income tax purposes the annual value of that land, because, if it could not do so, the exemption conferred by the Act of 1660 would otherwise have been overridden and made nugatory.

In my opinion, the grant of this licence to use the patent is something completely distinct and separate from the purchase of the aluminium alloys, and it is not permissible to prevent the company, for the purpose of national defence contribution, from charging against its profits the sums which it actually pays for such aluminium alloys. If the contention of the Crown were to be sustained, whilst the income from the patent would be excluded by r. 7, it would be brought in again by not allowing the company to charge the sum actually paid for the aluminium alloys. That seems to be inconsistent with the principle of *Cadbury Bros., Ltd.* v. *Sinclair* (5). Therefore, both because the purchase of the aluminium alloys is not provided for by the licence agreement and because it is unconnected with that agreement, and for the reason also that the principle of *Cadbury Bros, Ltd.* v. *Sinclair* (5) appears to me to be applicable, I hold that the decision of the commissioners was right upon this point also, and the appeal will be dismissed with costs.

Appeal dismissed with costs.

Solicitors: *Solicitor of Inland Revenue* (for the appellants); *Claremont, Haynes & Co.* (for the respondents).

[*Reported by* D. K. BELCHER, *Barrister-at-Law.*]

R. *v.* TARBOTTON.

[COURT OF CRIMINAL APPEAL (Viscount Caldecote, L.C.J., and Humphreys and Wrottesley, JJ.), **November 17, 1941.**]

Criminal Law—Practice—All offences to be taken into account in sentence—Practice where matter to be taken into account is pending in a superior court.

Whilst serving a sentence in respect of one offence, a prisoner was brought up for sentence in respect of another offence—namely, the breaking of her recognisances—which was committed before the offence for which she was then serving sentence, and was ordered to be detained in a Borstal institution for a term not exceeding three years. The prisoner appealed against this sentence :—

HELD : the practice of bringing up a prisoner whilst serving one sentence for a further sentence in respect of a previous offence is most undesirable. Such previous offence should have been taken into consideration at the time when the current sentence was delivered and one sentence given for both offences. Where the matter to be taken into consideration is one which is being dealt with by a superior court, the permission of that court should be obtained.

[**EDITORIAL NOTE.** It is the general practice for the court to take into consideration charges hanging over the convicted person in respect of which he has not been indicted or charged, but where a charge is pending before a superior court, magistrates have felt that they have no power to deal with it in the sentence they impose. The Court of Criminal Appeal have here stated that, in such a case, he should communicate with the superior court and, with its permission, deal with all charges hanging over the accused. It is of the greatest importance that a prisoner should, on his discharge, start life again with a clean sheet. There is, however, a practical detail which the court has not dealt with, and that is the delay that is likely to result from having to communicate with courts like quarter sessions and assizes which do not sit continuously. It seems clear, too, that, where magistrates are imposing a sentence, only offences involving a sentence within the magistrates' jurisdiction can be taken into account.

AS TO MATTERS TO BE CONSIDERED IN REGARD TO SENTENCE, see HALSBURY, Hailsham Edn., Vol. 9, pp. 256-259, para. 365; and FOR CASES, see DIGEST, Vol. 14, pp. 472, 473, Nos. 5070-5103.]

APPEAL against sentence passed at London County Sessions for breach of recognisances. The facts are fully set out in the judgment of the court delivered by HUMPHREYS, J.

No counsel appeared.

HUMPHREYS, J. [delivering the judgment of the court]: The appellant, a young woman of 21 years of age, was convicted in Apr., 1940, of obtaining goods by false pretences, and was bound over. She was again before the court in Nov., 1940, charged again with obtaining goods by false pretences, and was again bound over. Unfortunately, the probation officer, in whose charge she was put, reports that, although every possible effort has been made to help her, she has made no effort to help herself, and in the officer's opinion, is unsuitable for further probation. Then the question was re-opened when, on June 23, 1941, the appellant was brought up at the Westminster Police Court on a number of charges of false pretences. On that occasion, she was sentenced to six months' imprisonment, and that sentence she is still serving, although it has probably almost expired. In Aug., 1941, she was taken from prison and brought before the London Sessions charged with what is popularly known as having committed a breach of her recognisances. That is to say, as she had not been of good behaviour, which her recognisances required her to be, she was brought up for sentence on the charge of having obtained goods by false pretences, on which she had not been sentenced up to that time. On that occasion, the chairman sentenced her to be detained in a Borstal institution for a period not exceeding three years.

No one can feel any particular sympathy for the appellant, who has been given every possible chance, and, according to the view of the probation officer, is undeserving of any sympathy. However, the court is informed, as indeed, the quarter sessions were informed at the time, that the appellant was considered unsuitable for Borstal detention, as she was considered unsuitable for any further term of probation. It is in those circumstances that her application comes before us for leave to appeal against her sentence, and the court is disposed to grant her application. Indeed, the court has granted the application for leave to appeal, and the court is disposed to alter the sentence of Borstal detention, since it is always inadvisable to send a person to Borstal when the authorities of that institution, represented by the governor of the prison in which she is, recommend that she is not suitable for Borstal. The court, having considered all the circumstances of the case, comes to the conclusion that to impose a term of imprisonment to follow that which she is at present serving is the proper way in which to deal with the appellant. The sentence of detention in a Borstal institution will be altered to a sentence of six months' imprisonment, and that sentence will commence at the conclusion of the sentence which she is now serving.

There is one other matter to which we desire to draw attention. This is one of several cases before the court from time to time of a person who is serving a sentence being taken from a prison in order to be charged with what is called breach of her recognisances and then being sentenced to some further sentence. The court lays great stress upon the importance and the extreme desirability of a person sentenced to imprisonment knowing that, when he or she has served that term, he or she comes out with a clean sheet, and the court does not approve of persons who are serving sentences being taken away and sentenced to some other term for an offence which was committed long before the one for which they are then serving a sentence. In this case, when the appellant was before the magistrate at the Westminster Police Court in June, 1941, the magistrate was told that there was this case at sessions dating from Nov. 5, 1940, when the appellant had been put on recognisance, and that she had broken that recognisance, and he was asked to take that into consideration. He said—and we are far from suggesting that he was wrong in saying, according to the practice—that he could not take that into consideration, because it was a matter which was dealt with by the superior court—namely, quarter sessions. Therefore, he paid no attention to that, and so it was that, while she was undergoing a six-months' sentence, she was taken to quarter sessions and there sentenced to this further sentence, which this court thinks is an extremely undesirable practice. What might have been done, and what this court recommends should be done in future cases, is this. In those circumstances, the magistrate at the court of summary jurisdiction should be informed, as this magistrate was informed, of the pending case of breach of recognisances, and should communicate with the court which is dealing with that question, and inquire whether that court will be satisfied for him to take into consideration in his sentence the breach of recognisances. If that had been done, we think that the magistrate in this case, instead of sentencing the appellant to six months' imprisonment, might well have sentenced her to 12 months' imprisonment, as he had power to do, and that will be the effect of the sentence we pass to-day. We hope that that practice will be followed in future.

It is quite true that, if a court applies to the superior court for permission to take into consideration breach of a recognisance, and is told that that superior court does not approve of the course, nothing further can be done, but in most cases it will probably be found that the quarter sessions or assizes, or whatever court it is which has put the person on recognisance or probation where the recognisance has been broken, will be only too glad for the whole matter to be dealt with by any other court which has the case of that individual under consideration. The sentence in this case, therefore, is that the appellant will be sentenced to six months' imprisonment, and, as she has been given leave to appeal from the sentence, the ordinary result will follow and the time during which she has been detained will count towards sentence.

Appeal allowed.

[*Reported by* Irene G. R. Moses, *Barrister-at-Law.*]

UNGER *v.* PRESTON CORPORATION.

[Liverpool Autumn Assizes (Cassels, J.), **November 11, 1941**].

Contract—Frustration—Internment as alien enemy—Doctor engaged on whole-time basis by local authority.

The plaintiff, who was a refugee from Germany, was engaged by the defendants before the outbreak of war as a full-time school medical officer. In June, 1940, he was interned as an enemy alien, and was not released until Mar., 1941. In reply to a claim by the plaintiff for payment of his salary during the period he was interned, the defendants contended that, according to the doctrine of frustration, his contract of employment had been automatically terminated on his internment :—

Held : the contract between the parties had been frustrated, and, therefore, the plaintiff's engagement terminated on his internment.

[**EDITORIAL NOTE.** Lord Wright, in the recent *Constantine* case (1), stated that state interference may interrupt the performance of a contract for so long a time as to make it unreasonable for the parties to be required to go on with it. The ordinary case of frustration generally envisages the destruction of some object, which determines the contract as from the date of destruction, and the rights of the parties are then crystallised. In a case such as the present, the parties must wait to see that the interference is to be continued for so long a time that the doctrine must be held to apply. It has been said that a state of war must be assumed to be of such prolonged duration as *prima facie* to put an end to contracts which are conditional upon the continuance of a particular state of things which is only consistent with peace ; but this presumption would seem to be rebutted in the present case, for the plaintiff might have been released so shortly after his internment, that the contract could have been continued to the satisfaction of all parties. This, therefore, is a case of frustration where it can only be known from subsequent events that the doctrine will apply, but, once it is settled that the doctrine does apply, it has to be applied in all its rigidness—that is, that the parties' rights under the contract cease from the moment of frustration.

As to Frustation of Contracts of Personal Service, see HALSBURY, Hailsham Edn., Vol. 7, p. 217; and for Cases, see DIGEST, Vol. 12, pp. 400-402, Nos. 3237-3245.]

Cases referred to :

(1) *Constantine (Joseph) Steamship Line, Ltd.* v. *Imperial Smelting Corporation, Ltd., The Kingswood*, [1941] 2 All E.R. 165 ; Digest Supp. ; 110 L.J.K.B. 433 ; 165 L.T. 27.

(2) *Taylor* v. *Caldwell* (1863), 3 B. & S. 826 ; 12 Digest 371, *3093* ; 32 L.J.Q.B. 164 ; 8 L.T. 356.

(3) *F. A. Tamplin S.S. Co., Ltd.* v. *Anglo-Mexican Petroleum Products Co., Ltd.*, [1916] 2 A.C. 397 ; 12 Digest 390, *3194* ; 85 L.J.K.B. 1389 ; 115 L.T. 315 ; *affg.* ; [1916] 1 K.B. 485 ; [1915] 3 K.B. 668.

(4) *Krell* v. *Henry*, [1903] 2 K.B. 740 ; 12 Digest 385, *3168* ; 72 L.J.K.B. 794 ; 89 L.T. 328 ; *affg.* (1902), 18 T.L.R. 823.

(5) *Horlock* v. *Beal*, [1916] 1 A.C. 486 ; 12 Digest 384, *3166* ; 85 L.J.K.B. 602 ; 114 L.T. 193.

(6) *Nordman* v. *Rayner & Sturges* (1916), 33 T.L.R. 87 ; 12 Digest 402, *3244*.

(7) *Marshall* v. *Glanvill*, [1917] 2 K.B. 87 ; 12 Digest 300, *2468* ; 86 L.J.K.B. 767 ; 116 L.T. 560.

Action for arrears of salary or damages for breach of contract. The defendants relied upon the principle of frustration. The facts are fully set out in the judgment.

G. J. Lynskey, K.C., and *A. E. Baucher* for the plaintiff.
J. C. Jolly, K.C., and *R. Lambert* for the defendants.

CASSELS, J.: This action is brought by the plaintiff to recover from the defendants arrears of salary or damages for breach of contract. It raises the question whether any alien who is interned during his employment is entitled to his salary from his employers during his internment, or whether he is given notice under the contract, or whether the contract of employment is automatically brought to an end by his internment. The plaintiff, son of a Jewish father and and Aryan mother, was born in Berlin in 1908. His father was a professor of surgery, and the plaintiff qualified in the medical profession and held an appointment from which he was dismissed. He came to England in 1934, a refugee from Nazi oppression, and, having studied at Guy's Hospital, London, became a fully qualified medical practitioner in England.

In Nov., 1938, he was appointed by the defendants as from Jan. 1, 1939, as assistant school medical officer at an inclusive salary of £500, rising by annual increments of £25 to a maximum of £700 per annum. It was a whole-time appointment, and his daily hours of attendance were fixed. He was not to engage in private practice, and he had to contribute to the defendants' superannuation fund. The engagement was determinable by three months' notice. The plaintiff continued in this employment until June 25, 1940, when he was interned as an enemy alien. He was in category C, which, until June, 1940, had given him freedom from all restrictions. It is only fair to say that the plaintiff was at all times friendly to England. He had applied for naturalisation, and had even made efforts to get into the British Army. However, he was interned, and efforts to obtain his release during 1940 were not successful. On Sept. 4, 1940, in order to assist him in his efforts to obtain release, his solicitors wrote to the defendants asking if they still needed his services. The defendants replied that they did, but that, before the plaintiff could again be employed by them, they would have to give him a new appointment. On Oct. 12, 1940, another firm of solicitors on the plaintiff's behalf claimed his salary as from June 25, 1940, when he had been interned. The defendants replied that the plaintiff's engagement had been terminated by his internment, and they followed that up on Oct. 28 by a letter to the plaintiff giving him three months' notice to terminate his appointment if it had not—as they contended that it had—been already terminated, and not admitting any liability for salary since the date of the internment. The period of that notice ended on Jan. 28, 1941, when the plaintiff was still interned. He was not released until Mar. 7, 1941, and on May 14, 1941, he issued a writ claiming £306, being 7 months' salary from June 25, 1940, to Jan. 28, 1941, during the whole of which time he was interned, and claiming a return of his contributions to the superannuation fund.

The defendants admit that the plaintiff is entitled to the return of these contributions, and raise no point thereon, but, as to the claim for salary, they say that the object of the contract was frustrated by the plaintiff's internment, and that they are excused from any further performance of the contract as from June 25, 1940. By the contract, the plaintiff entered the employment of the defendants as medical officer, undertaking to devote the whole of his time to the duties of his office. He had daily hours. Once he was interned as an enemy alien, he could not discharge his duties, and the defendants could not employ him whilst he was under that order of internment. Even if he had escaped, it would have been illegal for the defendants to have employed him. The performance of the contract depended upon the continued freedom of the plaintiff from restraint—apart, at any rate, from temporary illness—to discharge his duties. From June 25, 1940, he was no longer free to discharge his duties, and he remained so until he was released 9 months later.

In my view, the contention of the defendants that this contract was frustrated by the internment of the plaintiff prevails. In his opinion in *Constantine (Joseph) Steamship Line, Ltd.* v. *Imperial Smelting Corpn., Ltd., The Kingswood* (1), VISCOUNT SIMON, L.C., said, at p. 171:

> . . . when "frustration" in the legal sense occurs, it does not merely provide one party with a defence in an action brought by the other. It kills the contract itself and discharges both parties automatically.

Later, he said, at p. 171:

> The doctrine of discharge from liability by frustration has been explained in various

ways, sometimes by speaking of the disappearance of a foundation which the parties assumed to be at the basis of their contract, sometimes as deduced from a rule arising from impossibility of performance, and sometimes as flowing from the inference of an implied term. Whichever way it is put, the legal consequence is the same. The most satisfactory basis, I think, upon which the doctrine can be put is that it depends on an implied term in the contract of the parties. This was the basis adopted in *Taylor* v. *Caldwell* (2), which is practically the first case of the modern line of authorities. It is the view taken in many later cases, nowhere more clearly than in the exposition of EARL LOREBURN in *F. A. Tamplin S.S. Co., Ltd.* v. *Anglo-Mexican Petroleum Products Co., Ltd.* (3), at pp. 403, 404. It has the advantage of bringing out the distinction that there may be no discharge by supervening impossibility if the express terms of the contract bind the parties to performance notwithstanding that the supervening event may occur. Discharge by supervening impossibility is not a common law rule of general application like discharge by supervening illegality. Whether the contract is terminated or not depends on its terms and surrounding circumstances in each case. Moreover, it seems to me that the explanation of supervening impossibility is at once too broad and too narrow. Some kinds of impossibility may, in some circumstances, not discharge the contract at all. On the other hand, impossibility is too stiff a test in other cases. For example, if the coronation cases, such as *Krell* v. *Henry* (4), are to be regarded as rightly decided on their facts, the explanation of such contracts coming to an end is not to be classed as due to impossibility, for the seats let remained available, and the actions in those cases were brought for the payment or return of money. Every case in this branch of the law can be stated as turning on the question of whether, from the express terms of the particular contract, a further term should be implied which, when its conditions are fulfilled, puts an end to the contract.

In the same case, VISCOUNT MAUGHAM said, at p. 174:

> The doctrine of frustration is only a special case of the discharge of contract by an impossibility of performance arising after the contract was made.

Later, he said, at p. 177:

> Frustration may occur, as I have already mentioned, in very different circumstances. First, in cases resembling the present where there has been the destruction of a specific thing necessary for the performance of the contract. Secondly, where performance becomes virtually impossible owing to a change in the law. Thirdly, where circumstance arise which make the performance of the contract impossible in the manner and at the time contemplated.

Again, he said, at p. 178:

> After all, the question is essentially one of common sense as related to justice. Two persons have entered into a contract which cannot be performed unless a certain subject-matter continues to exist. Ought either of the parties, after it ceases to exist, to be entitled to sue the other for damages based on his failure to perform the impossible? The law intervenes with the doctrine of frustration, and declares that the contract is at an end.

Later, LORD RUSSELL OF KILLOWEN said, at p. 180:

> . . . as a general rule, impossibility of performance does not release from liability the person who has promised the performance. An exception, however, exists in the case of contracts the performance of which is necessarily dependent on the continued existence, or the continued existence in a sound condition, of a person or thing. In the case of such a contract, the cesser of that existence may release the promisor from liability on the ground of what has been termed frustration of the contract.

The plaintiff in this case ceased to exist as a free person. He became an interned enemy alien. Then, in the same case, LORD WRIGHT said, at p. 184:

> . . . I must briefly explain my conception of what is meant in this context by impossibility of performance, which is the phrase used by BLACKBURN, J. In more recent days, the phrase more commonly used is "frustration of the contract" . . . "Frustration of the contract," however, is an elliptical expression. The fuller and more accurate phrase is "frustration of the adventure or of the commercial or practical purpose of the contract." This change in language corresponds to a wider conception of impossibility, which has extended the rule beyond contracts which depend on the existence, at the relevant time, of a specific object, as in the instances given by BLACKBURN, J., to cases where the essential object does indeed exist, but its condition has by some casualty been so changed as to be not available for purposes of the contract, either at the contract date or, if no date is fixed, within any time consistent with the commercial or practical adventure. For the purposes of the contract the object is as good as lost. Another case, often described as frustration, is where by state interference or similar overriding intervention the performance of the contract has been interrupted for so long a time as to make it unreasonable for the parties to be required to go on with it.

In *Horlock* v. *Beal* (5), a case which arose out of an action for the allotment of wages to the crew of a British ship when it was detained in a German port and the crew imprisoned when war between Germany and England was declared, it was held that the seaman ceased to be entitled to his wages as soon as the further performance of the contract became impossible. Counsel for the defendants in this case said that that case is indistinguishable in principle from this, an observation with which I agree. Counsel for the plaintiff cited *Nordman* v. *Rayner & Sturges* (6), a case of internment. There, just before the outbreak of the Great War, the plaintiff, a German, had become the agent of the defendants on commission. The contract was to be for a preliminary period of 12 months, and, if not then terminated, it was to run for another 5 years certain. The plaintiff was interned in Sept., 1914, and released the following month because he was an Alsatian. MCCARDIE, J., held that the plaintiff was entitled to recover, because internment for one month was not sufficient to cause a substantial frustration of the business engagement. Here the internment for a month was accordingly not a period which could reasonably be called substantial.

In *Marshall* v. *Glanvill* (7), MCCARDIE, J., explains his decision in *Nordman* v. *Rayner & Sturges* (6) by saying that the internment was merely temporary, and that, upon the special facts, it was doubtful from first to last whether it would last for any substantial period. In *Marshall* v. *Glanvill* (7), the plaintiff, during his appointment as a traveller on commission, joined the Royal Flying Corps 4 days before he would have been compelled to join the Forces by virtue of the Military Service Acts. He claimed a declaration that he was entitled to commission on all trade with his customers since he joined the Service, and his employers counterclaimed for a declaration that the contract between them and the plaintiff was rescinded when he enlisted. The county court judge held that the plaintiff was entitled to a declaration, and the defendants successfully appealed. ROWLATT, J., held that the Military Service Acts took the plaintiff out of the employment of the defendants and MCCARDIE, J., said, at p. 91 :

> The plaintiff was engaged under two contracts requiring the performance of personal services by him. The effect of his enlistment or of the Military Service Act, 1916, was to sweep away the basis of the arrangement between the parties. From the middle of July, 1916, the plaintiff could not fulfil any of his duties, and the defendants could not accept any of his services under the contracts. The contracts therefore came to an end. The principle which is to guide us has been laid down by the House of Lords in *F. A. Tamplin S.S. Co., Ltd.* v. *Anglo-Mexican Petroleum Products Co., Ltd.* (3), and the question is, Did the plaintiff and defendants make their bargain on the footing that a particular state of things should continue to exist ? If so, a term to that effect is implied, and when that state of things ceases to exist the bargain itself ceases to exist. Here, the parties clearly made their bargain on the footing that it should continue lawful for the plaintiff to render and for the defendants to accept his services. The rendering and acceptance of these services ceased to be lawful in July, 1916, and thereupon the bargain came to an end. A state of war is assumed to be of such prolonged duration as *prima facie* to put an end to contracts which are conditional upon the continuance of a particular state of things which is only consistent with peace.

I hold that the internment of the plaintiff was more than a temporary interruption, that it interfered with and frustrated the business purpose of the contract between the parties, and that the defendants' contention succeeds. There will therefore be judgment for the plaintiff for £38 9*s.* 9*d.* in respect of return of his contributions to the superannuation fund, with costs on the county court scale, and judgment for the defendants on the issue as to arrears of salary, with the general costs of the action.

Solicitors : *Le Brasseur & Oakley* (for the plaintiff) ; *Sharpe, Pritchard & Co.*, agents for *Herbert E. Nutter*, Preston (for the defendants).

[*Reported by* M. D. CHORLTON, *Barrister-at-Law.*]

R. *v.* CLEAL.

[COURT OF CRIMINAL APPEAL (Viscount Caldecote, L.C.J., and Hilbery and Asquith, JJ.), **December 8, 11, 1941**].

Criminal Law—Evidence—Corroboration—Indecent assault on boy—No corroboration of boy's evidence of identity—Lapse of time between giving of evidence and summing up.

A man was convicted of an indecent assault on a boy of 10 years of age on the boy's uncorroborated evidence as to the identity of the man. The chairman of quarter sessions gave the jury sufficient warning as to the danger of convicting on this uncorroborated evidence, although he declined, in the exercise of his discretion, to advise them not to convict. He omitted, however, to point out to them certain discrepancies and uncertainties in the boy's evidence. The summing up to the jury was delivered during the afternoon of the day following that on which the boy's evidence was given :—

Held : notwithstanding the fact that the chairman had given the jury full warning as to the dangers of convicting on such uncorroborated evidence, these omissions, having regard to the time which had elapsed between the boy's evidence and the chairman's summing up, amounted to a misdirection, and the conviction could not be upheld.

[**EDITORIAL NOTE.** This case does not in any way modify the rule in *R.* v. *Baskerville* (1), but deals rather with the application of the rule. It is necessary to explain to the jury the discrepancies in the uncorroborated evidence, and this is even more important where there has been a considerable interval of time between the giving of that evidence and the time when the jury are directed on the case as a whole.

As to Conviction on Uncorroborated Evidence, see HALSBURY, Hailsham Edn., Vol. 9, p. 196, para. 283 ; and for Cases, see DIGEST, Vol. 14, pp. 460-462, Nos. 4887-4919.]

Cases referred to :

(1) *R.* v. *Baskerville*, [1916] 2 K.B. 658 ; 14 Digest 463, *4934* ; 86 L.J.K.B. 28 ; 115 L.T. 453 ; 12 Cr. App. Rep. 81.

(2) *R.* v. *Beebe* (1925), 133 L.T. 736 ; Digest Supp. ; 19 Cr. App. Rep. 22.

Appeal by William Shakespeare Cleal from a decision of Gloucestershire Quarter Sessions convicting him of indecent assault on a boy of 10 years of age and sentencing him to 12 months' hard labour. The facts are fully set out in the judgment of the court delivered by Hilbery, J.

R. F. Lyne for the appellant.

S. R. Benson for the Crown.

Hilbery, J. [delivering the judgment of the court] : In this case the appellant was charged at the Gloucestershire Quarter Sessions with an indecent assault on a boy of 10 years of age and convicted on that charge. Leave to appeal was given by Humphreys, J., and, after hearing counsel on each side, the court allowed the appeal and quashed the conviction, but reserved until to-day the statement of the reasons for its decision.

The material facts can be shortly stated. On Friday, Sept. 5, a boy of 10 years of age was waiting outside the office of the Gloucester Echo in Cheltenham when a man spoke to him. He was a man whom the boy had never seen before. The man asked the boy if he would like to go to the pictures, and, after some conversation, took the boy for a walk up a road to a seat where they sat side by side. The man showed the boy a badge which he was wearing underneath the lapel of his coat. The badge was a Rotol badge—that is to say, a badge bearing the name of that factory and issued by that factory to workers employed there. Then the man suggested that they should go to the lavatory, and they went. There was evidence by the boy of acts of gross indecency done to him by the man. Just before the boy left, the man said : "Meet me outside the Gaumont picture house at 2 p.m. to-morrow." They then parted, the man saying that he had to catch a bus. The boy noticed that the time, according to the clock by the Gloucester office, was just before 6.30 p.m. He made a communication to his parents that night, and the next morning, a Saturday, he made a fuller communication, in consequence of which the police were informed and the boy was instructed to keep the appointment at 2 p.m. at the Gaumont picture house to identify the man, and was informed that a detective would be there. The boy gave a description of the man and of the way in which he was dressed, which was indorsed on the warrant which the police obtained. He went to the appointed place just before 2 p.m. and a detective officer in plain clothes, who was known by the boy to be there, kept observation from a distance of some 10 yds. or 15 yds. away. The boy knew that he was going to this place with a detective to find the man.

According to the boy, at about 2.10 p.m. the accused came up and spoke to him, saying : "So you have turned up. Does anybody know you are here ?" This was denied by the accused, who said that the boy spoke to him. The detective's evidence was that he saw the accused speak to the boy and then saw them talking together, and that he followed them as they went towards the queue rails and heard the accused say, "Does anyone know you are here ?" and then informed the man of the warrant and asked him to come to the station. Immediately on the intervention of the detective, it was common ground that the accused said : "I have never seen the boy before."

The accused called three witnesses employed at the Rotol works with a view to proving, as he swore himself, that, on the Friday evening in question, he was at the club in the Rotol works from about 5.55 p.m. until he went in to his work A at between 7.30 p.m. and 7.45 p.m. Only one of the witnesses gave evidence which covered the period in question. There was no contest about whether the acts of indecency had in fact been committed on the Friday night. The whole contest was as to whether the accused was the man who committed them. Identification of the accused as the man who had been guilty of the acts of indecency towards him depended entirely on the evidence of the boy. At the close of the evidence for the prosecution and the defence, it was conceded by the A prosecution that there was no corroboration of the boy's evidence, and in the argument before us it was again so conceded. *Ex concessis*, the case was, therefore, one which depended on the uncorroborated evidence of the boy, since that was the only evidence identifying the accused as the man who had committed the indecent acts.

The attention of the chairman of quarter sessions was called to *R.* v. *Baskerville* C (1), and it was submitted that the present was a case which should be withdrawn from the jury. The chairman's reply was in these terms :

> I am prepared to go this far. Assuming I sum up to the jury directly, I will tell them of the need to be very careful in this case, and I will tell them that, if, in spite of that warning, they are of the opinion that the sworn evidence given by the boy is true in fact and they find a verdict of guilty, the conviction could be quashed on the ground that there was no corroboration. I am prepared to go as far as that.

D Then, when the actual report of *R.* v. *Baskerville* (1) was read, it was submitted that the jury should be directed to return a verdict of not guilty, but the chairman declined to take this course.

In all cases of this kind, where the evidence of a child, upon which the whole case for the prosecution depends, is without corroboration, the position is defined by *R.* v. *Baskerville* (1), and restated by this court in *R.* v. *Beebe* (2), is this. It is for the court (i) to tell the jury that it is within their legal province E to convict upon such uncorroborated evidence, (ii) (and this is a rule to be observed and applied in all cases) to warn the jury of the danger of convicting a person on the uncorroborated testimony of the boy, and (iii) in the exerciseof its discretion to advise the jury not to convict. This last is something which the court may do, but is not bound to do. Lastly, it was said, at pp. 663, 664 :

> This court, in the exercise of its powers, will quash a conviction even when the judge has given to the jury the warning or advice above-mentioned if this court, after con-F sidering all the circumstances of the case, thinks the verdict unreasonable, or that it cannot be supported having regard to the evidence . . .

In the exercise of his discretion, the chairman declined to advise the jury not to convict. Having regard to certain passages in the boy's evidence to which I will allude more fully, I think that it was a case where the chairman would have been fully justified in directing the jury to return a verdict of not guilty. G Whether or not he so advised and directed the jury was, however, in his discretion, and it is not a case where it is possible to say that the discretion could not have been exercised judicially as in fact it was. The chairman did direct the jury that, as the child had been sworn, it was legally open to them to convict though the child's evidence was uncorroborated.

The case, therefore, was one in which it was of the utmost importance that the rule that the jury should be warned of the danger of convicting on the uncor-H roborated evidence of the boy should be complied with, and it was one where the warning needed to be given in such terms as could leave no possible doubt in the minds of the jury as to its import. If, as was the case, the boy's evidence of identification had been confessedly uncertain, and, on the application of more than one test, his powers of observation had been shown to be unreliable, it was a case which, if left to the jury as an open matter at all, required a summing up which would recall to the minds of the jury these important features of the boy's evidence.

The warning which the chairman gave was certainly not in such terms as must necessarily have conveyed to the jury with perfect clarity its true import. What he said was this :

> In this case, the law says that you can, if you wish, convict a person on the evidence of the boy, but I must warn you that in these cases where, as a rule, the alleged victim is a child of tender years the jury must be very careful to weigh the evidence given by the boy, together with any other evidence that is material, before they can be satisfied that the person accused of the offence has, on the evidence of the boy alone, been guilty of it.

In the light of what the chairman had said before in the hearing of the jury, A which I have already quoted, when the submission on behalf of the defence was made, it is not possible to be sure that this conveyed clearly to the jury that they were being warned against the danger of convicting on the uncorroborated testimony of the boy because of the possible injustice which might thus be done. The jury may, indeed, have thought that they were being warned that, if they convicted, the conviction was in danger of being quashed by the B Court of Criminal Appeal, and they must certainly have understood that they were being called on to take extra care, but it is by no means certain that they understood what such a warning properly given should convey—namely, that they would be entitled to return a verdict of guilty only if the boy's evidence carried such conviction to their minds that they were prepared to take the responsibility of convicting notwithstanding the warning. None the less, on the whole, it is not possible to say that the warning as given was so defective C as to be insufficient.

Treating the warning as sufficient, we think that, when we turn to the summing up, the omissions are such as, in the particular circumstances of this case, amount to misdirection. The boy's powers of observation and recollection had been shown to be imperfect. He described the man in question as having brown wavy hair, whereas the detective admitted that the accused's hair was not brown. We saw the accused, and his hair could not be mistaken for brown. It was D iron grey. The boy said that the man had on a navy blue suit, such a blue as a police constable's uniform, but it was established that the man had on a grey suit, the same suit as that in which he appeared before the jury. Again, when the boy was asked what the detective was wearing when he was waiting outside the Gaumont cinema a few yards from him, he was quite unable to recollect, except that he was sure that the detective was carrying a mackintosh over his E arm, but the detective deposed that he was not carrying any coat.

On the crucial question as to whether the boy's identification of the accused could be considered completely convincing, in his evidence the boy said that he went to the picture house to look for someone wearing a Rotol badge, that he told the police that the man in question had a Rotol badge, and that he had been told by the police that he would be able to see the Rotol badge. The boy went on to say that he looked to see if the man he met had a Rotol badge, and, after F seeing that he had one, felt that it was the man to whom he had spoken the night before. Of itself, that was highly important, as showing that the identification by the boy might well be regarded as largely dependent upon the fact that the man was wearing a Rotol badge. There was evidence, however, that Rotol employed 1,500 men or thereabouts, all of whom wore Rotol badges to admit them to the works. The boy's identification by means of the badge was, therefore, a very unsatisfactory identification of the individual man. No G allusion was made to any of these matters in the summing up.

The boy was asked as a last question in cross-examination : " Do you think you may have made a mistake about this man and it may have been another man ? " He answered : " Yes, sir, I might." The second question in the boy's re-examination was as follows :

> Did you go to look for this man, or did you go to look for a man who was wearing a H Rotol badge ?—I was looking for a man wearing a Rotol badge.

Those admissions by the boy were vital matters for the jury to have in mind where the whole case depended on whether the identification by the boy could be so certainly relied upon, and could be said to carry such conviction that the jury would be justified in convicting notwithstanding the warning against the danger of returning a verdict of guilty. In our view, more especially when it is remembered that the boy gave his evidence on one day and that the summing up was not given until late in the afternoon of the next, it was necessary that those passages in the boy's evidence should have been called to the attention of the jury. If they had been, it is unlikely that the jury would have convicted. To omit any reference to those passages was, in our view, misdirection, having regard to the particular circumstances of the case. For these reasons, we are of opinion that the conviction should be quashed.

Appeal allowed.

Solicitors: *Ivens, Thompson & Green* (for the appellant); *Director of Public Prosecutions* (for the Crown).

[*Reported by* IRENE G. R. MOSES, *Barrister-at-Law.*]

R. *v.* BRIXTON PRISON (GOVERNOR) *Ex parte* PITT-RIVERS.

[KING'S BENCH DIVISION (Viscount Caldecote, L.C.J., and Humphreys and Wrottesley, JJ.), **November 28, December 1, 18, 1941.**]

Emergency Legislation—Detention under Defence Regulations—Application for writ of habeas corpus—Form of detention order—Recital of necessity to exercise control—Defence (General) Regulations, 1939, reg. 18B.

The applicant was detained in prison under an order made by the Secretary of State for Home Affairs under reg. 18B of the Defence (General) Regulations, 1939. Reg. 18B empowers the Secretary of State to make a detention order against a person, where, by reason of the existence of the circumstances specified in the Regulation he believes it to be "necessary to exercise control over him." The order made against the applicant contained no recital by the Secretary of State to the effect that he believed it to be necessary to exercise control over him, and the applicant claimed that, by reason of this omission, the order was bad on the face of it. He further contended that the circumstances of the case disclosed sufficient reason for the court to inquire as to whether the Secretary of State had reasonable grounds for the opinion he had formed:—

HELD: (i) though a document setting forth in general terms the reasons for the detention is essential, the regulation does not prescribe any particular form. The detention order against the applicant was not invalidated by reason of the absence of a recital that the Secretary of State had reasonable cause to believe it to be necessary to exercise control over him.

(ii) since the order was good on its face and showed the competent exercise of a lawful authority, the court could not inquire into the grounds on which the Secretary of State had formed his belief under the Habeas Corpus Act, 1816, *ss.* 3, 4.

[**EDITORIAL NOTE.** This decision carries the matter recently discussed in the House of Lords one step further. It is desirable that a detention order by the Home Secretary should include a recital that he has reasonable cause to believe it to be necessary to exercise control over the detained person, but the omission of such a recital does not invalidate the order.

FOR THE LAW ON THE SUBJECT, see HALSBURY, Hailsham Edn., Vol. 6, p. 533, para. 662; and FOR CASES, see DIGEST, Vol. 11, p. 552, Nos. 538-543.]

Cases referred to:

(1) *Liversidge* v. *Anderson*, [1941] 3 All E.R. 338; Digest Supp.
(2) *Greene* v. *Home Secretary*, [1941] 3 All E.R. 388; Digest Supp.
(3) *R.* v. *Home Secretary, Ex p. Lees*, [1941] 1 K.B. 72; Digest Supp.; 110 L.J.K.B. 42; 164 L.T. 41.
(4) *R.* v. *Home Secretary, Ex p. Budd*, [1941] 2 All E.R. 749; Digest Supp.
(5) *Deybel's Case* (1821), 4 B. & Ald. 243; 16 Digest 264, *701.*
(6) *R.* v. *Lewes Prison (Governor), Ex p. Doyle*, [1917] 2 K.B. 254; 16 Digest 251, *518*; 86 L.J.K.B. 1514; 116 L.T. 407.
(7) *R.* v. *Brixton Prison (Governor), Ex p. Sarno*, [1916] 2 K.B. 742; 16 Digest 250, *498*; 86 L.J.K.B. 62; 115 L.T. 608.

APPLICATION for a writ of *habeas corpus*. The facts are fully set out in the judgment of VISCOUNT CALDECOTE, L.C.J.

J. Scott Henderson for the applicant.

The Attorney-General (*Rt. Hon. Sir Donald Somervell, K.C.*) and *Valentine Holmes* for the respondents.

Viscount Caldecote, L.C.J.: On Aug. 29, 1941, counsel for the applicant, George Henry Lane Fox Pitt-Rivers, at present detained in Brixton Prison, made application to Tucker, J., under R.S.C., Ord. 59, rr. 14, 15, for a writ of *habeas corpus* directed to the Secretary of State for Home Affairs and to the governor of Brixton Prison to have the body of the applicant before the court immediately after the receipt of the writ to receive all and singular such matters and things as the court should then and there consider of concerning him. In accordance with an order made by Tucker, J., notice of motion was served upon the Secretary of State and the governor of the prison, and on Nov. 28 the matter came before this court on motion duly made. The application to Tucker, J., was accompanied by an affidavit made by the applicant from which the following facts appear.

The applicant is a British subject by birth. On June 27, 1940, he was arrested at his home and detained at Brixton Prison under an order made by Sir John Anderson, the then Secretary of State for Home Affairs. The applicant has been detained without any charge ever having been preferred against him and without trial. At the time of his arrest, he was given what purported to be a copy of the order of the Home Secretary. The copy given to the applicant has been lost, but the applicant stated what was contained in the order. There is no question as to the precise terms of the order, which was as follows:

> Defence (General) Regulations, 1939. Detention Order. Whereas I have reasonable cause to believe George H. Lane Fox Pitt-Rivers to have been or to be a member of, or to have been or to be active in the furtherance of the objects of, an organisation as respects which I am satisfied (*a*) that the persons in control of the organisation have or have had associations with persons concerned in the government of, or sympathies with the system of the government of, a power with which His Majesty is at war, and (*b*) that there is danger of the utilisation of the organisation for purposes prejudicial to the public safety, the defence of the realm, the maintenance of public order, the efficient prosecution of a war in which His Majesty is engaged or the maintenance of supplies or services essential to the life of the community: Now, therefore, in pursuance of the powers conferred on me by the Defence (General) Regulations, 1939, reg. 18B (1A), I direct, by this my order, that George H. Lane Fox Pitt-Rivers shall be detained.
>
> June 25, 1940. John Anderson,
> One of His Majesty's Principal Secretaries of State.

The provisions of the Defence (General) Regulations, 1939, reg. 18B (1A), are by this time familiar, and it is unnecessary to state them at length. For the purposes of this application, the material part of para. (1A) is as follows:

> If the Secretary of State has reasonable cause to believe any person to have been or to be a member of, or to have been or to be active in the furtherance of the objects of, any such organisation as hereinafter mentioned, and that it is necessary to exercise control over him, he may make an order against that person directing that he be detained.

It is admitted that the organisation referred to in Sir John Anderson's order of June 25, 1940, was such an organisation as is mentioned in the latter part of para. (1A). On Oct. 12, 1940, in pursuance of reg. 18B (5), the applicant was informed in writing of the grounds on which the order of Sir John Anderson had been made against him, and was furnished with particulars to enable him to present his case to the advisory committee appointed under para. (3). On Nov. 9, 10, 11, 1940, the applicant appeared before the advisory committee. The applicant, in his affidavit, denies that either Sir John Anderson or the present Home Secretary can have had, or, in the case of the present Home Secretary, now has, any reasonable cause to believe any of the matters stated in the order for the applicant's detention.

Reg. 18B has recently been considered by the House of Lords in *Liversidge* v. *Anderson* (1) and *Greene* v. *Home Secretary* (2). In *Greene* v. *Home Secretary* (2), it was decided that the words "If the Secretary of State has reasonable cause to believe" appearing in reg. 18B refer, in the words of Viscount Maugham, at p. 391:

> . . . simply to the belief of the Secretary of State, based on his view as to there being reasonable cause for the personal belief which justifies the detention order.

Their Lordships also in *Liversidge's* case (1), in the words of Viscount Maugham in *Greene's* case (2) [p. 391]

> . . . expressed the opinion that the Secretary of State could not be called upon to

disclose his information or grounds of belief if he took the view that it would be contrary to the public interest to do so.

In *Greene's* case (2), the applicant was a person detained in pursuance of an order of the Home Secretary made under reg. 18B. The applicant had received wrong information from the chairman of the advisory committee as to the grounds on which the order had been made against him. It was held in the House of Lords that the order of the Home Secretary was itself a sufficient answer to an application for a writ of *habeas corpus*, and that the Home Secretary, in making an order under reg. 18B, must be presumed to have what he considered reasonable cause for his belief. It followed in that case, as their Lordships thought, that the Home Secretary had no need to submit an affidavit, once the order itself was proved or admitted. As to the mistake in the statement of the grounds on which an order for detention had been made against Greene, it was held that he had not been prejudiced by the error in the document, but that, in any case, a mistake in that document could not invalidate the original detention or render its continuance invalid.

I have thought it necessary at the outset of my judgment to state the results of these two cases, because they obviously narrow the range of arguments which can be open on such application as the present to persons detained under orders purporting to be made in pursuance of reg. 18B. The applicant in the present case submitted that the Home Secretary's order of June 25, 1940, was bad on the face of it, because it contained no recital that the Home Secretary had reasonable cause to believe that it was necessary to exercise control over the applicant. There is no doubt, in my opinion, that, before a valid order for detention can be made, the Home Secretary must have reasonable cause to believe that it is necessary to exercise control over the person to be detained. Whatever criticisms may be made of this regulation, it is designed in the interests of the safety of the state. It is made under the authority of an Act of Parliament which empowers His Majesty by order in council to make

> . . . such regulations . . . as appear to him to be necessary or expedient for securing the public safety, the defence of the realm, the maintenance of public order and the efficient prosecution of any war in which His Majesty may be engaged . . .

It would be a gross abuse of the powers given by Parliament to attempt to use them in order merely to suppress unpopular or obnoxious opinions. Regulations not required for any of the purposes stated in the Emergency Powers (Defence) Act, 1939, s. 1, or in the amending Act of 1940, would indeed be *ultra vires*. It was plainly in the light of such considerations that, in both cases (para. (1) and para. (1A)), in which the Secretary of State is empowered to make an order for detention, it was provided that the Secretary of State must have reasonable cause to believe that it is necessary to exercise control over the person to be detained—necessary, that is to say, having regard to the purposes stated in the empowering legislation. It is right to say that no contention to the contrary was made before us by the Attorney-General, nor have we been given any reason to suppose that the Secretary of State has at any stage in this case claimed the right to detain the applicant except on the footing that it is necessary to exercise control over him. Sir John Anderson has said in an affidavit sworn on Nov. 24, 1941, that he believed that it was necessary to exercise control over the applicant, that he had reasonable cause so to believe, and, further, that it seemed to him that it was implicit in the making of the order, and that it was unnecessary to recite it. The statement of reasons for the order given to the applicant by the chairman of the advisory committee on Oct. 12, 1940, contained such a recital. Counsel for the applicant did not—and, in my opinion, could not—reasonably contend that the applicant was in any way prejudiced by the absence of the recital from the order for detention. As far as we were informed, the applicant did not suggest, on finding the recital in the statement of reasons for detaining him, that this was a different or an additional ground, of which he had had no notice when he was given a copy of the order made by Sir John Anderson. The contention that the order is bad on the face of it is, therefore, one which might be described as a mere technicality, going only to form and not to substance, were it not for the fact that the applicant's personal liberty is at stake. He is entitled to insist upon proper compliance with the forms of law applicable to his case. If it could be said that the order is invalid as not having been made for sufficient reasons, the applicant would be entitled to succeed in the present proceedings. The question is whether the absence of the recital is a ground for saying that the order was not made for sufficient reasons. As was said by HUMPHREYS, J., in *R.* v. *Home Secretary, Ex p. Lees* (3), at p. 78 :

> The document in question is not a conviction nor an indictment nor even a charge.

In that case, the order suffered from the same defect, if defect it be, as the order in the present case. This was brought to the attention of the Divisional Court (*per* HUMPHREYS, J., in *R.* v. *Home Secretary, Ex p. Budd* (4),) and the fact that neither in the judgment of the Divisional Court nor in the judgment of the Court of Appeal was any reference made to the omission may be regarded as an indication that the point was not relied on by counsel for the applicant in *Lees*' case (3). In *Budd's* case (4), where again the order of the Home Secretary contained no reference to his belief that "it was necessary to exercise control over the applicant," the court reserved their opinion until the point arose. The point has now arisen, and I must express my opinion upon it. In my judgment, the absence of the recital does not warrant the inference that the order was made without the Secretary of State having reasonable cause to believe that it was necessary to exercise control over the applicant. Whether or not the Secretary of State had such reasonable cause did not, and could not, depend on a recital to that effect. What was vital was that the Secretary of State should have had reasonable cause, and the court, in my opinion, can properly find such cause to exist from the sworn statement of Sir John Anderson, which I have read. It makes no difference that this statement was made more than a year after the date of the order. The important point is the fact stated. The truthfulness and honesty of Sir John Anderson are not assailed.

The view which I have formed may be illustrated by considering the position which would arise after issue of the writ. The writ having issued, the gaoler would have been required to make a return. I will assume that the return would contain a copy of the order here by the Secretary of State, indorsed or annexed to the writ, as required by R.S.C., Ord. 59, r. 22, and a statement by the gaoler to the effect that the applicant was detained by order of the Secretary of State as appearing. This, in my opinion, would have been a good return, and the court would then have gone no further, and would not have inquired into the precise form of the order for the applicant's detention. I need hardly say that, if, contrary to my opinion, a cause of detention which was not lawful on the face of the order was returned, the applicant would be entitled to be discharged on the ground of the insufficiency of the return. The reason seems to me very clear, accepting, as of course I do, the decisions of the House of Lords in *Liversidge* v. *Anderson* (1) and *Greene* v. *Home Secretary* (2). Reg. 18B (1A) admittedly gives the Secretary of State very great powers. If he exercises these powers and, in the absence of any suggestion that he is not to be believed, says that he has exercised them, that is conclusive. A right exercise of the powers must, of course, be made, but the exact form of the order for detention is immaterial, in my judgment, provided that enough clearly appears from the order of the Secretary of State to show what powers the latter was using. In deference to a submission made by the Attorney-General, I ought to add that, in my opinion, the Secretary of State's order for detention is clearly required to be in writing.

The applicant's contention as to the absence of a necessary recital, which was his first and main contention, was not unconnected with another submission, to the effect that there was sufficient reason to justify the court in this case in inquiring into the truth of the facts stated in the order for detention—namely, whether or not Sir John Anderson had in fact reasonable grounds for the opinion he had formed. Authority for this proposition was claimed from the Habeas Corpus Act, 1816, ss. 3, 4. That Act empowers the court in non-criminal cases to examine into the truth of the facts set forth in the return. The judgment of MACKINNON, L.J., in the Court of Appeal in *Lees*' case (3) and the opinions given in the House of Lords in *Liversidge's* case (1) and in *Greene's* case (2) cannot be reconciled with the contention that in the present case the court should exercise its discretion to inquire into the facts. On the assumption that my opinion on the first contention for the applicant is to be accepted, the order is good on its face, and, to use the language of LORD WRIGHT in *Greene's* case (2), at p. 403, it shows "a competent exercise of a lawful authority." When, moreover, it is reinforced, as in this case, by the affidavit of Sir John

Anderson, who made the order, it seems to me unassailable. The inquiry proposed is, indeed, one which could only be pursued by requiring Sir John Anderson to disclose on affidavit the information on which he relied for his belief. That, however, has been decided by the House of Lords to be something not required of the Secretary of State. In my judgment, this is not a case for the exercise of the discretion given to the court in non-criminal cases by the Habeas Corpus Act, 1816, ss. 3, 4. In the result, I think that this application must fail. Nothing I have said must for a moment be taken to detract one iota from all that has been said by many judges about this historic writ, so jealously guarded and adapted to provide swift and effective remedies in cases of the unlawful invasion of any man's personal liberty. It is just as much a part of the law to-day as it ever was in the seventeenth and eighteenth centuries. If, in the circumstances in which we now find ourselves, Parliament has thought fit for a time to enact powers which seem to some to exceed the reach of the writ of *habeas corpus*, what Parliament has done Parliament can undo when it thinks fit. Meanwhile, it is our duty to interpret the laws as we find them, and to apply them as we understand them. The application should, in my opinion, be dismissed.

HUMPHREYS, J.: I am of the same opinion. Counsel for the applicant took two points. First, he submitted that the order is bad on the face of it, in that it contains no recital by the Secretary of State, who made it, as to his belief that it is necessary to exercise control over the applicant. The first question which appears to arise may be stated as follows. Does reg. 18B (1A), in pursuance of which the order purports to be made, require any order other than a mere oral direction? In my opinion, a written order, properly authenticated by the Secretary of State, is essential before any lawful detention can be effected for several reasons. In the first place, the wording of the regulation clearly contemplates the making of a document. The authority conferred by the Secretary of State is not to detain or cause to be detained. It is to make an order directing the detention. Such language, in my view, is quite inconsistent with the information of a mere oral direction. Secondly, I fail to see how the person detained can be expected to exercise the right of making representations in writing to the Secretary of State conferred upon him by reg. 18B (4), unless he has something more to rely upon than the statement of the constable effecting his arrest that the Secretary of State has directed his detention under reg. 18B. Thirdly, I think that the governor of the gaol would be entitled to refuse to receive and detain any prisoner without a written authority. In the event of the writ of *habeas corpus* being directed to the governor, he is required by R.S.C., Ord. 59, r. 22, to include in his return a copy of all the causes of the prisoner's detainer indorsed on, or annexed to, the writ. How can he make a copy of that which does not exist? Further, I can find nothing in the wording of the regulation to indicate that a revolution in the practice of centuries is contemplated, and I know of no other action by a Minister of the Crown of equal importance in regard to which it has ever been suggested that writing is not essential.

Similar considerations, particularly those based upon reg. 18B (4), apply to the argument addressed to us by the Attorney-General that, if writing is required at all, no more is needed than an order directing the detention of the named person in pursuance of the powers conferred by reg. 18B (1A). Such a document would not necessarily convey anything to the mind of the person detained, and, in my opinion, it would be contrary to the dictates of natural justice (which I hope and believe still remain part of the law of England) that a person not accused of any offence should be imprisoned for even a day without being informed of the general reasons for his detention. While I think that a document giving reasons is essential, it is to be observed that nowhere in the regulations is any particular form prescribed. In my judgment, all that the detained person is entitled to demand is an order purporting to emanate from the Secretary of State, stating, not in detail, and not necessarily in legal language, so much of the belief of the Secretary of State in regard to him as will inform him in general terms of the reasons for his detention and will enable him to exercise, at the earliest practicable opportunity, his right under para. (4) to make representations to the Secretary of State.

The order in the present case appears to me to comply with these conditions.

The applicant cannot be prejudiced in any way by the omission of a recital that the Home Secretary had reasonable cause to believe that it was necessary to exercise control over the applicant. The fact of his detention was the plainest intimation to him that the Secretary of State considered it necessary to exercise control over him, and the insertion of the words omitted would have added nothing to his information on the subject. It follows that, in my view, there is, on the facts of this case, no substance in this point.

A Counsel for the applicant insists that this order must be viewed in the light of its sufficiency as a return to a writ of *habeas corpus*. In the days of technical pleading, no doubt, the court exercised great strictness in cases of *habeas corpus*. Perhaps the highwater mark in this respect was reached in 1821 in *Deybel's* case (5). Jacobus Deybel was an impressed seaman who had obtained a writ of *habeas corpus*. The impressment would have been lawful by statute, if Deybel, a mariner, had been found on board a smuggling vessel without 4 leagues of the coast between the North Foreland and Beachy Head or within B 8 leagues of any other part of the coast. The return to the writ stated that he had been so found:

> . . . within 8 leagues of that part of the coast of Great Britain called Suffolk, that is to say, within 8 leagues of Orfordness, in the county of Suffolk.

The return was held to be insufficient, and Deybel was discharged. The judges felt themselves bound to take judicial notice of the general division of England C into counties, and of the fact that they were in the habit of directing their process to the sheriffs of those counties, but thought that that could not be extended to particular parts of counties and their local situations. Accordingly, the court held that it was not prepared to say judicially that Orfordness in the county of Suffolk was not a detached part of that county lying between the North Foreland and Beachy Head. Best, J., went rather further than the other members of the court. He said, at p. 248: D

> It seems to me, therefore, that we cannot take notice, judicially, either that Orfordness may not be an isolated part of the county of Suffolk, or even if it be part of the body of that county, that it is not within 8 leagues of Beachy Head.

That decision may be regarded, I think, as an example of judicial ignorance *in excelsis*. On the other hand, the courts never allow mere irregularity on the face of a commitment to prevail over the substance of the matter, and there E is a series of authorities showing that, where a commitment based on the conviction appeared to be irregular in form, the court would send for and examine the conviction in order to see whether there was more than a technical defect in the commitment: *R.* v. *Lewes Prison* (*Governor*), *Ex p. Doyle* (6). In *Doyle's* case (6), the court in fact arrived at the conclusion that the warrant of commitment was not bad upon the face of it. Lord Reading, L.C.J., expressed himself thus, at p. 269: F

> But even though we had come to the conclusion that the warrant of commitment was bad on the face of it, as this is a case of commitment after conviction we are again not only entitled but bound to look at the conviction in order to see whether there is more than a mere technical defect in the commitment. Upon behalf of the applicant it has been strenuously contended that we are dealing with the liberty of the subject, but we are also administering law and justice, and we have to see whether or not there is any ground for alleging that the applicant has not been properly convicted and G committed.

He then proceeded to examine some of the old authorities.

I do not myself think that the analogy of commitments based upon convictions should be pressed too closely, but I see no reason why, in a case where there is no conviction, this court should not look at any matter in evidence in the case to enable it to decide whether there is legal justification for the detention. If, then, we are at liberty to look at the affidavit of Sir John Anderson, H it becomes plain that, in making the order in question, the Secretary of State did believe, on grounds which to him seemed reasonable, that it was necessary to exercise control over the applicant. Since the order purports—and, in my opinion, rightly—to state the matters in respect of which the Secretary of State believed the applicant to have rendered himself liable to detention, I think that it is irregular, in that it omits one of the essential matters of such belief. The irregularity is to be deplored, but, for reasons above stated, I do not think that this court is called upon to do more than inquire whether the essential matters were present to the mind of the Secretary of State when he was making the order.

The second submission made on behalf of the applicant was that sufficient reason was shown for inquiring into the truth of the matter. That point is, I think, covered by the authority of the House of Lord's in *Greene's* case (2). It is sufficient to repeat, as applying to the present case, the language used by LORD WRIGHT, at p. 403:

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> In the present case, there are no facts to inquire into. The only possible inquiry of fact, once the authenticity of the order and its application to the appellant are conceded or established, is as to whether the Home Secretary had in his own mind what appeared to his mind to be reasonable cause.

I agree that the application should be refused.

WROTTESLEY, J.: I agree. Under reg. 18B (1), (1A), read literally, the Home Secretary might make an order for the detention of the applicant provided B that he had reasonable cause to believe that the applicant fell into one of the four categories of persons enumerated by the Attorney-General, and that, by reason thereof, it was necessary to exercise control over him. These categories are (i) hostile origin, (ii) hostile association, (iii) being concerned in acts prejudicial to public safety, and (iv) (under reg. 18B (1A)), membership of, or supporting, what I may call proscribed organisations. Nowhere is anything C laid down as to the form of the order, and an order in writing purporting to be made under reg. 18B (1) or 18B (1A) without further ado could not, I think, be said to be in excess of the powers conferred on the Home Secretary by the regulation, provided that the Home Secretary had what he thought reasonable grounds for the necessary belief. That is the result, I think, of *Liversidge* v. *Anderson* (1) and *Greene* v. *Home Secretary* (2). I can see no reason for not reading this regulation in its literal sense, and, if such an order is not in excess of the D Home Secretary's powers, I do not see why it is not a sufficient authority for a properly authorised gaoler to detain the person named in the order. Such an order, *prima facie*, so far as the gaoler is concerned, would have constituted a good return to the writ in former days, under the old procedure, bringing into play the Habeas Corpus Act, 1816, s. 3, if the court thought proper.

It is true that, if the order were made in that form, the person detained would not know into which of the above-named categories the Home Secretary believed E him to fall, and it is doubtless for this reason that para. (5) was enacted. Under this provision, the person detained is entitled to be informed both of the grounds for his detention—that is to say, into which category the Home Secretary believes him to fall—and also of the particulars of that ground, which means the facts believed by the Home Secretary. For instance, a ground might be that the person had furthered the objects of a proscribed organisation, and particulars F might be that he had done so by writing, speaking, interviewing or canvassing, or as the case might be. I do not suggest that, upon an application for a writ for *habeas corpus*, it would be a sufficient return or answer that the Home Secretary should say that the applicant was detained under reg. 18B (1) or under reg. 18B (1A), for it is obvious, I think, that the court is entitled to be told what the applicant is entitled to be told, and, in addition, since the Habeas Corpus Act, 1640, the courts have power to supervise and control the Crown and its ministers G in matters affecting the freedom of the subject: *R.* v. *Brixton Prison* (*Governor*), *Ex p. Sarno* (7). Unless, therefore, there should appear in the order some recital showing that the order was made upon grounds which are made sufficient by the regulations, specifying, where there are alternatives, which is or are relied upon, the court would have to be enlightened, either by statement or by affidavit.

In the case before us, the order purports to be made under reg. 18B (1A), H and to that extent is a lawful order on which the applicant's gaoler may act and hold him. It goes further, and states the Home Secretary's belief on reasonable grounds as to the category into which the applicant falls. In any case, this is a desirable thing to be included in any order, since it gives the applicant early notice of the category, and resolves any doubt as to which of them is relied upon. It would be of use to him in any representations he might wish to make under para. (4).

The Home Secretary cannot be worse off by reason of the fact that to this extent he condescended to particularise his belief when he made the order.

The order did not go on to set out that the Home Secretary believed it necessary to control the applicant. That would tell the applicant nothing which he did not know already, on the assumption that the Home Secretary was acting within his powers, as he said that he was by using in the order the words "in pursuance of reg. 18B (1A)."

In his careful argument, counsel for the applicant endeavoured to draw a comparison and effect an analogy with the process of the criminal law and with imprisonment for crime following upon conviction. In that sphere, conviction must be of a definite crime, and not of one or more alternatives. There, too, the standard is proof beyond reasonable doubt, but, under the regulations, the standard is not proof, but is reasonable suspicion. Under the regulation, duplicity is not a defect, but may well provide the more reason for taking action. In fact, generally, if these regulations are to protect the country against internal dangers of an insidious kind in a state of grave emergency, they must fall far short of the standards enforced by courts of law when trying persons charged with crimes with a view to their punishment. We are concerned, not with punishment or imprisonment, but with detention, and the difference is well illustrated by what we were told as to the applicant at the hearing. He was in a nursing home undergoing medical treatment. In the result, therefore, I think that by using the words "in pursuance of reg. 18B (1A)" the Home Secretary indicated on the face of the order that he believed on reasonable grounds that it was necessary to detain the applicant.

There is another matter upon which I desire to express emphatic agreement with what has fallen from my Lord. The decision in this case does not mean or imply that the words in the regulation "and that it is necessary to exercise control over him" are unimportant, or merely formal words. The contrary is the fact, and, if there had been any real doubt as to whether the Secretary of State held this belief, the court would have had no choice but to order the discharge of the applicant, for these are the words which make it clear that even now no man is to be deprived of his freedom, still less to be punished, because of his beliefs or convictions, or because the blood of an enemy race flows in his veins. It is only when some circumstance of the kind set out in the regulation renders it a danger to the realm that a particular individual should remain at large that the Secretary of State is authorised to detain that individual.

On the other point raised by the application, I have nothing to add to what has been said by my Lord. By challenging in an affidavit the soundness of the Secretary of State's belief, the applicant cannot impose on the Secretary of State a duty which the House of Lords has held is not imposed upon him.

Application dismissed.

Solicitors: *Wainright & Co.* (for the applicant); *Treasury Solicitor* (for the respondents).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

LATILLA v. INLAND REVENUE COMMISSIONERS.

[COURT OF APPEAL (Lord Greene, M.R., and Clauson and du Parcq L.JJ.), **November 11, 12, December 16, 1941**].

Income Tax—Sur-tax—Avoidance of tax—Transfer of partnership interests to Rhodesian company—Power to enjoy income—"Income becomes payable"—"Associated operations"—Finance Act, 1936 (c. 34), *s.* 18.

By an agreement dated Mar. 20, 1933, the appellant's wife, her two daughters, and a Mrs. J., being all resident at that time in the United Kingdom, sold to a company called the L. Trust, Ltd., their shares in a partnership carrying on the business of mining in Rhodesia. The shares in question were two one-third shares, of which one was owned by Mrs. J. and the other by the appellant's wife and her two daughters in equal shares. The remaining one-third share was owned by M., who lived in Rhodesia. The L. Trust, Ltd., was resident in Southern Rhodesia and was incorporated under the laws of that country on the same day as the agreement for sale was made. The consideration for the sale consisted of shares and non-interest bearing debentures in the L. Trust, Ltd. The company declared no dividends, but applied its profits in redeeming the debentures. The appellant contended that the share of the profits of L. Trust, Ltd., derived from the mining partnership and received by Mrs. L. was not liable to British income tax. The Crown claimed that by reason of the Finance Act, 1936, s. 18, income tax and sur-tax were payable by the appellant in respect of the income of the company, which was income which Mrs. L. had power to enjoy within the meaning of sect. 18 (3) :—

HELD : (i) the L. Trust, Ltd., was entitled to receive, under the agreement a share of the profits of the mining partnership, and that share was income payable to it within the meaning of the Finance Act, 1936, s. 18. The transaction, therefore, fell within that section, and the appellant was liable to pay income tax and sur-tax in respect of so much of the income of the L. Trust, Ltd., as Mrs. L. had power to enjoy.

(ii) if the income was not produced by the transfer of assets but by the activities of the partners, then those activities were " associated operations " within the definition in the Finance Act, 1936, s. 18 (2).

Decision of LAWRENCE, J., ([1941] 2 All E.R. 269) *affirmed.*

[EDITORIAL NOTE. The main argument for the taxpayer on the appeal was that a share of partnership profits paid to a partner is not income " payable to " the partner within the meaning of the Finance Act, 1936, s. 18 (3). The profits, it was said, are the result of the partner's own exertions, and are not aptly described as income payable to him. This argument the Court of Appeal has totally rejected.

AS TO EXEMPTIONS FROM INCOME TAX, see HALSBURY, Hailsham Edn., Vol. 17, pp. 79-81, paras. 161, 162 ; and FOR CASES, see DIGEST, Vol. 28, pp. 82-84, Nos. 469-483.]

Case referred to :

(1) *Howard de Walden* (*Lord*) v. *Beck* (1939), 23 Tax. Cas. 384.

APPEAL by the taxpayer from an order of LAWRENCE, J., dated Apr. 29, 1941, and reported [1941] 2 All E.R. 269. The facts are fully set out in the judgment of the court delivered by LORD GREENE, M.R.

J. Millard Tucker, K.C. and *Terence Donovan* for the appellant.

The Attorney-General (*Rt. Hon. Sir Donald Somervell, K.C.*), *J. H. Stamp* and *Reginald P. Hills* for the respondents.

LORD GREENE, M.R. [delivering the judgment of the court] : The questions raised by this appeal are short, and the answers to them do not, in our judgment, admit of doubt. They arise in the following circumstances. On Mar. 20, 1933, by an agreement of that date, four ladies, the appellant's wife, Mrs. Latilla, and her two daughters and a Mrs. Jane Johnson, being all at that time resident in the United Kingdom, sold to a company called Latjohn Trust, Ltd., their shares in a mining partnership having the firm name of John Mack and Co. The shares in question were two one-third shares, of which one was owned by Mrs. Johnson and the other by Mrs. Latilla and her two daughters in equal thirds. The remaining one-third share in the partnership belonged to John Mack, who lived in Rhodesia, where the mine owned by the partnership was situated. Latjohn Trust, Ltd., was a limited company incorporated under the laws of Southern Rhodesia, where it was admittedly resident during the period with which this appeal is concerned. The incorporation took place on the same day as the sale agreement. The consideration to which the four ladies were entitled under the agreement consisted of shares and non-interest-bearing debentures in the company, in each case of the nominal value of £1, the appellant's wife receiving 1,667 shares and 41,667 debentures. The sale was to take effect as from Apr. 1, 1932. Latjohn Trust, Ltd., proceeded to carry on business in partnership with Mack, who had consented to the sale. The terms of the partnership, as it existed between Mack and the four ladies, and later between Mack and the company are not stated. The accounts show the sums receivable by the company in the various years in respect of its two-thirds share of the profits of John Mack and Co. The company has never declared a dividend, but has applied its profits in redeeming debentures. It has been the practice of the four ladies to borrow money from the company in anticipation of the redemption of debentures which they held.

Until the Finance Act, 1936, came into force, Mrs. Latilla, as the result of these transactions, was able to obtain for herself a share of the profits which the company derived from the partnership business without incurring for herself or her husband any liability to British income tax. She, or rather her husband, as the person assessable in respect of her income, now claims that the provisions of that Act have not altered the position. The Crown, on the other hand, claims that by reason of the Finance Act, 1936, s. 18, income tax and sur-tax are payable by Latilla in respect of income of the company which Mrs. Latilla admittedly has power to enjoy within the meaning of sect. 18 (3). The details of the assessments which have given rise to the controversy need not be stated. The Special Commissioners found that the transfer of the shares in the partnership to the company was effected mainly for the purpose of avoiding British taxation, and was not a *bona fide* commercial transaction. This finding goes farther than is required by the proviso to sect. 18 (1), in force at the relevant times, which threw the burden of proof on the taxpayer. Nevertheless, an attempt was made, not very vigorously, to attack it on some ground which, we must confess, remains obscure to us. There was ample evidence to support the finding, which is quite unassailable, and we therefore say no more about it.

The substantial argument presented on behalf of the appellant was concerned with the words " income becomes payable " in the preamble to sect. 18. It is not disputed that, if those words are apt to describe the share of partnership profits received by the company, the operative part of the section applies to the case and the assessments as agreed are valid assessments. Accordingly, it is unnecessary to refer to the complicated provisions of the operative part of the section. The preamble explains the purpose of the legislation—namely, to prevent

> . . . the avoiding by individuals ordinarily resident in the United Kingdom of liability to income tax by means of transfers of assets by virtue or in consequence whereof, either alone or in conjunction with associated operations, income becomes payable to persons resident or domiciled out of the United Kingdom . . .

It is notorious that, before the passing of this legislation, individuals who were minded to enjoy their income without bearing the appropriate burden of British taxation were able to do so by transferring assets productive of income to a non-resident person or company by whom the income was retained abroad, so as not to incur taxation in England. The money representing the income was then, by means of one or other of several well-known expedients, transferred to England as capital. The device used in the present case, that of transferring money by repayment of debentures, was a favourite one, and it was effective for its purpose. These ingenious schemes the legislature set out to defeat in the Finance Act, 1936, s. 18, and the question which arises in the present appeal is whether or not the transaction now under consideration falls outside its scope.

As we have said, the answer depends on the true construction of three words in the preamble. It was argued by counsel for the appellant that the operative provisions of sect. 18 (1) are confined to cases where the transfer of assets which has taken place is of the description mentioned in the preamble—namely, a transfer of assets

> . . . by virtue or in consequence whereof, either alone or in conjunction with associated operations, income becomes payable to persons resident or domiciled out of the United Kingdom . . .

With this argument we agree, since the words " any such transfer " in subsect. (1) clearly refer to a transfer of the description mentioned in the preamble. Counsel for the appellant then argued that although the transfer in the present case was a transfer of assets within the comprehensive definition contained in subsect. (5), it was not a transfer of that description, since no income became " payable " to the company. He pointed out, quite correctly, that the assets transferred in the present case were shares in a partnership together with the interests of the transferors in the mining property itself, and that the income derived from the company was derived through the activities of the partnership in exploiting the mine. He contended that the words were not apt to describe income derived by a person's own exertions, since income so earned is his own, and cannot be said to be " payable " to him. In the special case of a partnership, he referred to the limitations which existed at common law upon the right of partners to sue one another, and he claimed that the share of partnership profits to which the company became entitled could not be described as income which became " payable " to the company. We disagree with all these contentions in their application to the facts of the present case, and we need not discuss their wider implications. The share of the profits of the partnership to which the company is entitled is that share which comes to it in accordance with the terms of the partnership. The company is entitled to call upon its partner to do whatever may be necessary, for example, by signing a cheque on the banking account of the partnership to enable the company to obtain its share. In the partnership accounts, the company's undrawn share of profits would appear as a debt owing to the company. If the profits were under the control of the other partner, the company could by appropriate proceedings compel him to pay over its share. If this is not income "payable" to the company, we do not know what it is. With regard to the argument that it was not the transfer of assets which produced the income, but the activities of the partners, we agree with the argument submitted by the Attorney-General that those activities are "associated operations" within the definition of that phrase in subsect. (2). By that subsection, so far as is relevant, an associated operation means, in relation to any transfer, "an operation of any kind effected by any person in relation to any of the assets transferred," words of the widest import, which, in our judgment, clearly cover the operation of turning the assets to account.

Although the figures are agreed, we must refer to a suggestion made by the Attorney-General in the course of his argument to the effect that the Crown in such a case as the present was entitled to go behind the accounts as agreed between the partners and examine the accounts of the partnership itself, in order to ascertain what, in the view of the Crown, the profits of the partnership were. In our opinion, this would not be legitimate. The "income payable" to a partner is his share of the partnership profits which the partners, in accordance with the partnership agreement, determine to divide. He cannot demand more. It is right to say that the Attorney-General finally accepted the position that, in the present case, the Crown was bound to accept the actual amounts received by the company as being the correct basis for the assessments. The appeal is dismissed with costs.

Appeal dismissed with costs. Leave to appeal to the House of Lords.

Solicitors: *Birkbeck, Julius, Edwards & Co.* (for the appellant); *Solicitor of Inland Revenue* (for the respondents).

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-law.*]

Re BICKERTON'S SETTLEMENT, SHAW *v.* BICKERTON.

[CHANCERY DIVISION (Uthwatt, J.), **November 12, 1941.**]

Settlements—Construction—Beneficial trusts—Implication of cross-remainders.

Clause 2 of a settlement of personalty provided that the settlor should be paid £1,000 per annum during his lifetime, and that the surplus was to be accumulated. Clause 3 provided that, after his death, the trustees should pay his widow £500 annually, and a further £100 annually in respect of each child of the settlor then born who should be living with her and under the age of 21 years, to be applied by her for the benefit of such child, and the surplus (if any) of the income was to be paid in equal shares to each child on attaining the age of 21 years. It was further provided by cl. 4 that, after the death of the widow, the trustees "shall hold the said trust fund upon trust to divide the same into as many equal shares as there shall be children of the settlor now born surviving him or who shall have died in his lifetime leaving issue surviving him and shall appropriate one of such shares to each such child who shall survive him or who shall have died leaving issue as aforesaid," on trust to pay the income to such child, and after his or her decease in trust for all the children of such child who, being sons, shall attain the age of 21, or, being daughters, shall attain that age or marry under that age in equal shares. It was further declared by cl. 9 that, if there should be no grandchildren as aforesaid, the trust fund should be held in trust for the settlor. One of the children died during the life of the widow without leaving issue. The trustees asked to whom they should pay the income of the deceased child during the lifetime of the widow, and what was the ultimate destination of her share:—

HELD: (i) during the lifetime of the widow, the income should be paid to the personal representatives of the deceased child.

(ii) there was a gift over of such share to the other children, there being no reversion to the settlor except in the events laid down in cl. 9.

[**EDITORIAL NOTE.** The implication of cross-remainders is more restricted in the case of settlements than in the case of wills, for, a settlement being by deed, words of limitation cannot be implied. Where, however, the court is not asked to supply words of limitation, the same rule of construction applies to both settlements and wills, and the only question for the court to determine is the intention of the parties that there should be no *hiatus* in the limitations, and that the settled property should only revert to the settlor upon the failure of all the limitations.

As to Implication of Cross-remainders in Settlements, see HALSBURY, Hailsham Edn., Vol. 29, pp. 627, 628, para. 906 ; and for Cases, see DIGEST, Vol. 40, pp. 638, 639, Nos. 1761-1778.]

Cases referred to :

(1) *Lassence* v. *Tierney* (1849), 1 Mac. & G. 551 ; 40 Digest 471, *203* ; 15 L.T.O.S. 557.

(2) *Adamson* v. *A.-G.*, [1933] A.C. 257 ; Digest Supp. ; 102 L.J.K.B. 129 ; 148 L.T. 365.

(3) *Re Clark's Trusts* (1863), 2 New Rep. 386 ; 44 Digest 534, *3503* ; 32 L.J.Ch. 525 ; 8 L.T. 571 ; *subsequent proceedings* (1864), 3 De G.J. & Sm. 111.

Summons to determine, *inter alia*, questions arising on the construction of a settlement, dated Oct. 17, 1908, as to the payment of income of a share of a deceased child and the ultimate destination of that share. By the settlement, dated Oct. 17, 1908, the settlor, Henry Neild Bickerton, transferred all his personal property to trustees on the usual trust for investment. By cl. 2 thereof, a provision was made by which the settlor, during his lifetime, should be paid the yearly sum of £1,000 by equal half-yearly instalments, and after the payment of the annuity during his lifetime the surplus was to be accumulated. By cl. 3 it is provided as follows :

> After the death of the settlor the trustees shall apply the said income in the payment thereout annually to Alice Cooper Bickerton the wife of the settlor of the sum of £500 and a further sum of £100 annually to the said Alice Cooper Bickerton in respect of each child of the settlor now born who shall be living with her the said Alice Cooper Bickerton and who shall be under the age of 21 years to be applied by her for the benefit of such child and as to the said surplus (if any) of the said income in trust to pay the same to the children of the settlor now born in equal shares as and when they shall respectively attain the age of 21 years provided nevertheless that until such children shall respectively attain the age of 21 years the said surplus (if any) shall be invested as hereinafter directed and form part of the trust fund.

By cl. 4, provision is made as to the destination of the trust fund after the death of the widow, Alice Cooper Bickerton :

> . . . the trustees shall hold the said trust fund upon trust to divide the same into as many equal shares as there shall be children of the settlor now born surviving him or who shall have died in his lifetime leaving issue surviving him and shall appropriate one of such shares to each such child who shall survive him or who shall have died leaving issue as aforesaid (and so that any reference hereinafter contained to the shares of such respective children in the said trust fund shall be deemed to apply to the shares hereinbefore directed to be appropriated to them respectively whether they shall respectively survive him or not) but so nevertheless that such respective shares shall be held by the trustees upon the trusts and subject to the powers and provisions hereinafter declared and contained concerning the same respectively that is to say the trustees shall hold the share appropriated to each such child from and after such division and appropriation as aforesaid upon trust to pay the income arising therefrom to such child and after his or her decease in trust for all the children of such child who being sons shall attain the age of 21 years or being daughters shall attain that age or marry under that age in equal shares and if there shall be only one such child the whole to be in trust for that one child.

Other provisions for the advancement or benefit of that grandchild are contained in the settlement. By cl. 9 it is provided as follows :—

> If there shall be no such grandchild as aforesaid of the settlor who being a male shall attain the age of 21 years or being a female shall attain that age or marry under that age then the said trustees shall hold the said trust fund in trust for the said settlor absolutely.

The settlor had four children living at the date of the settlement, one of whom, Elizabeth Neild Bickerton, died on Jan. 23, 1941, without ever having had issue. The settlor died on Oct. 6, 1929. His widow was still alive at the date of the summons, and two of the three surviving children had issue.

Humphrey King (for *W. S. Wigglesworth* on war service) for the plaintiffs, the trustees.

Laurence Tillard for the first defendant, the widow.

C. Gandy for the second defendant, the settlor's son, the personal representative of the deceased child.

C. C. R. Romer, K.C. and *J. A. Wolfe* for the remaining defendants, the settlor's two daughters and their infant children.

UTHWATT, J. [His Lordship stated the facts and continued as follows]: Upon the first question, I feel no difficulty. It appears to be quite clear that, having regard to the form of gift in cl. 3, what Elizabeth Nield Bickerton got on attaining the age of 21 years was a right to receive her proportionate share of income during the lifetime of her mother. There is nothing in the settlement to take that right away or cut it down, and I am unable to accede to the argument of counsel for the first defendant that what was intended was that Elizabeth's interest in this share of income endured only during her lifetime. The gift is in such a form that it will not bear the construction that it was to be limited to this period.

The second question relates to the destination of the one-fourth share of which Elizabeth was tenant for life. Under cl. 4, the capital of the trust fund is to be divided into as many shares as there are children of the settlor surviving him or as shall have predeceased him leaving issue and surviving him. One share is to be appropriated to each such child, and then there is a general direction that the share appropriated to a child is to be held in trust to pay the income to that child, and after the death of the child is to be held upon trust for his or her children. Having regard to the ultimate gift in cl. 9, no one suggests that the rule in *Lassence* v. *Tierney* (1) applied so as to give Elizabeth, in the events which happened, an absolute interest in the *corpus* of her share, and I am unable to accede to the argument put forward by counsel for the second defendant that, in the events which happened, cl. 4, on its true construction, gave Elizabeth the income in perpetuity. The substantial point which I have to decide is whether counsel for the remaining defendants is right in his contention that, on the true construction of the settlement, one must imply a gift over in favour of the shares of the other three children as respects the share of Elizabeth. That it is possible in law to imply such a gift over in a settlement of personalty is clear, in my opinion. Sufficient authority for that view is to be found in the opinion of LORD RUSSELL OF KILLOWEN in *Adamson* v. *A.-G.* (2), at p. 279. The question whether the gift over ought to be implied in this case depends only on the true construction of the settlement. The argument in favour of such implication is based on cl. 9 of the settlement, which provides as follows:

> If there shall be no such grandchild as aforesaid of the settlor who being a male shall attain the age of 21 years or being a female shall attain that age or marry under that age then the said trustees shall hold the said trust fund in trust for the said settlor absolutely.

Read alone, that clause merely states one event in which the trust fund is to revert to the settlor. Read in conjunction with the rest of the settlement, however, that clause states the only event in which, within the contemplation of the settlement, the settlor is to take any interest in any part of the trust fund. On going back to cl. 4, one finds that the trust fund is dealt with under a general formula dividing it among the children and settling the shares in terms which, if cl. 9 were not included in the settlement, would dispose of the whole fund in all events. In the course of the argument, my mind has wavered on the question whether the gift which is contended for ought to be implied, but, on the whole, I am of opinion that by implying that gift over I am not doing more than giving effect to the intention of the settlor as expressed in the settlement. Authority for making this implication is, I think, to be found in *Re Clark's Trusts* (3). It is a matter of trying to arrive at the real dispositions, on the assumption made by the settlement that the only event in which the settlor is to take the trust fund, or any part of it, is the failure of any of his grandchildren to attain the age of 21 years, or, being female, to marry.

Declaration accordingly.

Solicitors: *Durrant, Cooper & Hambling,* agents for *Wigglesworth & Son,* Manchester (for the plaintiffs and the first defendant); *Gregory, Rowcliffe & Co.,* agents for *Pattinson & Harrison,* Macclesfield (for the second defendant); *Corbin, Greener & Cook,* agents for *Bennett, Brooke Taylor & Co.,* Buxton (for the remaining defendants).

[*Reported by* IRENE G. R. MOSES, *Barrister-at-Law.*]

UPTON-ON-SEVERN RURAL DISTRICT COUNCIL *v.* POWELL.

[Court of Appeal (Lord Greene, M.R., and Luxmoore and Goddard, L.JJ.), **January 21, 1942.**]

Contract—Implied promise—Request to police to send fire brigade—Brigade sent—Premises situate in area of another fire brigade—Liability of owner of premises.

Public Health—Fire brigade—Payment for services—Request transmitted through police—Liability of owner of premises.

The appellant's farm was in the Upton police district, but in the Pershore, and not the Upton, fire district. A fire broke out on the farm, and the appellant telephoned to the police inspector at Upton and asked for the fire brigade to be sent. The Upton fire brigade was informed, and it went to the farm at once. The appellant was entitled to the services of the Pershore fire brigade without charge, but the Upton brigade, if it went to a fire outside its own area, was entitled to contract for payment for its services. At the time when the brigade was summoned, all the parties concerned were under the impression that the farm was in the Upton fire district. For the Upton fire brigade it was contended that a contract had been created by implication, under which it was entitled to be remunerated for its services:—

Held: the appellant must be treated as having asked for the Upton fire brigade to be sent to his farm, and the fact that at the time the parties thought that the fire was in its area did not prevent there being a contractual relationship. The appellant was, therefore, liable under an implied contract to pay for the brigade's services.

[**EDITORIAL NOTE.** Fire services have been the subject of some statutory enactment and a considerable body of regulations recently. The supplying of help in the way of apparatus or services by brigades serving adjoining districts forms an important part of the scheme and it may be that the decision herein may be found to be of more importance than its particular circumstances would seem to suggest.

As to Fire Brigades, see HALSBURY, Hailsham Edn., Vol. 26, pp. 402, 403, paras. 832-834; and for Cases, see DIGEST, Vol. 38, pp. 225-227, Nos. 566-584.

As to Implied Contracts, see HALSBURY, Hailsham Edn., Vol. 7, p. 189, para. 88; and for Cases, see DIGEST, Vol. 12, pp. 112-114, Nos. 739-751.]

Appeal by the defendant from an order of His Honour Judge Roope Reeve, K.C., in the Great Malvern County Court, dated Oct. 13, 1941. The facts are fully set out in the judgment of Lord Greene, M.R.

G. Russell Vick, K.C. and *Harold Eaden* for the appellant.

D. A. Scott Cairns for the respondent council.

Vick, K.C.: In the circumstances of the present case, the judge was quite wrong in inferring that any contract had been entered into. There is no evidence of *animus contrahendi* in anybody at all. The fire brigade went intending to render a gratuitous service. It was only when it was discovered that the fire was in another area that it was decided that a charge should be made. The police officer to whom the appellant telephoned was under a public duty to inform the fire brigade. He was not acting as the agent of the appellant.

Counsel for the respondents was not called upon.

Lord Greene, M.R.: The appellant lives at Strensham, and in Nov., 1939, a fire broke out in his Dutch barn; he thereupon telephoned to the police inspector at the Upton police office and told him that there was a fire and asked for the fire brigade to be sent. The police inspector telephoned a garage near to the fire station at Upton, which itself had no telephone, the Upton brigade was informed and immediately went to the fire, where it remained for a long time engaged in putting it out. It so happens that, although the appellant's farm is in the Upton police district, it is not in the Upton fire district. It is in the Pershore fire district, and the appellant was entitled to have the services of the Pershore fire brigade without payment. The Upton fire brigade, on the other hand, was entitled to go to a fire outside its area and, if it did so, quite apart from its statutory rights, it could make a contract that it would be entitled to repayment of its expenses.

The sole question here is whether or not any contract was made by which the Upton fire brigade rendered services on an implied promise to pay for them made by or on behalf of the appellant. It appears that some 6 hours after the arrival of the Upton fire brigade, the officer of the Pershore brigade arrived on the scene, but without his brigade; he pointed out to the Upton officer that it was a Pershore fire, and not an Upton fire, but the Upton fire brigade continued rendering services until the next day when the Pershore fire brigade arrived and took over. In the view that I take in this case, what happened in relation to the arrival of the Pershore officer and his conversation with the Upton officer and the subsequent arrival of the Pershore fire brigade has nothing whatever to do with the issue which we have to decide. The county court judge held that the appellant when he rang up the police inspector, asked for "the fire brigade" to be sent. He also held that the inspector summoned the local Upton fire brigade, which was perfectly natural, and that he took the order as being one for the fire brigade with which he was connected. It appears that neither the appellant, nor the police officer, nor the Upton fire brigade, until it was so informed by the Pershore officer, knew that the appellant's farm was, in fact, not in the Upton area, but was in the Pershore area. The county court judge then goes on to find that the inspector passed on the order and sent his fire brigade, and that was the fire brigade, I have no doubt, which the appellant expected. The county court judge said:

> The defendant did not know that if he sent for the Pershore fire brigade what advantage he would have obtained. In my view, there is no escape from the legal liability the defendant has incurred. I think he gave the order for the fire brigade he wanted, and he got it.

Now those findings are attacked, because it is said that, as the defendant did not know what fire brigade area he was in, what he really wanted was to get the fire brigade of his area, whatever it might be. It does not seem to me that there is any justification for attacking the finding of the judge on that basis. What the defendant wanted was somebody to put out his fire, and put it out as quickly as possible, and in ringing up the Upton police he must have intended that the inspector at Upton would get the Upton fire brigade; that is the brigade which he would naturally ask for when he rang up Upton. Even apart from that, it seems to me quite sufficient if the Upton inspector reasonably so construed the request made to him, and, indeed, I do not see what other construction the inspector could have put upon that request. It follows, therefore, that on any view the appellant must be treated as having asked for the Upton fire brigade. That request having been made to the Upton fire brigade by a person who was asking for its services, does it prevent there being a contractual relationship merely because the Upton fire brigade, which responds to that request and renders the services, thinks, at the time it starts out and for a considerable time afterwards, that the farm in question is in its area, as the officer in charge appears to have thought? In my opinion, that can make no difference. The real truth of the matter is that the appellant wanted the services of Upton; he asked for the services of Upton—that is the request that he made—and Upton, in response to that request, provided those services. He cannot afterwards turn round and say: "Although I wanted Upton, although I did not concern myself when I asked for Upton as to whether I was entitled to get free services, or whether I would have to pay for them, nevertheless, when it turns out that Upton can demand payment, I am not going to pay them, because Upton were under the erroneous impression that they were rendering gratuitous services in their own area." That, it seems to me, would be quite wrong on principle. In my opinion, the county court judge's finding cannot be assailed and the appeal must be dismissed with costs.

LUXMOORE, L.J.: I agree.

GODDARD, L.J.: I agree.

Solicitors: *Dawes & Sons*, agents for *Reynolds & Co.*, Birmingham (for the appellant); *Gregory, Rowcliffe & Co.*, agents for *Lamberts*, Malvern (for the respondent council).

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-law.*]

BARNETT AND BLOCK *v.* NATIONAL PARCELS INSURANCE CO., LTD.

[KING'S BENCH DIVISION (Atkinson, J.), **January 20, 1942.**]

Insurance—Burglary insurance—Clause relating to theft while van in garage—"Garage."

By a policy of insurance, the respondents agreed to insure the appellants against the loss of furs by theft, but excluding theft from their motor vehicle when not individually attended, even whilst in a garage. By an indorsement of the policy, the respondents undertook not to repudiate liability up to a certain sum under the exception clause when the motor vehicle was in a garage, if the vehicle was fitted with a certain type of lock. The appellants made arrangements with the proprietor of an hotel to garage the vehicle in his yard. This was a space enclosed on two sides and a part of the third by hotel buildings, and on the remaining sides by high walls. At one point pipes projecting from the top of the wall were covered with plywood, forming slight roofing, but there was no evidence as to the part of the yard in which the vehicle was placed at the time of the theft. The court was asked to determine whether this yard was a garage within the meaning of the exception clause :—

Held : a garage connotes some sort of building which affords shelter and protection. A place having no roof and offering no shelter or protection on two sides cannot, therefore, be a garage.

[**EDITORIAL NOTE.** The point here is purely a question of the meaning of the word " garage." From a comparison of dictionary definitions, it appears that the word connotes a building giving protection to the vehicle garaged, and, for this reason, it is held that it can be properly applied only to a roofed-in building. It may also be necessary that the building must be so fitted that it can be securely locked, for some emphasis is placed upon the fact that the yard in this case was accessible from the windows of the hotel. It would seem advisable that these matters should be mentioned in the clause in the policy.

As to Insurance Against Theft, see HALSBURY, Hailsham Edn., Vol. 18, pp. 504, 505, paras. 778-780 ; and for Cases, see DIGEST, Vol. 29, pp. 415-419, Nos. 3248-3269.]

Case Stated by an arbitrator for the determination by the King's Bench Division of the High Court of Justice of the meaning of the word " garage " as used in a policy of insurance.

C. E. Loseby for the applicants, the insured.

R. T. Monier-Williams for the respondents, the insurers.

Atkinson, J. : This special case raises the question whether the insurance company is liable to indemnify the appellants in respect of a theft of furs. The appellants are merchants, and it is customary for them to keep a number of furs in a Bedford van. By a policy of insurance, taken out in 1937, they were insured against the theft of furs and the like. The policy contained this clause :

> Notwithstanding anything herein contained to the contrary, it is understood and agreed that this insurance does not apply to theft or larceny of property in or on automobiles or motor cycles belonging to the insured, or hired by and in the control of the insured or their employees, while such automobiles or motor cycles are not individually attended, even whilst in garage, nor shall there be any liability hereunder for loss caused by the dishonesty of any attendants.

The meaning of that is perfectly plain : that there is to be no liability for theft from a van wherever it is, even though it is in the plaintiffs' garage, unless it is individually attended. Annexed to that is an indorsement that the company will not repudiate liability under that clause in respect of property up to the value of £1,500 in the insured Bedford van " whilst left in a garage, subject to such vehicle being fitted with a separate Yale-type mortise dead-lock to the cabin door containing the handle lock," and various other contrivances to make it difficult to get into the van. That means, as I understand it, that the company will not insist upon individual attention while the van is in a garage.

The primary question here is whether the loss occurred while the van was in a garage within the meaning of that exception. The case describes the place where the van was when it was broken into and the contents stolen. About a year, I gather, before the theft, the insured had made an arrangement with the proprietor of a private hotel in London, that, for a payment of 5*s.* per week, they could keep the van, when not in use, in a yard or space which is at the back of the hotel. It was while the van was garaged in this yard or space at the back of the hotel, that the theft took place. The plan shows that it is a very well protected yard. The yard, running from north to south, is some 40 ft. long. For about 30 ft. of its length it is only some 10 ft. 10 ins. wide, for the remainng 10 ft. of its length it is 20 ft. wide. On the west and on the north it is bounded by the hotel. On the east, for some 30 ft., that is, on that narrow part, again by hotel buildings, and for the rest, that is, on the south and the east side of the 20 ft. wide part, there is a wall 12 ft. high with glass on the top. To the south there is a mews. There were large folding doors which opened on to the mews, and the only way for the public to get into this yard, unless they were on the hotel premises, was from the mews through the doors, so that it was not a large yard, and naturally it was extraordinarily well protected. There was no A roof at all. True, in one corner, there were four lengths of pipe which projected from the wall, and on the top there was some ply-wood making an apology for a roof for a few feet. There is no finding as to the part of the yard in which the van was placed. The contention was that the yard as a whole was in fact a garage. The arbitrator has found that it was not a garage and raised the question for the consideration of the court.

Now what is a garage ? No evidence was given to suggest or prove that the B word " garage " in the trade had got any special meaning, and it was agreed to take the four dictionary definitions set out in the agreed statement of facts. The four definitions were these. From the Shorter Oxford Dictionary : " A building for the storage or refitting of motor vehicles." From the New Century Dictionary : " A building for sheltering, cleaning or repairing motor vehicles. To put or keep in a garage." From the New Standard Dictionary : "A building for stabling or storing of motor vehicles of all kinds." From Nuttal's Standard C Dictionary : " A storehouse for motor vehicles." Those are four definitions from leading dictionaries all containing at any rate one word in common, and that is " building." As there is no evidence as to how the general public understand the word " garage," I suppose one is entitled to use one's own knowledge. I am inclined to think that the ordinary man in the street does regard a garage as connoting some sort of a building ; how far he would go I do not D know. I do not know whether he would think that there should be a wall all round it, or whether it would be sufficient if there were three sides walled in and a roof. I have one in mind where there is a row of sheds without any protection in front, which are commonly spoken of as "garages," but I am going to apply here the test suggested by counsel for the insured. He said " A garage is a place where one can get reasonable protection and shelter for a car." Can I say that you are getting reasonable protection and shelter for a car, if there E is nothing to protect the car from above—if there is no roof of any sort ? I think the ordinary man, as counsel for the insurers suggested, who took a house with a garage, if he came and found merely an open shed without any roof, would think he had been swindled, however high the walls might be. I cannot think that one is entitled to say that it is adequate or reasonable protection or shelter if there is no roof ; but this is worse than that, though I agree that the walls are very good here. Wherever you put a car in this yard, in addition to there being no shelter from F above, there will be no shelter on two sides. That seems to me to be really conclusive.

Then, if one looks at it from the point of view of safety, and that is, of course, perhaps, the point of view from which the insurance company look at it, I suppose that a building with a roof has an element of safety which an uncovered building has not. At any rate, in the case of this yard, there are two doors into it from G the hotel premises ; there are windows which open on to the yard and through which a thief might come. I should imagine, from the point of view of safety, that a place without a roof, with windows all round, and entrances from the hotel, might well be deemed a very unsatisfactory sort of place. Can one really think that that was the sort of thing which was meant by the insurance company or understood by the insured, when this concession was given that they need not have individual attention while the car was left in a garage ? Did H either party really think that would cover a yard, however good a yard, and however difficult of approach it was ? I cannot persuade myself to take a view different from that taken by the arbitrator, and I think this appeal must fail. The insured, therefore, are not entitled to recover under the policy.

Solicitors : *Herbert Baron & Co.* (for the insured) ; *William Charles Crocker* (for the insurers).

[*Reported by* D. K. Belcher, *Barrister-at-Law.*]

Re V. G. M. HOLDINGS, LTD.

[Court of Appeal (Lord Greene, M.R., and Luxmoore and Goddard, L.JJ.), **January 12, 13, 14, 15, 16, 1942**].

Companies—Shares—Purchase of shares with financial assistance of company—Whether purchase includes allotment—"Purchase"—Companies Act, 1929 (*c.* 23), *s.* 45.

The Companies Act, 1929, s. 45, provides that it shall not be lawful for a company to give financial assistance for the purpose of or in connection with a purchase of any shares in the company:—

Held: the word "purchase" in this section does not include the acquisition of shares by subscription or allotment.

[**EDITORIAL NOTE.** The sole question in the part of this case which is here reported is the proper construction of the word "purchase" in the Companies Act, 1929, s. 45. Bennett, J., in the court below, had held that this word included the acquisition of shares by subscription, but the Court of Appeal have reversed his decision on that point and have held that it can only apply to the case of a transfer of a share or shares already issued.

As to Companies Act, 1929, s. 45, see HALSBURY, Hailsham Edn., Vol. 5, pp. 188, 189, para. 335.]

Cases referred to:

(1) *Colonial Bank* v. *Whinney* (1886), 11 App. Cas. 426; 5 Digest 751, *6483*; 56 L.J.Ch. 43; 55 L.T. 362.

(2) *Oriental Steam Navigation Co., Ltd., Ex p. Briggs* (1861), 4 De G. F. & J. 191; 9 Digest 274, *1686*; 31 L.J.Ch. 241; 5 L.T. 477.

(3) *Trevor* v. *Whitworth* (1887), 12 App. Cas. 409; 9 Digest 98, *411*; 57 L.J.Ch. 28; 57 L.T. 457.

Appeal by the director charged with misfeasance from the decision of Bennett, J., given on Aug. 26, 1941. The appeal is only reported on the question of the construction of the Companies Act, 1929, s. 45. The facts, shortly stated, were that a company called V.G.M. Holdings, Ltd., was formed in May, 1938. It was arranged that the directors should take up 20,000 £1 shares in the company. A call of 16*s*. per share was made, and £16,000 was required to pay this call. For the purpose of the point here argued, it must be assumed that the following arrangement, by which the sum of £16,000 was provided, was wholly fictitious. The V.G.M. company bought the whole share capital of another associated company for £8,300, and made a loan to that company of £7,700, making a total payment of £16,000. The associated company then purported to pay debts owing by them to the directors of the V.G.M. company, amounting in all to £16,000, and the directors at once applied this payment to the payment of the calls upon the shares issued to them by the V.G.M company. The figures given are round numbers, and, as above stated, it must be assumed that the arrangement was fictitious in that the shares purchased were valueless, that the loan an improper one made upon no security, and that the payments made to the directors were not due to them. The result would then be that the calls were, in fact, paid by money provided by the company itself. The question to be decided was whether this transaction was a "purchase" of shares within the meaning of the Companies Act, 1929, s. 45.

H. J. Wallington, K.C., and *E. J. Heckscher* for the appellant, a director of V.G.M. Holdings, Ltd.

H. Wynn Parry, K.C., and *W. Raymond Jennings* for the respondent, the liquidator.

Wallington, K.C.: When a person subscribes for shares he does not purchase anything from the company. What he does is to contribute an agreed amount towards the capital of the company. No doubt his contributing a proportion of the capital of the company entitles him to a proportion of the declared dividends of the company, and the same proportion of the capital of the company in the event of a winding up. That is inconsistent with any purchase from the company. It is a contribution to capital just as much as a contribution in a partnership. When two partners contribute their respective shares of capital, they do not purchase anything from anybody. If a new partner is admitted into an existing business, no doubt he pays a premium, but he also contributes his share of capital. When it is intended to differentiate between the purchase and the issue of shares, the distinction is clearly made, as will be seen by reference to sects. 38, 43, and 44 of the Act, and also to the definition of a prospectus contained in sect. 380. The whole machinery of company law is inconsistent with a company selling any shares. The placing of the name upon the register is not an assignment of anything. Neither is it a purchase of anything. It is an allotment. Therefore it is wrong to say that a company sells anything when it issues and allots shares.

Wynn Parry, K.C.: In order to establish a case under the Companies Act, 1929, s. 45, it is necessary for me to satisfy the court that there was a provision, either direct or indirect, of financial assistance. There clearly was such a provision. It is no longer correct to draw an analogy between a share in a limited liability company and a share in a partnership. That is clearly recognised in *Colonial Bank* v. *Whinney* (1). Two essential acts are necessary to bring a company into existence. There must be agreed and subscribed by the corporators a memorandum of association containing the particulars required by the statute. At the same time there may, or may not, be a set of articles of association agreed. If there is not, the rights of the parties *inter se* will be regulated by Table A of the Act. The memorandum of association, however, is essential. The second essential step is that the registrar should register the company and his certificate is conclusive as to the existence of the company. The memorandum must state the capital of the company and the shares into which the capital is divided, if the company is one incorporated with shares. Assuming that the Act is complied with, the result of incorporation will be that a company with a share capital will be brought into existence. At that stage, not only is the company in existence, but the shares are also in existence. A company may cancel its shares. If language means anything, it is impossible to cancel anything which does not exist at the time the cancellation takes effect. The act of cancellation must be done by the company in general meeting. This shows the purely ministerial function of the directors. If a company desires to increase its capital, it may do so. The power, however, must be exercised by the company in general meeting. This emphasises the purely administrative function of the directors. The resolution will be that the capital of the company be increased. The directors cannot bring into existence a chose in action which had no previous existence. The language of sect. 50 is inapt, if the power given is to do anything creative. There are two cases which show that the court had no difficulty in treating the issue of shares as a purchase, namely, *Oriental Steam Navigation Co., Ex p. Briggs* (2) and *Trevor* v. *Whitworth* (3). The contract of issuing shares is nothing more than a sale and purchase of those shares.

Heckscher in reply.

LORD GREENE, M.R.: The Companies Act, 1929, s. 45, subject to certain exceptions with which I need not deal, provides as follows:

> . . . it shall not be lawful for a company to give, whether directly or indirectly, and whether by means of a loan, guarantee, the provision of security or otherwise, any financial assistance for the purpose of or in connection with a purchase made or to be made by any person of any shares in the company . . .

There is a penalty of £100 in case of contravention.

Those whose memories enable them to recall what had been happening for several years after the last war will remember that a very common form of transaction in connection with companies was one by which persons—call them financiers, speculators, or what you will—finding a company with a substantial cash balance or easily realisable assets, such as war loan, bought up the whole, or the greater part, of the shares of the company for cash, and so arranged matters that the purchase money which they then became bound to provide was advanced to them by the company whose shares they were acquiring, either out of its cash balance or by realisation of its liquid investments. That type of transaction was a common one, and it gave rise to great dissatisfaction and, in some cases, great scandals. I think that it is not illegitimate to bear in mind that notorious practice in considering the ambit of the section. By that I do not mean that, if the language of the section is wide enough to extend beyond transactions of that general character, that would afford any ground for cutting the language down. The only use which I think it is legitimate to make of it is that the existence of this very questionable practice affords a reason for the word "purchase" in the section. If, as a matter of construction, "purchase" extends to cases such as the present, where the money is used, not in connection with the purchase of the company's shares, but in connection with the subscription of the company's shares, that construction must be put upon the language.

The sole question is whether or not the word "purchase" in this section covers a case where the money which the company provides is used to assist a subscription for the company's own shares. There could be no doubt that, if that question were answered in favour of the respondent, the £15,980 was provided by the company by way of financial assistance, because whether a company provides the money by way of gift or by way of loan, or by buying assets from the person who is purchasing the shares at a fraudulent undervalue, all those transactions, it seems to me, would fall within the phrase "financial assistance." I, therefore, feel no difficulty about that; but, with all respect to Bennett, J., I am unable to agree with the view that he took that the subscription by these three directors for shares in V.G.M. was a purchase of those shares within the meaning of the section. In the first place, throughout the whole of the Companies Act, 1929, the language which is used with regard to the issue of shares to subscribers is invariably confined to words like "issue," "subscription," "application," "allotment," and so forth. There is not a single passage in the Act to which we were referred, nor to which my fairly complete recollection of the Act goes, in which the word "purchase" is used in relation to the transaction of subscription. That being so, it seems to me that a very clear context would be required to enable a meaning to be put upon the word "purchase" in this section which would extend it so as to cover the acquisition of shares by subscription.

Quite apart from those considerations relating merely to the language of the Act, it seems to me that the word "purchase" cannot, with propriety, be applied to the legal transaction under which a person, by the machinery of application and allotment, becomes a shareholder in the company; he does not purchase anything when he does that. Counsel for the respondent endeavoured heroically to establish the proposition that a share before issue was an existing article of property, that it was an existing bundle of rights which a shareholder could properly be said to be purchasing when he acquired it by subscription in the usual way. I am quite unable to accept that view. A share is a chose in action. A chose in action implies the existence of some person entitled to the rights, which are rights in action as distinct from rights in possession, and, until the share is issued, no such person exists. Putting it in a nutshell, the difference between the issue of a share to a subscriber and the purchase of a share from an existing shareholder is the difference between the creation and the transfer of a chose in action. The two legal transactions of the creation of a chose in action and the purchase of a chose in action are quite different in conception and in result.

The result is, therefore, that I can find no context in this section which enables me to construe the word "purchase" as bearing the extended meaning suggested, and I cannot agree with the view which Bennett, J., took on that part of the case.

Luxmoore, L.J.: I agree.

Goddard, L.J.: I agree.

Solicitors: *C. Butcher & Simon Burns* (for the appellant); *Sidney Pearlman* (for the respondent).

[*Reported by* W. K. Scrivener, Esq., *Barrister-at-Law.*]

READ *v.* READ.

[Court of Appeal (Lord Greene, M.R., and MacKinnon and Goddard, L.JJ.), **February 2, 1942.**]

Divorce—Service—Dispensing with service—Respondent resident in enemy territory—Matrimonial Causes Act, 1857 (*c.* 85), *s.* 42—*Supreme Court of Judicature (Consolidation) Act,* 1925 (*c.* 49), *s.* 99 (1) (*a*), (*g*)—*R.S.C., Ord.* 9, *r* 14 B—*R.S.C., Ord.* 13, *r.* 10—*Matrimonial Causes Rules,* 1937, *rr.* 10, 81, 82.

The appellant, a petitioner in divorce proceedings, sought leave to dispense with service of the petition on the respondent on the ground that she was an enemy within the meaning of the Trading with the Enemy

Act, 1939. The application was made under R.S.C., Ord. 9, r. 14 B. It was contended that this rule had been imported into the Matrimonial Causes Rules, 1937, by r. 81 of those rules :—

HELD : (i) the Matrimonial Causes Act, 1857, s. 42, has not been repealed by the Matrimonial Causes Rules, 1937, r. 82.

(ii) R.S.C., Ord. 9, r. 14 B has no application to divorce proceedings.

[**EDITORIAL NOTE.** Owing to the difficulty of serving writs upon persons in enemy countries, an order has been made allowing the court to dispense with service in certain circumstances. In divorce procedure, service occupies an even more prominent position than in the procedure of the other divisions of the High Court, and it is not a little surprising to find that the Matrimonial Causes Act, 1857, s. 42, contains a proviso allowing service to be dispensed with. It cannot be traced whether any application has ever been made under this proviso, but it is certain that no order has been made under it. It is here decided that this wide departure from normal procedure does not apply to divorce matters, on the ground that the rule itself requires that the person not served shall have an opportunity of setting aside any judgment obtained. It is clear that a divorce decree could not be set aside.

AS TO SERVICE OF DIVORCE PETITION, see HALSBURY, Hailsham Edn., Vol. 10, pp. 705-707, paras. 1055-1060 ; and FOR CASES, see DIGEST, Vol. 27, p. 396, Nos. 3928, 3929.]

APPEAL by the petitioner from an order of HODSON, J., dated Dec. 19, 1941. The facts are fully set out in the judgment of LORD GREENE, M.R.

Percy Lamb (for *D. W. Conroy* on war service) for the appellant.

LORD GREENE, M.R. : The application out of which this appeal arises was an application by the petitioner, the husband, by summons dated Nov. 17, 1941, seeking to have service of the petition on the respondent dispensed with on the ground that she was an enemy within the meaning of the Trading with the Enemy Act, 1939. The application was based on R.S.C., Ord. 9, r. 14B, which was made on Oct. 31, 1941. Para. 1 of that rule provides :

> Subject to the provisions of this rule the court or a judge may dispense with service of a writ of summons or a notice of a writ of summons on any defendant who is an enemy within the meaning of the Trading with the Enemy Act, 1939, as amended by or under any enactment.

Then the rule goes on to lay down certain conditions which must be satisfied before service can be dispensed with, and it would appear that HODSON, J., from whose decision the present appeal is brought, was satisfied that those conditions had been complied with. Therefore I say no more about them. Para. 3 of the rule, however, is in these terms :

> Where in any action an order is made dispensing with service of the writ of summons or notice thereof on the defendant under this rule and judgment is given against him in the action, R.S.C., Ord. 13, r. 10, shall apply to the judgment as it applies to a judgment under the preceding rules of that order.

R.S.C., Ord. 13, r. 10, deals with cases where judgment has been obtained in default of appearance and it provides :

> Where judgment is entered pursuant to any of the preceding rules of this order it shall be lawful for the court or a judge to set aside or vary such judgment upon such terms as may be just.

Para. 4 of r. 14B provides that the rule is to apply to proceedings other than actions commenced by writ of summons as it applies to actions commenced by writ of summons with the necessary modifications. It is said that R.S.C., Ord. 9, r. 14B is to be imported into the Matrimonial Causes Rules, 1937, by force of the language of r. 81 of those rules, which provides as follows :

> Subject to the provisions of these rules and of any statute the rules of the Supreme Court shall, notwithstanding the provisions of R.S.C. Ord. 68 thereof, apply with the necessary modifications to the practice and procedure in any matrimonial cause or matter to which these rules relate.

HODSON, J., formed the opinion that that rule did import R.S.C., Ord. 9, r. 14B, into the Matrimonial Causes Rules, but he refused to accede to the application on the ground that no proper case for the exercise of his discretion thereunder was made out.

The argument before us is concerned, so far as it has gone, with the question whether or not the judge was right in holding that R.S.C., Ord. 9, r. 14B does apply to divorce proceedings by virtue of the Matrimonial Causes Rules, r. 81. The matter was first argued before GODDARD, L.J., and myself, on Jan. 22. The court then took the view that the judgment of HODSON, J., on that point was wrong and two reasons were given. The first reason was that the opening words of the Matrimonial Causes Rules, r. 81, " subject to the provisions of these rules," directed a reference back to the Matrimonial Causes Rules, r. 10, which, on the face of it, appears to be peremptory and to forbid the trial of a petition unless the respondent and every co-respondent thereto and every person named therein has entered an appearance or it has been shown by an affidavit that they have been duly served with the petition. Service, of course, might be personal service or substituted service, but r. 10, read literally, appears to require peremptorily one or the other. A Accordingly, we formed the opinion that the words " subject to the provisions of these rules," when r. 10 is looked at, forbade the application to matrimonial causes of a rule of the Supreme Court which gives power to dispense altogether with service. Before the order was completed our attention was drawn to the fact, which by an oversight had not been mentioned to us, that the Matrimonial Causes Act, 1857, s. 42, does give power to the court to dispense with service altogether " in case it shall seem necessary or B expedient so to do," and to dispense with service apparently on a respondent. When that was called to our attention we thought it proper that we should hear further argument on the matter in the light of that section in order to see whether its existence would lead us either to change our view on the substance of the matter, or, at any rate, to express our reasons in rather different language. Dealing first of all, therefore, with that one of the two grounds upon which the court relied on the previous occasion, the first question that arises is whether or C not the provision of sect. 42, to which I have referred, under which service may be dispensed with, is impliedly repealed by the Matrimonial Causes Rules, 1937, r. 10. It is to be observed that the rules committee, or the authority which now in war time takes its place, has power, under the Supreme Court of Judicature (Consolidation) Act, 1925, s. 99 (1) (*a*), (*g*), to make rules relating to procedure and to repeal any enactments which relate to matters with respect to which the D rules are made under the section. Therefore, it was competent to the rule-making authority to repeal that provision of sect. 42. The question that arises is whether it has done so. In my opinion, that question must be answered in the negative. It is of great importance to notice that the Matrimonial Causes Rules, 1937, contain in r. 82 a repeal of certain sections of the Matrimonial Causes Act, 1857. That rule repeals sect. 41 ; it repeals sect. 43, but no reference is made to sect. 42. Accordingly, so far as r. 82 is concerned, it clearly leaves E sect. 42 standing. Having regard to that express repeal rule, I cannot construe r. 10 as by implication repealing sect. 42 or any part thereof. If it had been intended to effect such a repeal it would have been done expressly under r. 82. It appears to me that r. 10 must be read as subject to the power conferred by sect. 42 of the Act of 1857 to dispense with service in a proper case, and the rule must be read as being prefaced by a saving of the power contained in that section. F Applying that conclusion to the question with which we are concerned, r. 81 only imports into the Matrimonial Causes Rules a rule of the Supreme Court subject to the provisions of the Matrimonial Causes Rules themselves. If r. 10 be read as prefaced by the words " subject and without prejudice to the power conferred by sect. 42 of the Matrimonial Causes Act, 1857," or similar words, it still leaves that r. 10 as peremptory and applicable to all cases save to cases to which sect. 42 applies. G The present is not such a case, because the application is not made under that section at all, but under R.S.C., Ord. 9, r. 14B. It appears to me, therefore, that, notwithstanding the existence of the power to dispense with service in sect. 42 of the Act of 1857, the words " subject to the provisions of these rules," in r. 81, prevent the importation of this new rule of the Supreme Court.

Turning now to the second ground upon which it appeared to Goddard, L.J., and myself, that R.S.C., Ord. 9, r. 14B, could not apply to Matrimonial Causes H Rules, I will mention shortly the matter which impressed us. It was this, that under para. 3 of the rule provision is made for the application of R.S.C., Ord. 13, r. 10. The language used is that that rule shall apply to the judgment. The reason is obvious. This r. 14B involves a departure from what has always been a rule of our jurisprudence, namely that constructive service is not recognised. Service must be personal or it must be substituted, and substituted service can only be ordered on well-established principles where there is a reasonable probability that it will come to the notice of the person to be affected. The system of constructive service, where a defendant can have judgment recovered against him without his ever having any opportunity of knowing that the proceedings are on foot is a thing against which English jurisprudence has always set its face, but, owing to the particular circumstances of the present war, it was found that a strict adherence to that rule would or might result in injustice to British subjects desirous of enforcing their rights against enemies. The rule-making authority was, however, extremely careful to hedge round this new procedure with safeguards, so far as it was possible to do so, directed to giving an opportunity of remedying any injustice which might take place ; and that is the reason why a defendant, against whom judgment has been obtained by reason of the dispensation of service under the new rule, has the right to come to the court and ask for the judgment to be set aside under R.S.C., Ord. 13, r. 10. It is not too much to say that that provision is an essential part of the rule, and that the rule would never have been made without conferring upon a defendant the right to come after the war, or earlier if he can, and have his case heard, if it is practicable to do so. It is not a mere accident, nor is it some collateral and subsidiary reason, which led to the insertion in r. 14B of that paragraph. It is an essential part of the whole conception underlying the rule, and it is a part of the justification for the departure by this rule from our long-standing system. Bearing that in mind, it is noticeable that R.S.C., Ord. 13, r. 10, never could apply to divorce proceedings, at any rate where there has been a decree absolute ; and, therefore, it would never be possible for a respondent who has had a decree absolute made against him or her without service of the proceedings, personal or substituted, to come to the court and have that decree set aside. The essential safeguard, therefore, could not be used for the protection of a respondent in divorce proceedings. On the fact of it, therefore, it appears to me that the very subject matter of r. 14B shows that it is a rule which is not intended to apply to divorce proceedings. If that be the true view, what is the effect of the Matrimonial Causes Rules, 1937, r. 81. Is it to be construed as importing into the Matrimonial Causes Rules a rule of the Supreme Court which, upon the face of it, is inapplicable to divorce proceedings ? In my opinion, the answer to that question must be "No." It was argued by counsel that r. 14B, para. 3, is really no obstacle to him because, if it is incapable of being put into force in the case of divorce proceedings, so much the worse. He says it only means that, in cases where it would be possible for a party to come and ask the court to set aside an order, para. 3 applies ; that, in cases where it is, on the fact of it and by the very nature of the proceedings, impossible, that paragraph does not apply. In my opinion, that argument is ill founded for the reason I have given—that para. 3 is an essential part of the procedure which is here provided for.

In the result therefore, the appeal must be dismissed. We have not considered, of course, the question as to whether, assuming the rule did apply, a proper case for the exercise of discretion was, contrary to the view of Hodson, J., made out. I express no opinion upon that matter. My view is based entirely upon the considerations which I have expressed as to the inapplicability of R.S.C., Ord. 9, r. 14B.

MacKinnon, L.J. : I agree, and I do not think I need add anything.

Goddard, L.J. : I agree. This application was based, as is shown on its face, solely on R.S.C., Ord. 9, r. 14B, and, for the reasons given by my Lord, I agree that that order does not apply to divorce proceedings. There is another reason, I think, why one can say it does not apply, and that is by reason of the proviso to the Matrimonial Causes Act, 1857, s. 42, which, as my Lord has pointed out, is still unrepealed. The section deals with service and provides that there shall be service on the party to be affected by the petition. The proviso is :

> Provided always that the said court may dispense with such service altogether in case it shall seem necessary or expedient so to do.

As the rules of the Supreme Court are only applied to divorce proceedings subject to the provisions of the Matrimonial Causes Rules and of any statute, it seems to me it is an additional reason for saying that r. 14B does not apply to the Divorce Court, in that there was always a power under that proviso for the Divorce Court to dispense with service—I should think probably the only case in which service of proceedings in our system may be dispensed with entirely.

Still, there was the power, and, there being that power, there is no reason why this rule should apply to divorce cases. Indeed, it would still be open, I suppose, to the petitioner to make an originating application to the judge under the proviso to sect. 42. I am afraid the position would not be very encouraging, because we have been informed by the registrar that. so far as is known, in the 85 years in which the Matrimonial Causes Act, 1857, has been in force, whether or not any application has ever been made, no order under that proviso has ever been made ; and it may be for that reason that none of the authors who have written voluminous text books on the subject of divorce even mention that proviso. I have searched through the text books and I have found no mention of it at all. I certainly did not know that, and I mention it as a vindication of counsel, who did not call our attention to this proviso at the last hearing. I am not at all surprised, because, on looking at the text books, he would not find any reference to the proviso, because, I suppose, although it is in the statute, it has never been given effect to in the history of the divorce law.

Lord Greene, M.R. : I would like to associate myself with what Goddard, L.J., has said with regard to the excusability of counsel's omission to refer to that section. Nothing that I said in my judgment must be construed as in any way a criticism of him in that regard.

Solicitors : *Temple & Co.*

Applied. Smith *v.* British European Airways Corpn. [1951] 2 All E.R. 737.

[*Reported by* W. K. Scrivener, Esq., *Barrister-at-Law.*]

LORY *v.* GREAT WESTERN RAILWAY COMPANY.

[King's Bench Division (Asquith, J.), **November 12, 20, 1941.**]

Negligence—Damages—Deductions from damages—Pensions.

The plaintiff claimed damages in respect of the death of her husband for herself and her two children (aged 5 years and 2 years respectively) under the Fatal Accidents Act, 1846, and under the Law Reform (Miscellaneous Provisions) Act, 1934. The deceased was a policeman of 35 years of age and enjoyed perfect health. He was earning in pay and allowances £5 16*s.* 6*d.* per week, and it was estimated that upon retirement he would have received by way of pensions and ancillary earnings a similar sum. The widow received a gratuitous payment of £160 from a charitable fund, and a pension for herself, determinable on the occurrence of certain events, and for her two children until they reached the age of sixteen from a statutory pensions fund. She also received pensions, subject to the same age limit, for the children from a voluntary pensions fund. These were liable to vary according to the state of the fund. The plaintiff contended that these pensions ought not to be taken into account in assessing damages, as in the case of the statutory fund they were subject to the fulfilment of the prescribed conditions, while those received from the voluntary fund were in the nature of ordinary charitable payments :—

Held : (i) the pensions received from both funds were not in the nature of insurance moneys and had to be taken into account in the assessment of damages.

(ii) having regard to all the circumstances, £1,850 ought to be awarded under the Fatal Accidents Act, apportioned as to £1,500 to the widow, £200 to the youdger child and £150 to the older. . The damage to the estate for loss of expectation of life was to be assessed at £300 ; but this sum, since on the intestacy the widow was entitled to the whole of it, would merge in the sum of £1,500 awarded under the Fatal Accidents Acts.

[**EDITORIAL NOTE.** It was said by counsel in this case that it was surprising that, after so many actions had been tried in the last 100 years, it was not possible for the parties to reduce the matter of damages to such narrow limits that the sum to be recovered should be agreed between them, but, though the defendants were quite willing to meet the claim fairly, it had been found impossible for the parties to determine the amount recoverable within any limits which could properly form the basis of agreement. The chief matter in issue between the parties was whether certain pensions for the benefit of the widow and children had to be taken into account. The matter is fully dealt with in the argument and the judgment, and the case should remove some, if not all, of the difficulties referred to by counsel.

As to Deductions from Damages, see HALSBURY, Hailsham Edn., Vol. 23, pp. 698, 699, para. 986 and for Cases, see DIGEST, Vol. 36, pp. 138-141, Nos. 916-944.]

Cases referred to:

(1) *Baker* v. *Dalgleish S.S. Co., Ltd.*, [1922] 1 K.B. 361; 36 Digest 140, *943*; 91 L.J.K.B. 392.

(2) *Carling* v. *Lebbon* [1927] 2 K.B. 108; 36 Digest 141, *944*; 96 L.J.K.B. 515; 137 L.T. 255.

ACTION for damages for negligence by the widow of William John Lory, a police constable, claiming under the Fatal Accidents Acts and the Law Reform (Miscellaneous Provisions) Act, 1934. The defendants admitted liability, and the only issue was one of damages.

The deceased, who was 35 years of age at the date of his death, was a member of the Metropolitan Police Force. His earnings in pay and allowances amounted to £5 16*s.* 6*d.* per week, of which he retained 10*s.* and gave the remainder to his wife. He had two children, aged 5 years and 2 years. The plaintiff had received a gratuitous payment of £160 from the Police Charitable Fund. She was also in receipt of the following pensions: £30 per annum for herself and £10 per annum for each of the children from the Police Pensions Fund and £42 for each of the children from the Police Orphanage Fund. The plaintiff's pension was determinable on remarriage, and was subject to certain conditions as to good character. The pensions for the children from both funds were payable until they reached the age of 16 years. The payments from the Police Orphanage Fund were liable to vary according to the state of the fund.

E. Holroyd Pearce for the plaintiff.

Alban Gordon for the defendants.

Pearce: The plaintiff's pension from the Police Pension Fund ought not to be taken into account as it is not a payment to which she is entitled as of right, but only if she fulfils the prescribed conditions. It comes under the same heading as Widows', Orphans' and Old Age Contributory Pensions, which expressly and by statute are not computable upon the question of damages. The pensions from the Police Orphanage Fund ought not to be taken into account as they are ordinary charitable payments. Counsel referred to CHARLESWORTH ON NEGLIGENCE, p. 502, and *Baker* v. *Dalgleish S.S. Co., Ltd.* (1).

Gordon: It was decided in *Carling* v. *Lebbon* (2) that a statutory pension payable under the Widows', Orphans' and Old Age Contributory Pension Act, 1925, was to be taken into account. *A fortiori* similar pensions payable by local authorities or police authorities must be included. The Widows', Orphans' and Old Age Contributory Pensions Act, 1929, removed the anomaly solely as respects pensions payable under that Act. The position as respects other forms of pension remains as it was when *Carling* v. *Lebbon* (2) was decided. The gratuity of £160 must be taken into account. The pensions from the Police Orphanage Fund should be taken into account, though not necessarily at their full value.

ASQUITH, J.: This is an action by a widow claiming for the estate under the Law Reform (Miscellaneous Provisions) Act, 1934, and for herself and two children under the Fatal Accidents Act, 1846. She claims damages in respect of the death of her husband, alleged to have been due to the negligence of the defendants. The defendants admit negligence and liability, and the only question debated was the amount of damages recoverable by the plaintiffs.

The facts material to this issue, so far as the claim proceeds under the Fatal Accidents Act, 1846, are these. The deceased husband, a member of the police force, was, at the time of his death, earning, in pay and allowances, £5 16*s.* 6*d.*, and upon his retirement would have earned by way of pension and ancillary earnings a somewhat similar sum for so long as he lived. He was in the habit of retaining 10*s.* each week for himself and handing the rest over to his wife. Of this remainder, 15*s.* at least—and, as I hold, substantially more—was applied to his upkeep and maintenance. I compute the weekly sum which would, if he had lived, have been applied to the upkeep and maintenance of his wife and children at an average sum of £3 10*s.* per week. I estimate his expectation of life, if he had not succumbed to this accident, at 30 years. He was a man of 35 years of age, a teetotaller, and enjoying perfect health. If he had lived, according to this estimate, his wife and children would have benefited, from first to last, to the extent of something like £5,000, spread over a period of years. In estimating the damages to which his family are entitled, deductions have to be made from this sum under the following heads, amongst others: (*a*) the widow receives a police fund pension of £30 per annum without ostensible time limit, and each child receives a sum of £10 per annum until it shall reach the age of 16 years. One child is aged 5 years, and the other 2 years. These pensions can, of course, be discontinued if funds run out, or for certain other causes, and the same thing applies to the widow's pension, which ceases in certain events, but it is clear that, subject to these contingencies and possibilities, these pensions have to be taken into account in arriving at the amount of damages. They are not sums in the nature of insurance moneys. (*b*) So also has a sum of £42 per annum payable to each child, subject to the same risks and to the same time limits. (*c*) After these deductions have been made, the net sum remaining must be discounted by reference to the fact that it is to be spread over a period of years and is not a lump sum payable here and now. In other words, I have to arrive at the amount necessary to buy an annuity of such net sum for the widow and children respectively. (*d*) From the widow's share of these sums there must further be subtracted the lump sum of £160 received on the death of her husband. (*e*) I have further to take into account the possibility of the widow's death, and, indeed, that of the children, and the widow's remarriage. In that connection, one has to remember that whatever sum is awarded to her will make her in a small way an heiress, and she will thus be possibly more likely to remarry than she would be otherwise.

Taking all these considerations into account, I find that the total sum recoverable under the Fatal Accidents Act, 1846, is £1,850. Of this I award £1,500 to the widow and £350 to the children, of which I allocate £200 to the younger child and £150 to the elder one. In addition to this, I award funeral expenses at an agreed figure of £43. As to the claim under the Law Reform (Miscellaneous Provisions) Act, 1934, I award £300 to the estate as damages for loss of expectation of life. As there is an intestacy, all of this goes to the widow, and is overlapped and merged in the £1,500 which I have already awarded to her. There will be judgment for the plaintiff for those sums, with such costs as are recoverable having regard to the payment into court made by the defendants.

Solicitors: *Hancock & Willis* (for the plaintiff); *P. W. Pine* (for the defendants).

[*Reported by* D. K. Belcher, *Barrister-at-Law.*]

Re CENTRAL EMPLOYMENT BUREAU FOR WOMEN AND STUDENTS' CAREERS ASSOCIATION INCORPORATED.

[Chancery Division (Simonds, J.), **November 10, 11, 1941**].

Charities—Relief of poverty—Fund to help persons to become self-supporting—Implication of poverty.

A fund which was established "for the purpose of helping educated women and girls to become self-supporting," and which had no commercial end in view, is a valid charitable trust, as being for the advancement of education and relief of poverty within the meaning of the Statute of Elizabeth. The expressed purpose of the gift was a sufficient implication that its recipients were poor within the meaning of the Statute.

[**EDITORIAL NOTE.** Charitable gifts have been divided into several classes, and the gift here seemed to come within the class known as gifts for the relief of poverty. Before this could be definitely stated it had to be determined that the fund helping educated women and girls to become self-supporting necessarily implied that, without such help, they would be poor persons, and, therefore, that the help given to them would be in the nature of the relief of poverty. The court found itself able to make this implication, and the gift thus became a good charitable gift in law.

As to Gifts in Relief of Poverty, see HALSBURY, Hailsham Edn., Vol. 4, pp. 111-115, paras. 147-152; and for Cases, see DIGEST, Vol. 8, pp. 242-245, Nos. 7-50.]

Case referred to:

(1) *Re De Carteret, Forster* v. *De Carteret*, [1933] 1 Ch. 103; Digest Supp.; 102 L.J.Ch. 52; 148 L.T. 188.

Application by a company's liquidator to determine, *inter alia*, whether a certain fund was a valid charitable trust. The facts are fully set out in the judgment.

A. Belsham for the applicant, the liquidator.
A. Guest Mathews for the creditors.
E. M. Winterbotham for donors to the fund.
H. O. Danckwerts for the Attorney-General.

SIMONDS, J.: I have already decided that the Central Bureau Loan Fund, as it is called, being a fund established by the incorporated association, which is now being wound up, is held upon certain specific trusts, and that the moneys which constituted that fund are not available for the general purposes of the company. The far more difficult question which I now have to decide is whether the specific trusts upon which that fund is held are charitable trusts. The initial difficulty with which I am faced is that it is not easy to ascertain from the documents in evidence the precise trusts upon which the fund is held. I must, I think, go back to a period before the incorporation of the company, because the history of the fund has been continuous, and substantially the same language is used both before and after the incorporation of the company in relation to the description of the purpose of the fund, and also in any appeal which is made for subscriptions to the fund. The first document to which I must refer is called "Loan Fund Prospectus." It states in its first paragraph the object of the fund, and I take this to be the overriding and dominant purpose and the remaining paragraphs in this document and certain passages in other documents to be merely explanatory of this dominant object. It is stated in these terms:

> The Fund maintained by the Central Bureau exists solely for the purpose of helping educated women and girls to become self-supporting, and has no commercial object in view.

It has been urged on behalf of the Attorney-General, whose task it is to support the charitable object of the trust, that the object of this fund is either educational or in relief of poverty within the meaning of the preamble to the Statute of Elizabeth. The case is on the borderline, but I think that I shall be justified in giving effect to that contention. I am entitled, I think, to look at this passage which I have read, and which is repeated, in substance, in numerous documents of a later date, in the light of surrounding circumstances. I find that it is a document issued by the association formed, if not for a charitable purpose, at least for a benevolent purpose, and, although benevolent purposes are not necessarily charitable, I am at least entitled to look at this document not as if it was the prospectus of a moneylender, with which it was compared by counsel who appeared for one of the donors. It is a document issued by an association formed not for profit. It is a document issued with a view to obtaining money for the purpose of educating women, and, in so far as they are not self-supporting, helping them to earn their living by whatever means the committee of the fund may propose. It is clear that, so far as it is educational, it is a good charity, because I cannot distinguish between a gift for the advancement of education in general terms and a gift for the purpose of educating individuals in such manner as will be most conducive to their earning their living, as, for instance, if this had been a gift for apprenticeships. So far as it is a gift for educational purposes, it is a good charity, but it is said that it is not a good charity in so far as the loan fund may be used for the purpose of making grants to people for some particular business or enterprise for which they had educated themselves or been educated by means of the loan fund. It is clear from the cases which have been cited to me that a gift may be a good charitable gift, as in relief of poverty, although the recipients of the gift are not in destitution, or even on the borderline of destitution. "Poverty," it has been said, is a relative term. I think here that the implication of the gift to enable the recipients to become self-supporting is a sufficient indication that they stand on the poverty side of the borderline—that is to say, that they are persons who could not be self-supporting, in whatever enterprise they embarked, without the assistance of this fund. The cases which have been cited to me, and in particular the careful review of the earlier cases by MAUGHAM, J., in *Re De Carteret, Forster* v. *De Carteret* (1), would, I think, justify me in this case in saying that the intention and purpose of the fund are to benefit only those who are poor within the meaning of the preamble to the statute. Therefore, this gift, so far as it is educational, may be supported from that point of view, and, so far as it is in relief of poverty, it may be supported from that point of view also. Accordingly, I shall declare that the trusts of the fund are valid charitable trusts, and shall direct a scheme for its establishment. *Declaration accordingly.*

Solicitors: *Alfred Bright & Sons* (for the liquidator); *Taylor & Humbert* (for the creditors); *Hobson & Cobbett* (for the donors of the fund); *Treasury Solicitor* (for the Attorney-General).

[*Reported by* Irene G. R. Moses, *Barrister-at-Law.*]

A

DIPPLE *v.* DIPPLE.

[Probate, Divorce and Admiralty Division (Hodson, J.), **January 20, 1942.**]

Divorce—Maintenance—Death of divorced husband—Proceedings against administrator for secured maintenance—Supreme Court of Judicature (*Consolidation*) *Act,* 1925 (*c.* 49), *s.* 190—*Law Reform* (*Miscellaneous Provisions*) *Act,* 1934 (*c.* 41), *s.* 1. B

A decree absolute of divorce was pronounced on Nov. 14, 1938. On May 9, 1939, an interim order was made for maintenance during the joint lives of the husband and wife. On Nov. 27, 1940, the husband died. The wife then contended that she could bring proceedings against the administrator of the husband's estate for secured maintenance upon the ground that the cause of action survived by virtue of the Law Reform (Miscellaneous Provisions) Act, 1934:— C

Held: the wife had no cause of action which was kept alive by the Law Reform (Miscellaneous Provisions) Act, 1934, and her claim for secured maintenance failed.

[**EDITORIAL NOTE.** The sole question in this case is whether a divorced wife has a cause of action in respect of secured maintenance. Such right as she has is D derived from the Supreme Court of Judicature (Consolidation) Act, 1925, s. 190. The judge has held that this is a right to ask the court to exercise certain discretionary powers in her favour and is not a cause of action. It should be noted that in the principal part of the proceedings, where the wife would be asking for a decree *nisi* of divorce, the wife would, in some if not all cases, be asking for the exercise of discretionary powers in her favour, and the basis of the distinction made does not appear to have been exhaustively considered. The point raised is an important one, and, E without in any way suggesting that the conclusion here reached will in any way be departed from, future cases will no doubt define the term "cause of action" in the Law Reform (Miscellaneous Provisions) Act, 1934, s. 1, within narrower limits.

As to Cause of Action, see HALSBURY, Hailsham Edn., Vol. 1, pp. 8, 9, para. 9; and for Cases, see DIGEST, Vol. 1, p. 13, Nos. 104-108.]

Cases referred to:

(1) *Smithe* v. *Smithe and Roupell* (1868), L.R. 1 P. & D. 587; 27 Digest 530, *5739*.

(2) *Cooke* (*Cook*) v. *Gill* (1873), L.R. 8 C.P. 107; 1 Digest 13, *106*; 42 L.J.C.P. 98; 28 L.T. 32. F

(3) *Read* v. *Browne* (1888), 22 Q.B.D. 128; 1 Digest 13, *107*; 58 L.J.Q.B. 120; 60 L.T. 250.

(4) *Mould* v. *Mould*, [1933] P. 76; Digest Supp.; 102 L.J.P. 28; 148 L.T. 499.

Summons taken out by wife on an application for secured maintenance. The husband having died since the decree absolute of divorce had been pronounced, the wife contended that she could still bring proceedings for secured G maintenance, as her right to do so was a cause of action which survived the death of her divorced husband under the Law Reform (Miscellaneous Provisions) Act, 1934, s. 1. The facts are fully stated in the judgment.

H. Clifford Mortimer for the petitioner, the wife.

W. Latey for the Public Trustee, the administrator of the husband.

Hodson, J.: This summons has been taken out by a wife for leave to join H the administrator of the estate of her late husband (in this case the Public Trustee) as a party to her application for maintenance. The question to be determined is whether a wife, whose husband has died after a decree absolute has been pronounced against him, can obtain an order against his personal representative for secured maintenance under the Supreme Court of Judicature (Consolidation) Act, 1925, s. 190.

The wife obtained a decree *nisi* on Dec. 17, 1937, and on Feb. 4, 1938, served on the respondent an application for an order for (i) secured maintenance for herself, (ii) maintenance during their joint lives, (iii) maintenance of the child of the marriage. The decree absolute was pronounced on Nov. 14, 1938. On May 9, 1939, an interim order was made providing maintenance during joint lives until further order for the wife and the child at the rate of £360 per annum and £60 per annum respectively. On Nov. 27, 1940, the respondent husband died intestate, having previously remarried. The Public Trustee became the administrator of his estate and has been represented by counsel on the hearing A of this summons.

The Supreme Court of Judicature (Consolidation) Act, 1925, s. 190, provides :

> (1) The court may, if it thinks fit, on any decree for divorce or nullity of marriage, order that the husband shall, to the satisfaction of the court, secure to the wife such gross sum of money or annual sum of money for any term, not exceeding her life, as having regard to her fortune, if any, to the ability of her husband and to the conduct of the parties, the court may deem to be reasonable . . .
>
> B (2) In any such case as aforesaid the court may, if it thinks fit, by order, either in addition to or instead of an order under sub-sect. (1) of this section, direct the husband to pay to the wife during the joint lives of the husband and wife such monthly or weekly sum for her maintenance and support as the court may think reasonable.

It is conceded that, with the death of the respondent husband, the claim for maintenance during joint lives and for the maintenance of the child cannot be further proceeded with ; but it has been argued on behalf of the applicant that C the application for secured maintenance can proceed notwithstanding the death of the respondent husband by reason of the provisions of the Law Reform (Miscellaneous Provisions) Act, 1934, sec. 1, which reads as follows :

> Subject to the provisions of this section on the death of any person after the commencement of this Act all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of, his estate. Provided that this section shall not apply to causes of action for defamation or seduction or for inducing one spouse D to leave or remain apart from the other or to claim under the Supreme Court of Judicature (Consolidation) Act, 1925, s. 189, for damages on the grounds of adultery.

It is said that the wife has a cause of action which survives against the personal representative of the husband. It is no doubt true that the fact that the main suit is at an end does not of itself preclude applications in ancillary matters. For example, the court has entertained an application by children, after the death of the husband, for variation of a marriage settlement under the Matri- E monial Causes Act, 1859, sec. 5 : *Smithe* v. *Smithe and Roupell* (1). It cannot, however, I think, be said that apart from the Law Reform (Miscellaneous Provisions) Act, 1934, an order of any sort could have been made under the Supreme Court of Judicature (Consolidation) Act, 1925, s. 190, against anyone but the living husband himself. The only question is, therefore, whether the right to make an application for a sum to be secured to a wife for a term not exceeding her life can be said to be " a cause of action."

F A cause of action is defined in STROUD'S JUDICIAL DICTIONARY as the entire set of circumstances giving rise to an enforceable claim. As LORD ESHER, M.R., said in *Cooke* v. *Gill* (2) and later in *Read* v. *Browne* (3) a cause of action is

> every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the court.

The only cause of action which the applicant had was, in my opinion, the G matrimonial offence upon proof of which she obtained a decree of dissolution of marriage. If the respondent husband had died during the pendency of the suit, the Law Reform (Miscellaneous Provisions) Act, 1934, would no doubt have kept this cause of action alive so as to enable the wife to have proceeded with the suit had not his death brought about the very thing claimed, namely, the dissolution of the marriage. However, as BATESON, J., pointed out in *Mould* v. *Mould* (4), an application for maintenance is a different proceeding. The matrimonial offence H upon which the petition was based does not give rise to an enforceable claim for maintenance. The Supreme Court of Judicature (Consolidation) Act, 1925, s. 190, provides that the court may, if it thinks fit, order the husband to secure to the wife such a sum of money as the court may deem to be reasonable. The wife thus has merely the right to ask the court to exercise discretionary powers in her favour. This seems to me to be an essentially different thing from the wife having an enforceable claim against the husband.

I should add that I have been referred to an order made in chambers in another case, where taxation of costs was allowed to proceed against the personal representative of a co-respondent who had died after decree. The order for costs having been made against the co-respondent in his lifetime, there was an enforceable claim against him which was kept alive by the Law Reform (Miscellaneous Provisions) Act, 1934. In this case, however, the wife has no cause of action within the meaning of that Act, and her application to join the administrator as a party fails and must be dismissed.

Application dismissed.

Solicitors: *Kenneth Brown, Baker, Baker* (for the petitioner); *Blundell, Baker & Co.* (for the Public Trustee).

[*Reported by* D. Armstead Fairweather, Esq., *Barrister-at-Law.*]

Re AMAND.

[King's Bench Division (Wrottesley, Croom-Johnson and Cassels, JJ.), **January 19, 20, 21, 22, 23, 26, 27, 30, 1942.**]

Constitutional Law—Allied governments established in England—Conscription of subjects resident in England—Arrest as deserter—Allied Forces Act, 1940 (*c.* 51)—*Allied Forces* (*Application of Visiting Forces* (*British Commonwealth*) *Act*, 1933) (*No.* 1) *Order*, 1940 (*S.R. & O.*, 1940, *No.* 1118).

The applicant, a Netherlands subject who had resided in England for a number of years, was called up for service in the Netherlands army in England. For some time he served with the Netherlands Forces, and drew the usual pay and allowances. While on leave, he failed to return to duty, and was arrested as a deserter under the Army Act, s. 154, as applied by the Allied Forces Act, 1940, and an order in council made thereunder. The calling-up notice with which the applicant was served was issued under a decree made in England on Aug. 8, 1940, by the Queen of the Netherlands. The Allied Forces Act, 1940, did not become law till Aug. 22, 1940. At all material times Holland was in enemy occupation, but the British Government recognised the Queen and her ministers as exclusively competent to perform the legislative, administrative and other functions appertaining to the sovereign and government of the Netherlands. The applicant contended (i) that the royal decree was illegal and unenforceable under English law, on the ground that no foreign power can recruit an army in England without Parliamentary authority; (ii) that the status of a person living in England under the protection of the Crown cannot be affected by foreign legislation; (iii) that the decree was invalid by Netherlands law:—

Held: (i) the applicant was not estopped by the fact that he had actually served with the Netherlands forces in England from questioning the validity of the decree of the Netherlands Government imposing conscription on Netherlands subjects.

(ii) it is not contrary to British constitutional law for the government of an allied state established in England with the consent of the British Government, to issue a decree conscripting its subjects resident in England.

(iii) the Netherlands Government in England can legally legislate for the Netherlands Kingdom and Empire, and for Netherlands subjects residing in England to the same extent as it could have done so if established in Holland.

(iv) in the circumstances the decree and the summons directed to the applicant were not invalid according to English law.

(v) it was the duty of the court to inquire into the Netherlands law to determine whether the decree was binding on Netherlands nationals under that law.

(vi) the decree was valid by Netherlands law. The applicant was legally a member of the Netherlands forces to whom the provisions of the Allied Forces Act applied, and, in the circumstances, was rightly arrested as a deserter. The application for a writ of *habeas corpus* was, therefore, dismissed.

[**EDITORIAL NOTE.** A sovereign state has power to legislate for its own subjects wherever they may be, but, in normal times, it can only enforce its enactments within the limits of its own territory. In the exceptional circumstances of the present war, the Netherlands Government has been established in England with the consent and aid of the British Government, special legislation being passed to regularise the position thus arising. The question here discussed is whether it is possible for the two governments acting together to give the Netherlands authorities in England power to conscript a Netherlands subject ordinarily resident in England and to render him liable to arrest in

England upon his desertion from the Netherlands Army. It is held that, in the circumstances of this case, the statutes and order combined with the Netherlands decree has given the Netherlands authorities that power.

FOR THE ALLIED FORCES ACT, 1940, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 33, p. 466.]

Cases referred to:

(1) *Aksionairnoye Obschestvo A. M. Luther* v. *Sagor* (*James*) *& Co.*, [1921] 3 K.B. 532; 11 Digest 536, *387*; 90 L.J.K.B. 1202; 125 L.T. 705; *on appeal from* [1921] 1 K.B. 456.

(2) *Oetjen* v. *Central Leather Co.*, (1918), 246 U.S. 297.

(3) *Paley* (*Princess Olga*) v. *Weisz*, [1929] 1 K.B. 718; Digest Supp.; 98 L.J.K.B. 465; 141 L.T. 207.

(4) *The Jupiter* (*No 3*), [1927] P. 250; Digest Supp.; 97 L.J.P. 33; 137 L.T. 333.

(5) *Williams* v. *Bruffy*, 96 U.S. 176.

(6) *Mighell* v. *Johore* (*Sultan*), [1894] 1 Q.B. 149; 1 Digest 48, *387*; 63 L.J.Q.B. 593; 70 L.T. 64.

APPLICATION by Jean Jacques Amand for a writ of *habeas corpus*. A former application was dismissed on May 23, 1941, and an appeal against the decision of the Divisional Court was withdrawn. The facts are fully set out in the judgments.

D. N. Pritt, K.C., *G. O. Slade* and *V. K. Wolff* for the applicant.

C. T. Le Quesne, K.C., and *G. B. McClure* for the respondents, the Netherlands Minister of Defence.

The Attorney-General (*the Rt. Hon. Sir Donald Somervell, K.C.*) and *the Hon. H. L. Parker* for the Secretary of State for Home Affairs.

WROTTESLEY, J.: The applicant has for many years resided and carried on business in this country. On Mar. 14, 1941, he was arrested and detained in custody by the metropolitan police for the purpose of being handed over to the Netherlands military authorities as a deserter or absentee from the Netherlands Army. He is now on bail granted by the chief magistrate at Bow Street, but none the less entitled to have the writ issued, or else to have the court order that he be discharged from custody, unless the respondents to the proceedings, that is to say, the Dutch Minister of Defence and the Home Secretary, can establish, to the satisfaction of the court, that the applicant is a deserter or absentee without leave from the Netherlands Army and therefore amenable to the provisions of sect. 154 of the Army Act, as a result of the Allied Forces Act, 1940, and the Allied Forces (Application of 23 Geo. V, c. 6) (No. 1) Order, 1940, made under it, which applies certain parts of the Visiting Forces (British Commonwealth) Act, 1933, with certain adaptations and modifications, to the military forces of the Netherlands in this country.

The applicant had entered an appeal to the Court of Appeal against a previous decision of a Divisional Court refusing to order the issue of the writ. However, before the hearing of the appeal, the applicant gave notice to the Secretary of State and the Netherlands Minister of Defence that he intended at the hearing of the appeal to apply for leave (i) to cross-examine the deponents to three affidavits used by the Netherlands Minister of Defence before the Divisional Court, containing the evidence of Netherlands lawyers as to the legal validity and effect under Netherlands law of a decree published on Aug. 8, 1940, and made by the Queen of the Netherlands upon the report of her Minister of Defence, and signed by the Minister of Justice on Aug. 14, 1940; (ii) to adduce further evidence from the deponent to one affidavit used by the applicant and directed to the same matter, namely, Dr. Bisschop. In the event, this application was heard by the Court of Appeal before the appeal, as a separate matter, and it was refused because, amongst other things, it was unnecessary for the Court of Appeal to take any such course. It was pointed out by LORD GREENE, M.R., that, inasmuch as the remedy asked for by the applicant was a writ of *habeas corpus*, it was open to him to make his application to a judge, notwithstanding the fact that a prior application had been refused, and in that way to put forward any further evidence. Accordingly, during the long vacation an application was made to UTHWATT, J., sitting as vacation judge in the King's Bench Division in chambers. He adjourned the application to a sitting of the Divisional Court on Oct. 14, 1941, so that notice could be given to the Secretary of State. Nevertheless, it was not until Jan. 19, 1942, that the applicant in fact made his application to the court.

The application is supported by further affidavits sworn by Dr. Bisschop as lately as Dec. 8, 1941, dealing in considerable detail, not merely with his own opinions, which had already been expressed in the affidavits filed on behalf of the applicant in the former application, and elaborating the grounds for those opinions, but also dealing with the opinions of Dr. de Moor and Dr. Snyders expressed in the affidavits used in the previous application on behalf of the Netherlands Minister of Defence. In addition, there is in evidence before us yet another affidavit, sworn on Jan. 19, 1942, dealing with the last affidavits of A Dr. de Moor and Dr. Snyders. This court has the advantage, therefore, of being able to study, not merely Dr. Bisschop's opinion as to the law of the Netherlands on the matter in debate as originally expressed in his earlier affidavit, but also his reasons for adhering to them in spite of the criticisms made and the views expressed by Dr. de Moor and Dr. Snyders in their affidavits in the former application; and in addition we have before us, in writing, Dr. Bisschop's criticisms of the substantive opinions pronounced by Dr. de Moor and Dr. B Snyders, and we have those opinions expressed with greater elaboration than they were expressed in the former proceedings, including the reasons why they, for their part, adhere to their views in spite of Dr. Bisschop's criticisms. In the result, we have before us the additional evidence which the applicant sought to adduce before the Court of Appeal. The evidence as to Netherlands law has been so full and exhaustive on both sides that it is not surprising that we were not asked by the applicant's counsel for leave to cross-examine the witnesses C for the Dutch Minister of Defence.

The respondents to the application justify the arrest and detention of the applicant as follows: On Aug. 22, 1940, the Allied Forces Act, 1940, became law, and by sect. 1 (1) of this Act it is provided that:

> Where any naval, military or air forces of any foreign power allied with His Majesty are for the time being present in the United Kingdom or on board any of His Majesty's D ships or aircraft, the naval, military and air force courts and authorities of that power may, subject to the provisions of this Act, exercise within the United Kingdom or on board any such ship or aircraft in relation to members of those forces, in matters concerning discipline and internal administration, all such powers as are conferred upon them by the law of that power.

The material part of subsect. (3) is as follows:

> His Majesty may by order in council provide for the application to any such naval, E military and air forces as are mentioned in subsect. (1) hereof . . . subject to such adaptations, modifications and exceptions as may be provided by the order, of subsect. (2) to (5) of sect. 1, of sects. 2 and 3, of subsects. (1) and (3) of sect. 5, and of sect. 6, of the Visiting Forces (British Commonwealth) Act, 1933, as amended by or under any enactment whether passed before or after this Act.

At the time this Act was passed the Kingdom of the Netherlands was a foreign power allied with His Majesty, and naval, military and air forces of the Netherlands were present in the United Kingdom. So that from Aug. 22, 1940 (the F date of the Royal Assent) Parliament expressly authorised the military authorities of the Netherlands Army in the United Kingdom to control and manage it according to the law of the Netherlands. Parliament also enabled His Majesty by order in council, to set up a convenient machinery for the purpose of making this control and management more effective. On Oct. 11, 1940, His Majesty, by the Allied Forces (Application of 23 Geo. V, c. 6) (No. 1) Order, 1940, applied G to the Netherlands Army certain sections of the Allied Forces Act, 1940, including the one applying sect. 154 of the Army Act, which provides for the apprehension of deserters and absentees. It was under this provision that the applicant was arrested. If the applicant was, on Mar. 14, 1941, a member of the Netherlands forces, he was rightly arrested, for, in that case, he was indubitably either a deserter or an absentee. The applicant's case is based entirely and only on the allegation that he was not a member of such forces. H

Looking at the evidence, we have come to the same conclusion as the Divisional Court on the former hearing—namely, that, if the applicant became a member of the Netherlands forces, it was not by voluntary enlistment, but because he was summoned to comply with the royal decree and did so. He drew pay as a soldier; he served with the Dutch forces; he applied for and obtained leave of absence; he applied for and received allowances for his family. I find nothing in the evidence to suggest that the applicant was deceived or intimidated, or so treated as to be deprived of the power of acting as he thought right. In his evidence he speaks of protests, but they were not claims that he was not liable to serve, but referred to the loss and inconvenience to which absence from business would expose him, and were coupled, first, with applications for postponement of his calling up, and, secondly, for leave to return to put his business in order. In my view he accepted—not, perhaps, with a very good grace—the position, and preferred to answer the call of his Queen and country, rather than to run the risks of the penalties provided for in the decree. It was not until some time in Feb., 1941, that the applicant bethought himself that he might be able to challenge the power of the Netherlands Government to keep him with the colours, and made enquiries of that government through his then solicitors, After that, he was actually on his way back to his unit when he saw in an evening paper a statement made in the House of Commons, which led him to abandon the idea of returning to his unit, and to consult the solicitor who has acted for him in these proceedings.

It was submitted on behalf of the Dutch Minister of Defence that these facts alone, quite apart from the validity or otherwise of the decree, made the applicant a member of the Dutch forces and, therefore, subject to the provisions of the Allied Forces Act, 1940, s. 1, and para. 3 of the Allied Forces (Application 23 Geo. V, c. 6) (No. 1) Order, 1940. It may be that in some future case circumstances may arise which will estop a person, who is in fact serving with an allied force, from asserting that he is not a member of such force owing to some invalidity in the law of his country governing the matter or to some informality. Where, however, as in the present case, the first fact is a decree ordering the person to join the colours, and a summons coupled with an announcement of a penalty for non-compliance, I do not think the facts can be said to amount to such an estoppel.

There are two principal grounds upon which it is claimed that the applicant never became a member of the Netherlands forces in this country. The legality of the summons, which was dated Aug. 19, 1940, depends upon the royal decree of the Queen of the Netherlands, dated Aug. 8, 1940. Indeed, it quotes this decree for the statement that

> Anyone, not yet enlisted in the Netherlands army and navy as an ordinary recruit, will be considered as such in consequence of art. 6 of the royal decree of Aug. 8, 1940, No. 1.

Art. 6 of the decree is as follows:

> By the calling up intended in art. 5 the persons designated as ordinary conscripts are deemed to be enlisted in the naval or land forces as ordinary conscripts.

The applicant claims that this decree and the summons which depends on it are both of them illegal and of no force or effect.

First, he says that under the law of England, the decree and the summons are alike illegal and unenforceable. Secondly, he claims that, even if the law of England has made decrees and summonses lawful by Dutch law enforceable here against Dutch subjects, this is a decree which is not lawful by Dutch law. Further, the applicant points to the fact that the decree was made on Aug. 8, and the summons to him on Aug. 9; that the order to report at Paddington Station on Aug. 20 was made on Aug. 16, whereas the Allied Forces Act, 1940, did not become law until Aug. 22, and the order in council was not made until Oct. 11, 1940.

I will deal first with the contention that, whether or not the decree was valid by Dutch law, it is of no force or effect in England by reason of the law of England. It is said on behalf of the applicant that it cannot make a Dutchman resident in England, and so under the protection of the Crown, into a Dutch soldier, because in the first place no foreign power can recruit an army in this country without the authority of Parliament. Indeed, without this authority the Crown itself cannot recruit an army in time of peace. Nobody, I suppose, would question this proposition, if confined to times of peace. Since the Bill of Rights, there is no doubt that a standing army can neither be recruited nor maintained in England without the authority of Parliament in time of peace. We are not in time of peace, however, and Parliament has not been silent. The decree under debate here is that of the Queen of the Netherlands. In accordance with precedent, therefore, we have had recourse to our own government to ascertain the status of Queen Wilhelmina and her government. The Attorney-General, who is in court, representing the Home Secretary, one of the respondents, is in a position to enlighten us. This is what he told us:

> The Government of the Netherlands is a government for the time being allied with His Majesty and established in the United Kingdom; it is established and exercising its functions in the United Kingdom with the assent and on the invitation of His Majesty's Government in the United Kingdom. His Majesty's Government recognise Her Majesty Queen Wilhelmina and her Government as the Sovereign and Government of the Netherlands and as exclusively competent to perform the legislative administrative and other functions appertaining to the Sovereign and Government of the Netherlands. A

The words of this pronouncement may prove to be important.

We start, therefore, with this, that Queen Wilhelmina is not here as a refugee, her kingdom in Europe having been overrun by her and our enemies, but that she and her government are allied with His Majesty and established here, and are exercising their functions here, not merely with the assent, but on the invitation, of His Majesty's Government. Our government at any rate goes so far as to recognise the Queen and Government here situate as competent to perform B whatever the Sovereign and Government of the Netherlands can perform, and they say that no one else is in such a position. That is what the word "exclusive" means in this context. The alliance, we are told, dates back to May 10, 1940. So far as His Majesty's Government is concerned, therefore, there is no flaw in the title of the Queen of the Netherlands and her Government to do here what appertains to the Sovereign and Government of the Netherlands, C that is to say, amongst other things, to claim the allegiance of Dutchmen, wherever they may be.

However, that is not the complaint here. Parliament, it is said, has not been consulted. At first sight there may seem to be some unreality in the claims of a Dutchman resident here, and so under the protection of the Crown, to draw attention to an alleged infringement of the privileges of Parliament as distinguished from the Crown, especially when the Attorney-General is here D and declines to take the point. Nor has our attention been drawn to anything said or done by or in either House to suggest an infringement of their powers or privileges. However, without deciding it, I am ready to assume it to be the duty of the courts, without any such assistance, to investigate any such claim, especially where the freedom of the subject or of a person under the protection of the Crown is concerned. I look, therefore, at the Allied Forces Act, 1940, which was passed into law on Aug. 22, 1940. In that Act I find that E Parliament, not merely recognises without disapproval the presence in the United Kingdom of the navy, army and air force of, amongst other countries, the Netherlands, but that it even takes pains to ensure that those forces are maintained and nourished as fighting forces. It takes steps to preserve in this country the authority of the Netherlands Sovereign over the forces of the Netherlands, if that foreign power is allied, as we know it was and is, with F His Majesty. In those circumstances, is there anything repugnant to the law of England in the Sovereign of the Netherlands recruiting her own subjects to her own army, or legislating so as to render one of her lieges resident here liable to serve in the army of the Netherlands, our ally? It seems to me that, if Parliament is taking pains to maintain in the United Kingdom under the sovereign power of the Netherlands a standing army of Dutch subjects, it is, by implication, anxious that Dutch subjects resident here, liable by the Dutch G constitution to co-operate in the maintenance of the independence of that kingdom and in the defence of its territory, should fulfil that obligation, if possible, by obeying a summons to join the Dutch colours. And now the fulfilment of that obligation is possible.

In addition, I think, that there is force in the argument, put before us on this point by the Attorney-General. Never, so far as I am aware, has it been thought to be any trespass on the sovereignty of this country that foreign H governments should acquaint their nationals, either through the medium of the post or through the medium of their accredited representatives and consuls, that it is the duty of such nationals to join the forces of those countries. So well recognised is this that I find the matter specifically dealt with in Oppenheim, International Law, 5th Edn., Vol. 1, p. 235:

> In consequence of its personal supremacy, a state can treat its subjects according to discretion, and it retains its power even over such subjects as emigrate without thereby losing their citizenship. A state may therefore command its citizens abroad

to come home and fulfil their military service, may require them to pay rates and taxes for the support of the home finances, may ask them to comply with certain conditions in case they desire marriages concluded abroad or wills made abroad to be recognised by the home authorities, and can punish them on their return for crimes they have committed abroad.

If, therefore, the Dutch sovereign might summon the applicant to the Netherlands to do his service, it is no breach of this country's sovereign power to summon him to her army here in England, if that army's presence here is not illegal ; and we know that it is not merely not illegal, but was welcomed by Parliament itself.

The second ground upon which it was argued that this decree, and the summons issued under it, was unlawful is that no foreign power can introduce an army into this country lawfully ; and so it cannot lawfully add persons to it. It is agreed that the Allied Forces Act, 1940, legalised the introduction and maintenance of the Netherlands Army, but the applicant was recruited before the Act was passed. The answer to this argument is that the point is academic. This court is concerned not with the right of the Netherlands Government to interfere with the personal freedom of the applicant in this country prior to Aug. 22, 1940, but with its right to do so on Mar. 14, 1941. I am far from saying that it was unlawful for the Netherlands Government to introduce the Dutch forces into this country before the passing of the Allied Forces Act, 1940. We know that the Netherlands Government was in alliance with His Majesty's Government from May 10, 1940, onwards, and that the Dutch forces entered this country after the alliance had been contracted. The circumstances under which the Dutch forces entered this country make it impossible to say that this entry was unlawful. The retreat of those forces into this country in the course of warlike operations against the common enemy was a breach of neither municipal nor of international law. That the sovereign and government of our ally should, in the process, call to their aid Dutchmen resident here cannot reasonably be construed as a breach of the sovereign rights of this country.

The events which happened are in strong contrast to the case of a belligerent army retiring into a neutral territory. The fact that the decree preceded the Allied Forces Act, 1940, may have made its enforcement against the applicant difficult, or even impossible, at the time when it was made. The sequence of events, however, has made that point of no importance. Assuming, as I must do for the purposes of the argument, that the decree was one which was valid against this particular subject by Dutch law, it altered the status of the applicant *vis-a-vis* his sovereign—a sovereign power recognised by our own government. In addition, the applicant obeyed the summons, and the question of enforcement never arose.

The third ground upon which the decree and summons is said to be invalid by English law is that the status of a man living in England under the protection of the Crown cannot be affected by foreign legislation, that is to say, a foreign state cannot turn a civilian into a deserting soldier so as to make him liable to arrest in England. This proposition appears to me to beg the whole question. It is best to go by stages. As I have said already, a foreign country can decide whether its nationals living abroad are, nevertheless, to serve in that country's forces, whether in peace or war. Further, we have seen that it is not a breach of the comity of nations that it should do so ; nor that it should enforce penalties against a person neglecting to obey such an order, provided that the penalty is exacted in the foreign country itself, for instance, by confiscation of property in that country, or by punishing the subject if he returns. What a foreign country cannot do is to enforce such a law against the person or property of the subject here in England.

There is, therefore, nothing contrary to English law in a decree by the Sovereign and Government of the Netherlands designating as a conscript a Dutchman living in England under the protection of the Crown. What, in my view, could not have been done in England without the assistance of Parliament was to enforce this change of status by compelling the subject to join the Dutch colours. It was precisely here, however, that Parliament lent its assistance. The Netherlands Government made the applicant a member of the Netherlands forces by the decree. The Allied Forces Act, 1940, and the Allied Forces (Application of 23 Geo. V, c. 6) (No. 1) Order, 1940, rendered him amenable as such a member to the process contained in sect. 154 of the Army Act, provided that the appropriate request had been made under para. 3 (3) of the order in council.

Later in his argument, counsel for the applicant put the last two points rather differently. He submitted that only the British Parliament can legislate in Britain, or in respect of Britain. In view of the communication from the Attorney-General I cannot accept the first proposition. We are bound to say that the Government of the Netherlands can legislate here for the kingdom and A empire of the Netherlands, and, to some extent, for Dutchmen wherever they may be. Generally speaking, it cannot legislate for Great Britain, or for persons living in Great Britain, to any greater extent than it could do when in the Kingdom of Holland. It can legislate as fully as when it was within the territory of that kingdom, and, for the purposes of this case, that is enough, coupled with what Parliament has done. Further, it was submitted, as a proposition both of English law and of international law, that nothing short of an Act of B Parliament could empower a foreign legislature to sit here and pass valid legislation. Passages from WHEATON, INTERNATIONAL LAW, OPPENHEIM, INTERNATIONAL LAW and DICEY, CONSTITUTIONAL LAW were quoted to us in support of the proposition that no power could come into rivalry with the sovereignty of Parliament in this realm, for every nation possesses exclusive sovereignty and jurisdiction throughout the full extent of its territory. No one can doubt that a foreign legislature could not function here in the United C Kingdom against the will of the Government, even as foreign courts could not function here in the like case. Here we have, however, the case of a foreign government exercising its functions in the United Kingdom, not merely with the assent, but on the invitation, of His Majesty's Government in the United Kingdom. It does not seem to me to lie within the province of international law to measure or weigh the validity of such an assent or of such an invitation— D it is a domestic matter.

Does it, then, infringe our constitutional law? Here it seems to me to be important that the action of the Crown, on the advice of its responsible Ministers, is not challenged where it would be challenged if it were an unwarranted assumption of power. No authority was cited for this proposition. The subject matter is the relationship between His Majesty and His Majesty's government on the one hand, and Her Majesty Queen Wilhelmina and the government of E the Netherlands on the other; and this, not in time of peace, but in time of war, when the Netherlands are allied with our own country. This relationship is essentially a matter to be regulated by the Crown on the advice of its responsible ministers. It was suggested that, by its action, the Crown was purporting to give away some part of its sovereignty, and that without the assent of Parliament. I do not detect a trace of anything of the kind. The Crown has not conferred on the Sovereign and Government of the Netherlands anything F which in the least reduces or lessens the sovereignty of the government of this country, or its powers to deal with all those persons and matters which are the subject of such sovereignty.

In the result, therefore, I find that the royal decree and the summons issued under it were not invalid by English law in the circumstances in which both were issued. And in view of what followed—namely, the Allied Forces Act, G 1940, and the Allied Forces (Application of 23 Geo. 5, c. 6) (No. 1) Order, 1940 —they justified, so far as English law is concerned, the apprehension and detention of the applicant on Mar. 14, 1941.

The decree and the summons are challenged on another ground—namely, that they were invalid under Dutch law. It is contended that the power exercised, therefore, by the Netherlands Government was not one conferred by "the law of that power," and so the Allied Forces Act, 1940, does not apply. H In order to decide this question it was necessary for us to hear evidence as to the law of the Netherlands touching this matter. At this point we were met by the contentions of the respondents that, since we had the decree of a government admitted by our own government in the fullest sense to be a sovereign dealing with one of its own nationals, it was not for the courts of this country to listen to arguments impugning its validity. Now, in *Luther* v. *Sagor* (1), ROCHE, J., said, at p. 474:

> If a foreign government is recognised by the government of this country the courts

> of this country may and must recognise the sovereignty of that government and the validity of its acts . . .

When the same case was considered by the Court of Appeal, WARRINGTON, L.J., laid it down as well-settled that the validity of the acts of an independent sovereign government in relation to property and persons within its jurisdiction cannot be questioned in the courts of this country. He quoted with approval CLARKE, J., delivering the judgment of the Supreme Court of the United States, in *Oetjen* v. *Central Leather Co.*, and said, at p. 302 :

> Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the Government of another done within its own territory.

In *Paley* (*Princess Olga*) v. *Weisz*, SCRUTTON, L.J., said, at p. 725 :

> . . . our courts are bound to give effect to the laws and acts of that Government so far as they relate to property within that jurisdiction when it was affected by those laws and acts.

It will be observed that none of the above propositions go so far as to cover precisely the facts of this case, unless the phrase " persons within its jurisdiction " used by WARRINGTON, L.J., would include the applicant as a person within the jurisdiction of the Dutch courts. I do not think WARRINGTON, L.J., could have intended to cover such a case as the present, for the simple reason that he had not such a case in his contemplation. We are therefore thrown back on the reason for the rule, in order to ascertain whether the rule should extend to this case. The question is not without difficulty. I have come to the conclusion, however, that we ought not to extend it. The rule which prevents a court from pronouncing to be invalid some act, which may nevertheless be invalid by the law of the state which made it, is justified on many grounds, but principally on the grounds of the great advantage which flows from the recognition on the part of every civilised state of the rights of every other civilised state to deal with persons and property inside its own territory. That reasoning clearly does not apply to an act of a foreign country which deals with the personal freedom of a person living in England within the protection of the Crown. In that sphere the tendency has been for the protecting power to maintain its own independence.

The facts here are peculiar, for we have to deal with a decree which brings into play an Act of Parliament affecting the most important of the personal rights of a resident foreigner. If this court is not to enter upon this inquiry, there is no court to which the applicant can resort, for the only other courts which could investigate the validity of the decree, those of the Netherlands, are admittedly in abeyance. Moreover, some support for entering on the inquiry may perhaps also be derived from the fact (although I do not attach much importance to it) that in the Allied Forces Act, 1940, s. 1 (1), Parliament enables foreign countries allied with His Majesty to exercise in England " all such powers as are conferred upon them by the law of that Power." In all the circumstances I have come to the conclusion that we ought to enter upon this inquiry and to discover whether under the law of the Netherlands, this decree and the summons issued under it are valid.

Two views have been presented to us. Dr. Bisschop tells us that neither in emergency or otherwise has the sovereign any greater power in relation to legislation than that which is conferred upon him by the written constitution. The oath taken by the sovereign ascending the throne is that " she shall always uphold and maintain the constitution." The constitution, says Dr. Bisschop, has no provision for dealing with emergencies. The decree is invalid because

> (*a*) there is no statutory authority for legislation to any such effect by decree, but, on the contrary, it is provided by art. 188 of the constitution, as already mentioned, that conscription must be regulated by statute ; (*b*) it purports to impose penalties, which according to art. 57 of the constitution can only be done by statute ; (*c*) it purports to have effect outside the territory of the Netherlands, although by arts. 2 and 125 of the constitution its provisions and those of statutes are only binding for the kingdom in Europe ; (*d*) it purports to compel subjects both to join the forces and to serve outside the Netherlands, although by art. 192 of the constitution conscripts in the army (in distinction to naval ratings) cannot be compelled to serve outside the Netherlands ; (*e*) it purports to compel subjects to serve for an indefinite period, although it is provided by art. 193 of the constitution that when in case of war conscripts not on active service are called up a bill must immediately be brought before Parliament to

regulate their retention in the service; (*f*) it was issued outside the Netherlands, although the constitution by art. 21 in effect provides that legislation must be passed within the Kingdom.

As to point (*a*), the lack of statutory authority, it is not denied that according to the constitution (art. 188) it needs a statute to regulate conscriptions; nor that in the events which happened no statute was or could be passed. As to point (*b*), it is also the fact that the decree imposed, in case of non-compliance, the penalties laid down by the Conscription Act, 1922, of the Netherlands. As to A point (*c*), the decree does purport to have effect outside the territory of the Netherlands. Art. 2 of the Netherlands constitution is not concerned however with the scope of royal decrees, but only with that of the constitution. The article reads as follows:

> The constitution is binding only for the kingdom in Europe, in so far as the contrary does not appear therefrom. Where in the following articles the kingdom is mentioned, only the kingdom in Europe is intended. B

From this article we may perhaps learn that the powers of the sovereign of the Netherlands over her subjects outside the kingdom of the Netherlands, of whom there are, I believe, many millions, are not necessarily to be found in the written constitution. Art. 125 is as follows:

> The statutes are binding only for the kingdom in so far as it is not expressed therein that they shall be binding for the Netherlands-Indies, Surinam and Curacao. C

It is an article which is not perhaps of much interest or value in this inquiry. It affords another reminder that the sovereign is not merely the Queen of what we call Holland, but also of an empire overseas. Neither article even tends to establish that the decree in this case contravened the constitution.

As to point (*d*), Dr. Bisschop is in error when he says that by art. 192 of the constitution conscripts in the army cannot be compelled to serve outside the Netherlands. It would indeed be an odd article if it so provided. An army D which disintegrates at the moment that it succeeds in driving the enemy across the frontier would not be of much service to defend its country. The article in question merely provides that conscripts for the land forces may not, without their consent, be sent to the Netherlands-Indies, Surinam and Curacao.

As to point (*e*), the decree does purport to compel subjects to serve "for the duration of the war or for such longer time as the Queen shall deem necessary." Art. 193 is as follows: E

> When in case of war, danger of war or other extraordinary circumstances the conscripts, who are not on active service, are wholly or in part called to the colours by the King by way of extraordinary measure a bill is submitted to the States General without delay in order to determine in so far as is necessary that the conscripts shall remain with the colours.

From this article it appears that it may fall to the lot of the sovereign F "exceptionally" to call conscripts to the colours without the submission, and still more without the enactment, of any statute to regulate the length of service. To me it appears that this article may well impose on the sovereign, or possibly the government, a duty to submit without delay, that is to say, as soon as possible, a bill to determine the length of service of conscripts. I have no reason to suppose that such a bill will not in due course be submitted to the States General; though I do not suppose that Queen Wilhelmina is today in a position to fix a day for this G session of the States General.

The other view, expressed by Dr. de Moor and Dr. Snyders, is that the written constitution of the Netherlands is not exhaustive, but that in certain emergencies, to deal with which the written constitution is not apt, the government must take such steps as are necessary in the interests of the state. In such a case the Crown should act upon the advice of its ministers. A great deal of material showing that the Dutch legislature and the Dutch courts have acted or are H expected to act on this basis was quoted to us. For instance, the opinions of leading members of the committee of state which drew up the constitution in 1815; the fact that, although from 1830 to 1840, when Belgium seceded, all the legislation was passed by a States General so reduced in number that not one statute was passed in a chamber containing the necessary quorum demanded by the constitution, yet these laws have ever since been regarded as binding without any confirmation; the fact that in 1865, Thorbecks, one of the greatest authorities on Dutch constitutional law and a minister, stated openly in the

Dutch legislature that one of the articles of the constitution, namely, art. 131, did not apply in case of war (this article reserved certain matters to the Provincial Councils); statements in the States General by the committee on the bill concerning military inundation of 1889 that the commander-in-chief would take no notice of law or other prescriptions, but would do what the emergency demanded.

Next come the opinions of writers of authority on Dutch constitutional law. The views of P. Van Meeurvan, expressed in 1860, may be summarised as follows:

> Our constitution is apparently brought into being only for normal circumstances.

Huart, dealing with art. 100 of the criminal code, which provides penalties for the wilful contravention of prescriptions given and published on behalf of the government either in the interests of neutrality or in the interest of the state, says:

> It must have been the intention of the art. 100 to establish a duty enforceable by penalty to obey the prescriptions given by the government in the interests of the neutrality or the safety of the state, no matter whether the prescriptions given are or are not within the competence of the issuing authority.

Of course, "the competence of the issuing authority" in this passage means according to the constitution. The importance of art. 100 is that it provides in advance for the breach of orders which the government may give in case of war, leaving the government for the time being to make the prescription or order. It is, as Dr. Snyders claims, an article which can only be explained on the understanding that powers not expressly provided for in the constitution exist in time of emergency.

HUART, again, in his book, THE NETHERLANDS' PART IN THE DEVELOPMENT IN THE LAW OF NEUTRALITY DURING THE WORLD WAR, speaks of the extraordinary powers which followed from the danger of war or the state of siege. Struycken, in his work on Dutch constitutional law, published in 1928, with the fate of Belgium in the last war in mind, observes prophetically:

> The fate of Belgium in the European war has caused it to be realised that it will sometimes not be possible to observe a provision as the one of art. 21, para. 2. There will therefore be every reason to permit in the constitution deviation therefrom in extraordinary circumstances, if possible with the consent of the States General. In the revision [of the constitution] of 1922, however the provision remained unaltered.

It was this passage, or its equivalent in the 1915 edition of the same book, which led to inquiries in the First Chamber of the States General as to whether art. 21, para. 2, ought not to permit the temporary transfer of the seat of the government in times of emergency. The government's answer, quoted by Huart, was this:

> The possibilities which may make the transfer of the seat of the government outside the kingdom unavoidable, cannot be adequately described in the constitution. The deviation from the constitutional prohibition would have to be accepted, especially since many provisions of the constitution could not be strictly observed in the case of enemy invasion. *Impossibilium nulla obligatio.*

I refrain from quoting all the reasoning which leads me to prefer the evidence of Dr. de Moor and Dr. Snyders, as I refrain from giving all the reasons which lead me to reject the evidence of Dr. Bisschop and the gentleman who says quite simply that he holds the same views. Broadly, the theory enunciated by Dr. de Moor and Dr. Snyders is supported by something more than the pronouncements of statesmen responsible for the creation or the administration of the constitution under debate, and the learning of Dutchmen who have been students of Dutch constitutional law. To an English court the acid test will always be decided cases, rare and infrequent though such decisions must be. Dr. Snyders has told us of such a decision in 1917. The High Court of the Hague held that art. 100, para. 2, does not demand that the prescriptions be given competently and lawfully, but with a view to the serious circumstances, and it apparently demands immediate obedience to all the prescriptions of the government. In that case it was urged on behalf of the accused that the Minister of War, who was responsible for the prescription in question, did not possess statutory competence to make it. When the accused appealed to the Supreme Court of the Netherlands, he did not even rely on the argument of incompetence, and the appeal was dismissed. Again, shortly before the invasion of the Netherlands in 1940, a person was prosecuted before the district court of Rotterdam, of which Dr. de Moor was a member, for contravening the provisions of the proclamation of Sept. 3, 1939. This was neither a law nor a general measure of government, nor even a royal decree; nevertheless it forbade a number of acts normally neither forbidden nor punishable. The court condemned the accused person to imprisonment for 4 years under art. 100.

The answer of Dr. Bisschop to all this is simple. He does not deny the historical facts relied upon by Dr. de Moor and Dr. Snyders. He dismisses all of them as lying outside the province of law. In effect, he says that in an emergency strong men disregard the law, and do what is necessary to preserve A
or rescue the state, relying on the good sense of their countrymen in the day of reckoning to indemnify them for the illegalities which they have committed. I have considered this view in order to see if it can be said to account for the instance quoted by Dr. de Moor and Dr. Snyders. Here it fails completely. No act to confirm the legislation from 1830 to 1840 has ever been thought necessary. The States General has deliberately refrained from attempting to extend the constitution so as to provide for emergencies. The decisions of the B
courts under art. 100 have gone unchallenged.

In the result I find myself convinced of the accuracy and reliability of the views expressed by Dr. de Moor and Dr. Snyders. Putting aside the various obvious inaccuracies to be found in Dr. Bisschop's evidence, his whole theory seems to me to break down completely, whether tested by the pronouncements of responsible members in the States General or its committees, by the learning of constitutional lawyers, or by decided cases. Accordingly, I find that the C
royal decree under debate is by Dutch law valid and effective. By that decree and the summons issued under it, the applicant became a member of the Dutch forces as between himself and the Dutch government. And by the Allied Forces (Application of 23 Geo. 5, c. 6) (No. 1) Order, 1940, the applicant became liable to powers put in force under sect. 154 of the Army Act. In my view the application must be dismissed. D

Croom-Johnson, J.: This is an application for a writ of *habeas corpus* intended originally to be directed to the chief police officer at Bow Street police station on behalf of Jean Jacques Amand, a Netherlands subject, to test the validity of his arrest and detention hereinafter mentioned. On Mar. 14, 1941, he was arrested by a police officer of the metropolitan police and detained in custody at Bow Street police station for the purpose of being handed over, as an absentee from the Netherlands Army, to the Netherlands military authorities E
now in this country. The applicant has been admitted to bail, but this court has to deal with the application as if he were still in custody.

The applicant is a Netherlands subject, 34 years of age, and has resided in this country, with the permission of the Home Office, for over 13 years. At all material times he was engaged in business in England. He is married to a British born woman and has two young children. After the invasion of Holland by the German army Her Majesty the Queen of the Netherlands and her government F
came to this country and remained here, and a part of the Netherlands forces apparently did the same. The States General and the Senate remained in the Netherlands. The Netherlands Government in this country desired to organise naval, military and air forces within the United Kingdom, and it became necessary to make arrangements for the discipline of these forces. Thereafter the applicant became aware, by a wireless message broadcast by the G
British Broadcasting Corporation, and by a notice appearing in the press, that all Netherlands subjects living in England were requested to send their particulars to the Netherlands consul in London. He did this, and in July, 1940, he underwent a medical examination at the request of the Netherlands authorities. The applicant was informed that this was for purposes connected with the Netherlands Army.

On Aug. 8, 1940, a decree was signed by Her Majesty the Queen of the Netherlands, H
upon the presentation of the Minister of Defence, concerning compulsory military service of Netherlands subjects residing in (amongst other countries) Great Britain and Northern Ireland. This decree was further signed as "promulgated" by the Minister of Justice on Aug. 14, 1940. It was published in the official gazette of the Netherlands. By art. 1 of the decree all Netherlands subjects born between Jan. 1, 1904, and Jan. 1, 1921, residing in the abovementioned territories (which therefore included the applicant) were required, in so far as they were not on active service with the naval or land forces, to

register for compulsory military service in the manner to be determined by the Minister of Defence. In case of non-compliance with that obligation art. 46 of the Netherlands Conscription Act was to apply. By art. 3 of the decree, such persons were designated ordinary conscripts. Article 5 stated that

> Our Minister of Defence will make provisions concerning the calling-up of persons intended in art. 4. He also appoints the places where they shall perform their active service.

Art. 6 was as follows:

> By the calling up intended in art. 5 the persons designated as ordinary conscripts are deemed to be enlisted in the naval or land forces as ordinary conscripts.

On or about Aug. 9, 1940, and again on or about Aug. 16, 1940, the applicant received what purported to be a written summons for military service or a calling-up notice from the Netherlands Ministry of Defence in England, ordering him to report on Aug. 20, 1940, at a named camp, and to meet the Netherlands officer in charge of Netherlands conscripts at Paddington Station. After interviewing the Netherlands authorities, and having been informed that he had to join the Netherlands Army, and having protested against a refusal to postpone his calling up for the purpose of attending to his business affairs, the applicant reported at Paddington Station on the appointed day and went to the specified Netherlands army camp. He again asked for leave to put his business in order, and this was again refused. After about a fortnight at the camp he was moved to another camp, where he met with a motor accident, after which he was given sick leave until Jan. 3, 1941. He duly reported at the new camp and stayed there until Jan 30, 1941, when he was given 7 days' leave. At the end of that leave period he asked the commanding officer in writing for a further period of leave to attend to his business, but he received a telegram directing him to return immediately. He was next interviewed by a police sergeant from Bow Street police station and requested to return immediately to the Netherlands army camp. He gave a promise, as he says in ignorance of his legal position, to return to the camp, but he did not do so, and, after further meetings and discussions with the police authorities at Bow Street, he was arrested by the police on Mar. 14, 1941, as an absentee. The applicant at no time signed any document expressing any willingness to join or acknowledging that he had joined the Netherlands forces, nor had he sworn any oath of allegiance to the Netherlands government or to the Queen of the Netherlands. I think that the protests of the applicant were directed to the refusal of his applications for leave in order to put his business in order, inasmuch as it is deposed to by Captain Hendricks, a captain of the Royal Netherlands Army, that the applicant at no time between Aug. 21, 1940, and Jan. 30, 1941, made any protest against being compelled to join the Netherlands Army. The applicant drew pay for himself and also allowances for his family from the time of his obeying the summons to report on Aug. 20, 1940.

As from May 10, 1940, the kingdom of the Netherlands was allied with His Majesty the King, and a short time thereafter, and at all material times, forces of that kingdom were present in the United Kingdom. On Aug. 22, 1940, the Allied Forces Act, 1940, received the Royal Assent. Sect. 1 (1) of that Act is as follows:

> Where any naval, military or air forces of any foreign power allied with His Majesty are for the time being present in the United Kingdom . . . the naval, military and air force court and authorities of that power may . . . exercise within the United Kingdom . . . in relation to members of those forces in matters concerning discipline and internal administration, all such powers as are conferred upon them by the law of that Power.

Sect. 1 (3) empowered His Majesty by order in council to provide for the application to members of any of such forces of a number of the provisions contained in the Visiting Forces (British Commonwealth) Act, 1933, therein set out, subject to such adaptations, modifications and exceptions as might be provided in the order.

On Oct. 11, 1940, the Allied Forces (Application of 23 Geo. V, c. 6) (No. 1) Order, 1940, was accordingly made, applying certain parts of the Visiting Forces (British Commonwealth) Act, 1933, with adaptations and modifications, to any body, contingent or detachment of the military forces of the Netherlands which is with the consent of His Majesty's Government in the United Kingdom, lawfully present in the United Kingdom. Among other provisions which were made applicable to the military forces of the Netherlands, it was provided that sect. 154, paras. (1), (4), (9) of the Army Act (which related to the apprehension of deserters and absentees without leave from a home military force) should, within the United Kingdom, apply in relation to a deserter or absentee without leave from a Netherlands force. The answer made to this application was that the applicant had been lawfully arrested and detained pursuant to sect. 154 of the Army Act (amended to include soldiers absent without leave by the Army Act Amendment (No. 2) Act, 1915, s. 5) as made applicable to the Netherlands forces by the legislation above-mentioned. A

The reply to that on behalf of the applicant was: (1) that the English legislation gives no power to the Netherlands Government to incorporate in their forces lawfully in this country a Netherlands subject already residing here under the King's Peace, and then to say that the Allied Forces Act, 1940, s. 1 (3) applies to him as a member of the Netherlands Army; (2) that the decree of Aug. 8, 1940, is invalid in Netherlands law as not being in accordance with the provisions of the Netherlands constitution, which is a written and exclusive constitution; (3) that, assuming the decree to be valid in Netherlands law, no authority is conferred in English law to conscript or recruit a Netherlands army here; (4) that, if the Allied Forces Act, 1940, impliedly legalises the presence here of the Netherlands forces, if it was to do more it should have said so; (5) that the status of a Netherlands subject resident in England cannot be affected by Netherlands legislation; (6) that the Allied Forces Act, 1940, is not retrospective; (7) that the Allied Forces Act, 1940, applies only to members of the Netherlands forces who came and landed here as such. It will be observed that the precise question raised is not whether the applicant was directly obliged by our law to obey the decree or the calling-up notices, although, incidentally, failure to do so might constitute absence without leave and so render him liable to be dealt with under sect. 154 of the Army Act. B C D

The effect of the decree as a matter of construction was not in dispute. Assuming it to be lawful, its language is that the applicant is deemed to be enlisted in (that is, to be a member of) the Netherlands forces. On that hypothesis it is not suggested that the present application can succeed. The short question therefore is: Was the applicant on Mar. 14, 1941, a member of the Netherlands forces (*a*) in Netherlands law, and (*b*) in the law of England?

E As to the first part of the question, the mere production of the decree is not enough; it does not prove itself, but I did not understand counsel for the Netherlands Government to argue that that was all he had to do, or that its mere production was conclusive as to its validity. It needed statutory provisions to render proof of the making of certain foreign and colonial laws unnecessary (Evidence Act, 1851, s. 7), and this decree was admittedly not within those provisions. However, the decree was proved and, indeed, admitted at the bar by the applicant's counsel, as having been made by the Netherlands Government established in this country as I have already set out. According to our procedure, evidence was then admissible, and possibly necessary, as to the meaning and legal effect of its provisions in Netherlands law. That, as I have said, was not necessary, as that was not the contest. What was sought to be done was to challenge the power and ability of the government which purported to make it so to do, and the power of the individuals who signed it to bind that government, and on that ground and on other grounds to challenge its validity in Netherlands law as being unconstitutional or contrary to constitutional law. Thereafter it was sought to say that the decree was and is of no effect in England and Wales by English law. F G

It was submitted by counsel for the Netherlands Government that our law does not permit the challenge of invalidity to be made. The argument on this point was as follows. If the Netherlands Government at the time of making the decree of Aug. 8, 1940, had had its seat of government in its own territory, it being manifestly an independent sovereign state, the courts of this country may and must recognise the sovereignty of that foreign government and the validity of its legislation and other acts of state. See *Aksionairnoye Obschestvo A. M. Luther* v. *Sagor (James) & Co.* (1). The courts of this country will not sit in judgment on the acts of the government of another done within its own territory: *Paley (Princess Olga)* v. *Weisz* (3); *Oetjen* v. *Central Leather Co.* (2). H

In *Luther* v. *Sagor* (1) WARRINGTON, L.J., stated the following proposition, at p. 548:

> It is well settled that the validity of the acts of an independent sovereign government in relation to property and persons within its jurisdiction cannot be questioned in the courts of this country.

The words "within its jurisdiction" raise the difficulty. In *Luther* v. *Sagor* (1) evidence was admitted to prove what the law was, but not, I gather, to question the power of the Russian Government to make it. The power of the foreign government to make laws relating to movable property not its own and not within its own territory (or jurisdiction in that sense) is not here in question: see *The Jupiter* (*No.* 3) (4). As to its nationals resident in another country, it was argued that the government of an independent soverign state may legislate for them (see DICEY, CONFLICT OF LAWS, 5th Edn., p. 507, but compare WHEATON, CONSTITUTIONAL LAW, 6th Edn., pp. 205, 206), but cannot enforce such legislation except in its own country. According to the affidavits of Dr. de Moor and of Dr. Snyders, there is nothing in Netherlands law to make legislation preventing the government from passing legislation binding on Netherlands subjects who are residing outside the Netherlands. This court would have no power to entertain an action for the enforcement, directly or indirectly, of a penal, revenue, or political law of a foreign state. (DICEY, CONFLICT OF LAWS, 5th Edn., p. 212).

A Netherlands subject abroad comes within the jurisdiction of the Netherlands Government when its seat of government lies within its territory, and on his return to his native country it would be no answer, if the government then sought to enforce the law against him, to say that he was abroad when the law was passed. The seat of the Netherlands Government, however, in the circumstances of the times, has ceased to be in its own territory, but, it was submitted, that makes no difference. The proper source of information as to a foreign power its status and sovereignty is the sovereign of this country through our government (*per* ROCHE, J., in *Luther* v. *Sagor & Co.* (1), at p. 473). In this case the Attorney-General, as representing our government, has made a statement at the bar in the following terms:

> The Government of the Netherlands is a government for the time being allied with His Majesty and established in the United Kingdom; it is established and exercising its functions in the United Kingdom with the assent and on the invitation of His Majesty's Government in the United Kingdom. His Majesty's Government recognise Her Majesty Queen Wilhelmina and her government as the Sovereign and Government of the Netherlands and as exclusively competent to perform the legislative administrative and other functions appertaining to the Sovereign and Government of the Netherlands.

The government of this country, therefore, still recognises the Netherlands Government as that of an independent sovereign state. That recognition apparently is effective as from the date of the establishment of the Netherlands Government in this country (see *per* BANKES, L.J.), in *Luther* v. *Sagor* (1), at p. 542, citing the American case of *Williams* v. *Bruffy* (5), and the decree has been proved to be an act of state of the Netherlands Government in England and so recognised by the English Government.

The difficulty I feel in the matter (a difficulty which, I understand, is shared by WROTTESLEY and CASSELS, JJ.) is that there is no reported decision in English law which supports the proposition that, with regard to a Netherlands subject who is in the jurisdiction or the territory of another power, the Netherlands Government has ever legislated for him. This case, after all, deals pointedly with the liberty of an individual residing here under the protection of the King's peace, and it is manifest that there are most unusual circumstances. The ordinary Netherlands courts are not available to the applicant. It may very well be that to examine the validity of the decree would be to deny the sovereign independence of this particular state, or to commit a breach of what is called the comity of nations, and to deny full force to our own government's statement. It was submitted that the principle enunciated in the decided cases is wide enough to cover this case. I am attracted by the argument, and I have been inclined, on principle, to accept it; but, in the absence of express authority going so far, I am not prepared to hold that this court ought not to inquire, and cannot inquire, into the power of the Netherlands Government here to make the decree in question or to examine its validity in Netherlands law when made.

Assuming, therefore, that we may or must examine the competence or ability of the Netherlands Government here to make the decree and its validity when made, I have considered all the evidence and documents laid before us as to what in fact is the Netherlands law in all its detail, and all the arguments adduced. For myself, I prefer the evidence of Dr. Snyders and Dr. de Moor to that of Dr. Bisschop and Dr. Cate. The two former witnesses speak with great authority and their evidence seemed to me to be more accurate and less open to effective criticism than that of the other two witnesses, and their knowledge wider and A more up to date. In particular, I was impressed by the argument relating to art. 100 of the Netherlands constitution. I think that the necessary inference from it is that, inasmuch as disobedience to a prescription of the government in time of war is thereby rendered punishable criminally, there must be power in some officer of the state to make the prescription. Dr. de Moor deposes to a judgment of a Netherlands court, of which he was a member in 1940, imposing a sentence of 4 years' penal servitude under art. 100 for breach of a prescription B by proclamation apparently not made by the usual legislative means or bodies indicated in the written Netherlands constitution. It is noteworthy that, even in reply, neither Dr. Bisschop nor Dr. Cate make any effective reference to this judgment or challenge its validity in their affidavits. I am also impressed by the evidence as to the judgment of the court of the Hague in 1917, and as to the events following upon the secession of Belgium in 1830, when it was impossible for the States General to provide the quorum laid down for its meetings by the C written constitution as it then stood. I have also had the advantage of reading and considering in advance the judgment just read by Wrottesley, J., on that point, and I concur in its reasoning and result.

I accept the evidence that there is, in Netherlands law, a power in the Netherlands governing bodies, or such of them as survive, to make and execute acts of state legislation, prescriptions and the like, which have the force of law during D a time of emergency. I also accept the evidence of the respondents' witnesses that the Netherlands constitution is not exclusive of all other constitutional powers. It is worth calling attention to the duty laid upon all Netherlands subjects by para. 187 of the constitution to co-operate in the maintenance of the independence of their country and in the defence of its territory. The precise point at which the line of emergency must be drawn may be difficult of ascertainment, but I cannot conceive of any patriotic Netherlands subject coming to the E conclusion that there was no emergency when his country was overrun by a foreign enemy and when his sovereign and her ministers were fugitives in a strange land. I find that there was power in the Netherlands Government here to make the decree, and that it is valid according to Netherlands law.

As to enforcing the valid decree so made, having regard to the Allied Forces Act, 1940, and the order made thereunder, I can see nothing in the decree which infringes upon the sovereign independence of our own state or the functions of F Parliament. In times of peace a foreign state cannot lawfully maintain armed forces in this country or lawfully discipline them when here. In times of war, it is for His Majesty the King on the advice of his ministers (i.e., our government) to permit such forces to be maintained here. I cannot see how any such permission effects any infringement of the status of this country as an independent sovereign state, *a fortiori* when the foreign state in question is one of our allies G in a common cause; nor can I see how such permission can be said to be an infringement of the rights of Parliament. In any event, Parliament, by passing the Allied Forces Act, 1940, appears to have consented. On this point and all the other points raised I agree with the reasons given by Wrottesley and Cassels, JJ., except that I prefer to say nothing as to a suggested estoppel.

In the result, in my judgment the applicant was at the material date, Mar. 14, 1941, in Netherlands law and in English law, a member of the Netherlands H forces lawfully in this country; he was absent without leave, and as such, as a matter of English law, was subject to the provisions of the Allied Forces Act, 1940, and to sect. 154 of the Army Act, as applied. It follows that his arrest and detention were not unlawful and the application must be dismissed.

The question whether the applicant enlisted voluntarily or was conscripted by the decree does not seem to me to be decisive of any question in this case. In any event, after the calling-up notice, I am satisfied that the applicant served in the Netherlands Army until Jan. 30, 1941, and I believe that, if he had been given leave of absence to attend to urgent business affairs as he wished, he would never have raised any question as to the Netherlands Government's powers to keep him there. He was receiving pay, wore uniform, accepted discipline by applying for leave, and took advantage of the provisions made by the Netherlands authorities for his wife. In view of the evidence to the contrary, I do not find myself able to accept his evidence that he joined his country's forces and remained in them under protest. By every test of appearance, he was a serving member of the Netherlands Army during those months, but, inasmuch as there is no evidence as to whether those facts would be sufficient in Netherlands law to make him a member of the Netherlands forces, I treat them as merely part of the history of the case and as having no determining value.

Cassels, J.: I agree, but by reason of the issues raised and the nature of the case, I desire to add a few observations. It is contended on behalf of the applicant that while living under the protection of the British government he cannot be affected by the legislation, assuming it to be such, of the Queen and government of his own country. It is said that the decree of Aug. 8, 1940, in accordance with which he was served with a notice calling him up to the Dutch army here, was invalid according to Dutch law and unlawful according to English law.

Can the validity of that decree be inquired into in our courts ? Counsel for the applicant asserts that it can ; counsel for the respondents says that it cannot ; and the Attorney-General submits that we can listen to argument as to what the decree means, but that once it is accepted that it emanates from the Queen who, with her government, is recognised as the sovereign government, we cannot listen to argument as to whether or not it is legislation. It is well settled that the courts of this country cannot question the validity of the acts of an independent sovereign government in relation to property and persons within its jurisdiction (*Mighell* v. *Johore Sultan* (6) and *Luther* v. *Sagor* (1)). Does the same principle apply when the act, the validity of which is questioned, is the act of a sovereign government sojourning temporarily by reason of emergency in this country and recognised as the legislative authority by the government of this country ? Does the same principle apply when that act affects a national of that sovereign government resident in this country under the protection of the government of this country and its laws ?

Upon this point there seems to be no authority. I agree with Wrottesley and Croom-Johnson, JJ. I am impressed by the fact that the Netherlands courts no longer function. The applicant cannot apply for redress in his own courts. I know that the principle " rests at last upon the highest consideration of international comity and expediency," but I think it would be wrong to say of our courts that, upon such a question as this, and at such a time, they are closed to the nationals of a foreign sovereign temporarily resident in this country and recognised for legislative purposes by our government. A great deal of argument and evidence were devoted to this question. The circumstances under review are exceptional. I agree that we ought to go into this matter. After due consideration, I hold that this decree was valid according to Netherlands law as that law has been deposed to before this court in the affidavits of Dr. Snyders and Dr. de Moor, whose testimony I accept.

In 1922 the Netherlands constitution had added to it an article dealing with conscription. In the same year a conscription act was passed, and art. 46 of that statute provided the punishment for those who did not fulfil their obligations. The decree of Aug. 8, 1940, was made without any statute, in a foreign country, and by the Queen alone, although with the assistance of her ministers. Upon that the applicant's deponents drew attention to art. 21 of the constitution, which provides that in no circumstances can the seat of the government be transferred outside the kingdom ; to art. 57, which provides that provisions to be enforced by punishment require the virtue of a statute ; to art. 112, which provides that the legislative power is exercised by the King and the States General jointly ; and to art. 193, which provides that in time of war or danger of war a bill is to be submitted to the States General to determine the period of military service.

If I am to accept the submissions as to the Netherlands law made on behalf of the applicant by Dr. Bisschop, then the only way in which the government of the Netherlands could have met the situation which arose in May, 1940, would have been to have requested the German invaders to delay their progress while the Dutch Government met and amended the constitution—an elaborate process which involves the dissolution of both houses and an election. That was impossible. Is it to be said, then, that when the Queen and her government were driven from their own land and found refuge in this country, they were powerless to legislate or to administer, or to increase from their nationals here the remnant of their armed forces which had also escaped, and that, though the government of this country gave them, as allies, the fullest recognition ? In my view, the constitution does not bring about such a state of affairs. Art. 137 says that

> All Netherlanders able to do so are obliged to co-operate in the maintenance of the independance of the kingdom and in the defence of its territory.

Counsel for the applicant submits that there is no law of emergency, and adds that it is a dream with no definite outlines. He asks : (1) " What constitutes an emergency ? " and (2) " If you say that in an emergency you can do anything who are you ? " I hesitate to attempt a full definition of emergency, but surely for a Queen and her government to be dispossessed of their country by force of arms constitutes an emergency. It is to be noted that some of our own legislation passed by reason of the situation created by the war has been entitled emergency legislation. The answer to the second question is : " We are that Queen and that government and, in the country where we are, the government has recognised us as exclusively competent to perform our legislative, administrative, and other functions."

By the law of the Netherlands the applicant became a member of the Netherlands Army by reason of the decree and the calling-up notices. There is no evidence that he made any appeal for exemption. Provision was made for this in art. 7 of the decree and art. 15 of the Netherlands Conscription Act of 1922. He says that he protested to the commanding officer against being compelled to join the Dutch Army and asked for leave to return to London to put his business in order. The officers say that he made no protest. If he protested at all I think that he protested against not getting a postponement or leave.

A further contention on behalf of the applicant is that he is entitled to succeed by English law though the decree was valid by Netherlands law. The Allied Forces Act, 1940, came into operation on Aug. 22, fourteen days after the decree of Aug. 8. The order in council applying the Act to the Netherlands Army was made and became operative on Oct. 11. It may well be that between Aug. 8 and Oct. 11 there was no provision by the law of this country whereby the applicant could have been compelled in this country to obey his calling-up notices, if he had not complied with them. After Oct. 11 (by virtue of the Allied Forces Act, 1940, and the order in council made thereunder) he was liable to arrest on proper request by our police, if absent without leave. He was absent without leave ; the request was made for his arrest ; and he was arrested and detained. In my judgment he was lawfully detained.

Writ refused.

Solicitors: *Gisborne & Co.* (for the applicant) : *Stephenson Harwood & Tatham* (for the Mininter of Defence of the Netherlands); *Treasury Solicitor* (for the Secretary of State for Home Affairs).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

WOOD *v.* SMALLPIECE.

[Court of Appeal (Lord Greene, M.R., and Luxmoore and Goddard, L.JJ.), **January 19, February 2, 1942.**]

Emergency Legislation—Mortgages—Foreclosure order absolute—Whether leave necessary for writ of possession—Courts (Emergency Powers) Act, 1939 (c. 67), *s.* 1 (2) (*b*)*—Possession fo Mortgaged Land (Emergency Powers) Act,* 1939 (c. 108).

Mortgages—Foreclosure—Order for delivery of possession contained in order absolute—Mortgagee's right to possession without leave of court—Courts (Emergency Powers) Act, 1939 (c. 67), s. 1 (2) (*b*)*—Possession of Mortgaged Land (Emergency Powers) Act,* 1939 (c. 108).

A mortgagee obtained an order for foreclosure *nisi* on Aug. 16, 1940, leave to institute the proceedings having duly been obtained pursuant to the Courts (Emergency Powers) Act, 1939, s. 1 (2) (*b*). An order for foreclosure absolute was obtained on June 12, 1941. The order directed that the mortgagor should "forthwith deliver to the plaintiff possession of the said property." Possession not having been given, the mortgagee applied under the Courts (Emergency Powers) Acts for leave to enforce the order absolute by the issue of a writ of possession :—

A HELD : the effect of an order for foreclosure absolute being to destroy the mortgagor's interest in the mortgaged property and to vest the same at law and in equity in the mortgagee, no leave to enforce the order for possession is necessary. The order for delivery of possession is inserted in the order for foreclosure absolute only to avoid multiplicity of proceedings.

[**EDITORIAL NOTE**. It was here sought to be said that the interpretation clause in the Courts (Emergency Powers) Act, 1939, s. 3 (2) brought foreclosure proceedings B within that Act. The subsection states that references to judgments or orders for the recovery of possession of land includes references to any judgment or order the effect of which is to enable a person to obtain possession of land, and in particular includes, in relation to a mortgagee, a judgment or order for the delivery of possession of land. At first sight it might be thought that these words were appropriate to foreclosure proceedings, but, as the Court of Appeal point out, they must be read with reference to the particular subject-matter which they are defining, that is, the recovery of posses- C sion of land by a mortgagee by reason of a default in the payment of money. When a mortgagee recovers possession under an order absolute for foreclosure he recovers possession as owner of the land by virtue of the foreclosure, and not on account of any default in payment. The Courts (Emergency Powers) Act, 1939, and the Possession of Mortgaged Land (Emergency Provisions) Act, 1939, do not, therefore, apply to an order for the recovery of possession of the land included in an order absolute for foreclosure. In so far as the court holds that no leave to proceed is necessary since the mortgagee is exercising rights vested in him as owner of the land, it seems to give D some support to the dissenting judgment of LORD GREENE, M.R., in *Smart Bros.* v. *Ross*, [1942] 1 All E.R. 1 ; Digest Supp. ; but, though it would be easy to suggest similarities between the subject-matters of the two cases, it cannot be stated with any certainty that the judgment here has any bearing on the decision in that case.

FOR THE ACTS HERE DISCUSSED, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 32, pp. 946, 1179. See also BUTTERWORTH'S EMERGENCY LEGISLATION, Statutes Volume, pp. 206, 220.]

Cases referred to :

E (1) *Whitstable Urban District Council* v. *Tritton*, [1941] 3 All E.R. 405 ; Digest Supp.

(2) *S. & A. Services, Ltd.*, v. *Dickson*, [1940] 2 K.B. 219 ; [1940] 3 All E.R. 98 ; Digest Supp. ; 109 L.J.K.B 665 ; 163 L.T. 74.

APPEAL by the defendant from an order of MORTON, J., dated Nov. 18, 1941. The facts are fully set out in the judgment of LORD GREENE, M.R.

F *A. H. Pocock* for the appellant.

Ingram J. Lindner for the respondent.

Pocock : No order was made by MORTON, J., on the ground that leave to enforce the order for foreclosure absolute by applying for an order for possession was unnecessary. If the right to possession arises out of the order for foreclosure absolute, the order for foreclosure *nisi* is given effect to and that order is obtained by reason of default in the payment of money. The circum- G stances of a defendant may change between the time of the order for foreclosure *nisi* and the time when the order is made absolute. It is not unreasonable, therefore, that the matter should be considered twice during the course of the proceedings.

Lindner : No leave under the Courts (Emergency Powers) Act, 1939, as amended by the Possession of Mortgaged Land (Emergency Provisions) Act, 1939, is necessary to enforce the order for delivery of possession contained H in the order for foreclosure absolute. Sect. 1 (3) of the former Act, as amended by s. 2 (1) of the latter Act and read in conjunction with s. 3 of the former Act as amended by s. 2 (2) of the latter, only makes leave necessary where the order for delivery of possession is in consequence of a default in the payment of money. In the present case, the judgment or order for delivery of possession is not by reason of default in the payment of money, but by reason of the order for foreclosure absolute, which determines all the rights, titles and interest of the mortgagor in the property. The order for delivery of possession, therefore, has nothing to do with the payment of money, but is purely ancillary to the order for foreclosure. The order for delivery of possession need not have been included. It is conceded that, but for the default, the order for foreclosure absolute would not have been made, but, once the order for foreclosure absolute is made, no question of default arises on the making of an order for delivery of possession under it, the mortgagor having no longer any interest in the property. The mortgagee, the property being vested in him, only needs to enforce the order. *Whitstable Urban District Council* v. *Tritton* (1) and *S. & A. Services, Ltd.*, v. *Dickson* (2) have no application to the facts of the present case. Quite apart from this, the court has already considered whether a case for relief has been made by the mortgagor when application was made for leave to institute the proceedings. The consideration of the question of relief after foreclosure absolute might lead to an impossible position, since the court could not grant relief without re-opening the foreclosure. The court has no jurisdiction so to do under the Courts (Emergency Powers) Acts.

Pocock, in reply:

Lord Greene, M.R. [delivering the judgment of the court]: This appeal raises a question as to the application of the Courts (Emergency Powers) Acts to foreclosure proceedings. The point is one of practical importance, and we were informed by counsel that different views had been taken in Chancery chambers with regard to it.

The action was for foreclosure of a mortgage dated Dec. 18, 1934. The leave of the court to institute the proceedings was duly applied for and obtained pursuant to the Courts (Emergency Powers) Act, 1939, s. 1 (2) (*b*), and an order *nisi* was made on Aug. 16, 1940. The appellant, the mortgagor, having failed to pay the sum due, an order for foreclosure absolute was made on June 12, 1941. The order directed in the usual form that the appellant should thenceforth

> . . . stand absolutely debarred and foreclosed of and from all right title interest and equity of redemption of in and to [the mortgaged property] and that he should forthwith deliver to the plaintiff possession of the said property.

Possession not having been given, the respondent applied under the Courts (Emergency Powers) Acts by summons dated Aug. 18, 1941, for leave to enforce the order absolute by the issue of a writ of possession. This summons was adjourned into court for argument before Morton, J., who held that no leave to issue a writ of possession was necessary, and accordingly made no order on the summons.

It is, we think, clear that, under the Courts (Emergency Powers) Act, 1939, as originally passed, the leave of the court to issue a writ of possession consequential on an order for foreclosure absolute was not required in the case of proceedings instituted after the commencement of the Act. The only provision in the Act which affects foreclosure proceedings is that contained in sect. 1 (2) (*b*), under which, in the case of proceedings instituted after the commencement of the Act, the only leave required is that which must be obtained before the proceedings are instituted. The real question, and in our opinion the only question, upon which any doubt could be entertained is whether the position has been altered by subsequent legislation.

The only statute which it is necessary to consider is the Possession of Mortgaged Land (Emergency Provisions) Act, 1939. This Act received the Royal Assent some three weeks after the Courts (Emergency Powers) Act, 1939. It was passed to remedy an obvious defect in that Act, which had made no provision for the case of a mortgagee desirous of enforcing his common law right to obtain possession. It was accordingly provided that, in the case of mortgages made before Sept. 3, 1939, the right to obtain possession should only be exercisable in the event of default in payment of the mortgage money or interest thereon or breach of obligation under the mortgage. This restriction does not apply to cases where possession has been obtained before the passing of the Act, but it applied equally to proceedings commenced before and after the passing of the Act. In cases where there has been " an order or judgment for the recovery or delivery of possession of land by (sic, the words ' or to ' must be supplied) a mortgagee thereof " there shall be deemed to have been a default in the payment of money unless the contrary appears (s. 1 (3)).

Having thus limited the mortgagee's right to obtain possession to cases where a default had taken place, the Act proceeded to bring such cases into line with the default provisions of the Courts (Emergency Powers) Act, 1939. This was effected by an amendment of the Courts (Emergency Powers) Act, 1939, s. 1 (3), a sub-section which prohibited the enforcement of judgments or orders "for the recovery of possession of land in default of payment of rent" without the leave of the court. The amendment extended the scope of the subsection by inserting, after the words quoted, the words "or for the recovery of possession of land by the mortgagee thereof by reason of a default in the payment of money." The interpretation section of the Courts (Emergency Powers) Act, 1939—sect. 3—was also amended by the insertion of a new subsect. (2) in the following words:

> References in this Act to judgments or orders for the recovery of possession of land include references to any judgment or order the effect of which is to enable a person to obtain possession of land, and in particular includes, in relation to a mortgagee, a judgment or order for the delivery of possession of land.

The effect of the Possession of Mortgaged Land (Emergency Provisions) Act, 1939, may be summarised as follows. First, the mortgagee's common law right to obtain possession is limited to cases of default. Secondly, where a judgment or order for possession has been obtained by reason of such default, it can only be enforced by leave of the court under the Courts (Emergency Powers) Acts. The mischief with which the Act was obviously intended to deal and the machinery provided for dealing with it are thus reasonably clear. Foreclosure proceedings had already been provided for in the Courts (Emergency Powers) Act, 1939, itself, and no reason is apparent why any further protection to the mortgagor in such proceedings was necessary. It is said, however, that the language of the Possession of Mortgaged Land (Emergency Provisions) Act, 1939, is wide enough to cover the case where a mortgagee, having obtained an order for foreclosure absolute, seeks to enforce his consequential right to possession of the mortgaged land. It is pointed out that the order absolute directs the mortgagor to deliver possession to the mortgagee, and it is said that this brings the order within the new definition clause. In our opinion this argument does not bear examination. The definition clause is inserted for the purpose of defining the particular subject-matter dealt with, and this, in the case of mortgages, is judgments and orders for the recovery of possession of land by a mortgagee thereof "*by reason of a default in the payment of money*." The question, therefore, resolves itself into this: Is the order for delivery of possession contained in an order for foreclosure absolute a judgment or order for the recovery of land by or delivery of possession of land to a mortgagee by reason of a default in the payment of money within the meaning of the Courts (Emergency Powers) Act, 1939, as amended by the Possession of Mortgaged Land (Emergency Provisions) Act, 1939? Quite apart from the considerations based on the apparent purpose of the latter Act, we are clearly of opinion that the answer to this question must be in the negative. The effect of an order for foreclosure absolute is to destroy the mortgagor's equity of redemption as the result of his default in payment of the money due under the mortgage and to vest the mortgaged land at law and in equity in the mortgagee. The consequential order for possession is inserted, not by reason of the default in payment of the mortgage money, the effect of which is exhausted by the foreclosure, but in aid of the mortgagee's title as owner of the land. There is, strictly speaking, no need to insert an order for delivery of possession in the order absolute. It is merely inserted for convenience in order to avoid multiplicity of proceedings. If it were omitted, the mortgagee would have to take separate proceedings to recover possession and such proceedings would be based, not on the mortgagor's default, but on the mortgagee's own title as owner of the land.

Confirmation of this view, if confirmation is needed, is to be found in the fact that, if, after foreclosure absolute, a further application to the court were necessary before possession could be obtained, any relief granted to the mortgagor in the matter of the payment of the mortgage money would, in effect, be equivalent to re-opening the foreclosure.

One further point needs mention. The amendments made by the Possession of Mortgaged Land (Emergency Provisions) Act, 1939, refer to judgments and orders for the recovery or delivery of possession of land. It is suggested that the phrase "judgment for recovery of possession" is the correct phrase to describe the relief granted at common law to a mortgagee seeking to enforce his common law right to possession, and that the phrase "order for delivery of possession" is the correct phrase to describe relief granted in equity, and is apt, therefore, to describe the order for possession contained in a foreclosure order absolute. This argument is, in our opinion, unsound. If the only relief in the matter of possession which a court of equity could give were that contained in the order for foreclosure absolute, there would be force in it; but this is not the case, since orders for delivery of possession in enforcement of the mortgagee's common law right can be made in the Chancery Division under R.S.C., Ord. 55, r. 5a, and such applications are now assigned to that division by Ord. 5, r. 5a. The appeal is dismissed with costs.

Solicitors: *Adam Burn & Son*, agents for *Triggs, Turner & Co.*, Guildford (for the appellant); *Rising & Ravenscroft* (for the respondent).

[*Reported by* W. K. Scrivener, Esq., *Barrister-at-Law.*]

WORTHING CORPORATION *v.* SOUTHERN RAILWAY CO., HALL & CO., LTD., AND HORSHAM AND WORTHING AREA ASSESSMENT COMMITTEE.

[Chancery Division (Uthwatt, J.), **October 23, 28, 29, 1941, January 22, 1942.**]

Rates and Rating—Railway—Railway hereditament—Jurisdiction to determine what premises are railway hereditaments—Proposal for amendment of list—Rating and Valuation Act, 1925 (*c.* 90, *s.* 37—*Railways* (*Valuation for Rating*) *Act*, 1930 (*c.* 24).

The first defendants were the owners and the second defendants the occupiers of a coal wharf, which, on the first railway valuation roll, was rated as a coal wharf. As a result of a decision in the House of Lords, the plaintiff, the rating authority, anticipated that the coal wharf would not appear in the second valuation roll as a railway hereditament, and, on Feb. 22, 1937, they made a proposal under the Rating and Valuation Act, 1925, s. 37, for the separate assessment by an assessment committee of the coal wharf, on the ground that it was not a railway hereditament. On the second valuation roll, which was completed on Jan. 27, 1939, the wharf did not appear as a railway hereditament. The Railway (Valuation for Rating) Act, 1930, s. 18 (3), provides that the provisions of the Rating and Valuation Act, 1925, with respect to the amendment of current valuation lists shall not apply to hereditaments "for the time being shown in the railway valuation roll as a railway hereditament." The question to be determined was whether "railway valuation roll" in this subsection meant the valuation roll existing at the date of the above proposal for amendment, or the later valuation roll which, taking effect retrospectively, governed the quinquennium during which the proposal was made:—

Held: (i) on the proper construction of the Act of 1930, the phrase meant the railway valuation roll existing at the time when the proposal was made, and, since it appeared therein as a railway hereditament, the machinery for amendment under sect. 37 was not available. The proposal was, therefore, ineffective.

(ii) the railway assessment authority have exclusive jurisdiction to determine what is a railway hereditament.

[**EDITORIAL NOTE**. The point here discussed arises out of the necessary delay in completing the valuation of railway properties. The rateable premises were classed as a railway hereditament in a railway valuation roll for a period ending in 1936. It seemed clear from a decision in the House of Lords that this was a wrong view of the nature of the premises and it was sought to include them in the ordinary list before a new railway valuation roll had been completed. It is, in effect, held that so long as they are included in a railway valuation roll, they must be treated in all respects as a railway hereditament, and no proposal for the amendment of a valuation list in respect of the premises can be entertained.

AS TO RATING OF RAILWAY PREMISES, see HALSBURY, Hailsham Edn., Vol. 27, pp. 411, 412, para. 842 ; and FOR CASES, see DIGEST, Supp., Nos. 800a-800h.]

Case referred to :

(1) *Westminster City Council* v. *Southern Ry. Co.*, [1936] A.C. 511 ; [1936] 2 All E.R. 322 ; Digest Supp. ; 105 L.J.K.B. 537 ; 155 L.T. 33.

ADJOURNED SUMMONS to determine the validity of a proposal made by the plaintiffs on Feb. 22, 1937, that a certain hereditament should not be rated as a railway hereditament. The facts are fully set out in the judgment.

Sydney G. Turner, K.C. and *E. J. C. Neep* for the plaintiffs, the rating authority.

W. Craig Henderson, K.C. and *Colin Pearson* for the first defendants, the owners of the coal wharf.

G. D. Squibb for the second defendants, the occupiers of the coal wharf.

J. Scott Henderson for the third defendants, the assessment committee.

UTHWATT, J. : The facts in this case are not in dispute and may be shortly stated. At all material times the Southern Railway have been the owners, and Hall & Co., Ltd., the occupiers, of a coal wharf in the borough of Worthing. The part of the first railway valuation roll made under the Railways (Valuation for Rating) Act, 1930, which related to the undertaking of the Southern Railway was completed on Apr. 27, 1934, and took effect from Apr. 1, 1931. In that roll the coal wharf, together with other hereditaments occupied by the Southern Railway in the borough, were included, a net annual value and a rateable value being attributed to them, pursuant to sect. 8 of the Act of 1930. In due course, the hereditaments and the values so attributed to them were, in accordance with sect. 12 of the Act of 1930, entered by the assessment committee on the valuation list for the borough of Worthing kept under the Rating and Valuation Act, 1925, being distinguished, I apprehend, in the list by the letter " R " and the number of the hereditament in the roll (see the Rating and Valuation Acts (Railway Valuation Roll) Rules, 1933). On May 20, 1936, the House of Lords gave its decision in *Westminster City Council* v. *Southern Railway Co.* (1), and the plaintiffs, who are the rating authority for the borough of Worthing, anticipating that in the second valuation roll the coal wharf would not appear as a railway hereditament occupied by the Southern Railway Company, and purporting to act under the Rating and Valuation Act, 1925, s. 37, made, on Feb. 22, 1937, a proposal for the amendment of the valuation list by the separate assessment of the coal wharf on the ground that it was not a railway hereditament. On Jan. 27, 1939, the part of the second valuation roll which related to the undertaking of the Southern Railway Company was completed, and in that roll the coal wharf did not appear as a railway hereditament. This part of the roll took effect for all purposes as from Apr. 1, 1936 (see sect. 17 of the Act of 1930). No step directed to the hearing of the proposal has yet been taken. The question at issue is whether or not this proposal is a nugatory document. No point is taken on its form and the determination of the matter at issue depends solely on the true construction of the Rating and Valuation Act, 1925, and the Railways (Valuation for Rating) Act, 1930.

The power to make a proposal for the amendment of the valuation list is conferred by sect. 37 of the Act of 1925. Under that section any person who is aggrieved by the incorrectness or unfairness of any matter in the valuation list for the time being in force or by the inclusion therein or omission therefrom of any matter may make a proposal for the amendment of the list and provision is then made by sect. 37 (11) for the prompt hearing and determination of the proposal. If an amendment is made in pursuance of a proposal made by the rating authority, then, under sect. 37 (10), it is deemed to have had effect, as regards the rate current at the date of notice of the proposal, as from the commencement of the period in respect of which the rate was made, and it also has effect for the purpose of any subsequent rate. Sect. 18 (3) of the Act of 1930, which has to be considered in connection with the other provisions of the Act of 1930, provides, *inter alia*, that the provisions of the Act of 1925 with respect to the amendment of current valuation lists shall not apply in the case of a hereditament for the time being shown in the railway valuation roll as a railway hereditament.

The ultimate question to my mind is whether the phrase " Railway Valuation

Roll " in sect. 18 (3) of the Act of 1930 means (*a*) the valuation roll by virtue of which the coal wharf at the date of the making of the proposal appears on the valuation list, or (*b*) the valuation roll which governs the quinquennium in the course of which the proposal is made. If the former meaning is attributed to the phrase, the machinery for altering the valuation list by means of action taken under proposals was not available at the date when the proposal was made, and it would appear that (subject to the effect of a proposal made after the second valuation roll had come into being or the effect of a new valuation list made after that date) a hereditament which appeared in the first valuation roll as a railway hereditament but did not so appear in the second valuation roll—in this case the coal wharf—will escape liability for rates. If the latter meaning is attributed to the phrase, the machinery in question was available, and there was an effective means of securing the appearance on the valuation list of the coal wharf and other hereditaments in the like case as from the beginning of the quinquennium governed by the second valuation roll. The phrase as it appears in sect. 18 (3), taken alone, is capable of either meaning. The proper meaning to be attributed to it can only be determined upon a consideration of the general scheme of the Acts of 1925 and 1930 and such assistance as may be got from the matters of detail embodied in their provisions.

The Act of 1925 contemplated that, subject to certain provisions applicable to particular classes of property to which it is not necessary to refer, particulars of every hereditament in a rating area, and of its values were, through the machinery provided by the Act, to appear in the valuation list: see sect. 25. Save for exceptions immaterial for present purposes, each valuation list remains in force for five years when it is superseded by a new valuation list. No machinery is provided by that Act for carrying over to a succeeding valuation list any entry appearing in its predecessor.

Until the Act of 1930 came into operation property comprised in the undertaking of railway companies was dealt with under the Act of 1925 for purposes of rating. The Act of 1930, which, by sect. 24, is to be construed as one with the Act of 1925, sets up an entirely new machinery for the ascertainment by the railway assessment authority constituted under that Act of the net annual value and rateable value of the railway hereditaments occupied by a railway company, and for the entry by that authority of the values so ascertained on instruments called railway valuation rolls. The leading provision in the Act of 1930 is contained in sect. 1, and enacts that the provisions of the Rating and Valuation Acts relating to the ascertainment of the values of hereditaments are, as from April, 1931, except as expressly provided by the Act of 1930, to cease to apply in the case of railway hereditaments in England occupied by a railway company, and the values of all such hereditaments are to be the values thereof as ascertained in accordance with the Act of 1930. Railway hereditaments are defined in sect. 1, but it is unnecessary for me to refer to their definition. Provision is then made under which the railway assessment authority is, as soon as may be after its constitution, and thereafter at intervals of five years, to prepare a railway valuation roll showing the net annual and rateable values of every railway hereditament in England: see sect. 3 (1) of the 1930 Act. Sect. 3 (2) reads as follows:

> The first railway valuation roll shall come into force on the appointed day, and every subsequent railway valuation roll shall come into force at the expiration of five years from the day appointed by this subsection for the preceding roll to come into force, and the period during which any roll is in force is in this Act referred to as a " quinquennial period."

The appointed day is, as regards London, Apr. 1, 1931, and Apr. 6, 1931, as regards the rest of the country. It may be here observed that the quinquennial period during which the railway valuation roll remains in force does not correspond with any quinquennial period for which a valuation list remains in force.

Sects. 4 and 5 contain provisions stating the principles on which the net annual value of the railway undertaking of each railway company affected by the Act is to be determined for the purposes of the railway valuation roll, and sect. 6 provides for the apportionment of that value among all the railway hereditaments occupied by the company. In my opinion the railway hereditaments referred to in sect. 3 (1) and sect. 6 are the railway hereditaments in the occupation of the railway company at the beginning of the quinquennium which is to be governed by the roll.

The procedure for the preparation of the roll as regards each railway undertaking is, stated shortly, as follows. The first step is the settlement of a draft of the part of the roll relating to the undertaking. Information as to its contents and the date on which it was settled is to be sent to the railway company, the county valuation committees and the rating authorities concerned. Representations may be made to the authority upon matters dealt with by the draft, including any proposal to treat any premises as being or as not being a railway hereditament. After consideration of any representation the railway assessment authority is, so soon as may be, to determine the net annual value of the undertaking, and the net annual value and rateable value of each hereditament: see sect. 7 and sched. III. The roll, when completed, is to include, *inter alia*, the net annual value and the rateable value of every railway hereditament occupied by the company: see sect. 8 (2). Sect. 8 (3) provides that, on the request of any railway company, county valuation committee or rating authority, the railway assessment authority shall state whether any particular premises have or have not for the purposes of the Act been treated by them as forming part of a railway hereditament, and any such statement is to be deemed to form part of the roll and binding on all persons. Appeals may be made to the Railway and Canal Commissioners in respect of entries on the roll on grounds specified in sect. 9 (2), amongst which are included the ground that premises have been incorrectly treated as being or as not being a railway hereditament, and the ground that the net annual value and the rateable value of a railway hereditament has been determined incorrectly. After the roll has been completed it may be revised under sect. 10. Provision is made by sect. 11 for alterations being made to the roll on representations being made to the railway assessment authority.

The detailed provisions of sect. 11 are immaterial. It is important to observe, first, that, though representations must be made during the quinquennial period, there is nothing in the Act which precludes those representations being dealt with by the railway assessment authority after the quinquennium during which the roll is to be in force has expired. Secondly, the changes in occupation, or in the nature of occupation, which are to be taken into account are changes which have occurred since the date on which the draft of the relevant part of the roll was settled. Sect. 17 of the Act of 1930 provides as follows:

> Any failure on the part of the Railway Assessment Authority to complete the whole or any part of a railway valuation roll before the date upon which under the provisions of this Act the roll is to come into operation, shall not of itself render the roll or any part thereof invalid, and each part of the roll as and when completed shall for all purposes take effect as from the said date.

Next come the provisions which deal with the relation between the railway valuation roll and the valuation list, and the effect of the entries on the roll for rating purposes. Sect. 6 (1) of the Act of 1930 provides, in general terms, that the amount of the net annual value of an undertaking apportioned to a hereditament by the railway assessment authority shall be deemed to be its net annual value for rating purposes. Under sect. 8 (4) of the Act of 1930, it is the duty of the railway assessment authority to notify the assessment committees of the completion of any part of the roll, together with all relevant information, and under sect. 12 (1), it is the duty of the assessment committee when they have received this notice, to cause the values entered in the railway valuation roll and the prescribed particulars to be entered in the valuation list in substitution for values or particulars appearing in that list. Under sect. 12 (2) particulars of any alteration made by the railway assessment authority in the railway valuation roll, either in revising the roll or at a date subsequent thereto, are to be sent to the assessment committee, and under sect. 12 (3) the assessment committee then comes under an obligation to amend the valuation list so as to make it accord with the roll. The obligation imposed by sect. 12 (3) extends in terms to valuation lists which have ceased to be in force; Sect. 12 (1) does not in terms so extend, but, for the purposes of both subsections, the valuation list includes a new valuation list which has not yet come into force. I need not refer in detail to subsects. (4) and (5). They deal with the dates as from which an amendment has effect in relation to rates. Sect. 18 (1), (2), of the Act of 1930, reads as follows:

> As from the appointed day, a rating authority, in preparing a draft valuation list or a new valuation list under the Rating and Valuation Acts, shall enter therein in respect of any hereditament for the time being shown in the railway valuation roll as a railway hereditament the values and other particulars appearing in respect of that hereditament in the valuation list for the time being in force, and, while that hereditament remains in the roll, no amendment shall be made in the values or other particulars so entered except in pursuance of a notice sent to the assessment committee by the Railway Assessment Authority under the provisions of this Act relating to the notification to assessment committees of values and of alterations of values of railway hereditaments. A

Subsect. (3) runs :

> The provisions of the Rating and Valuation Acts with respect to objections to valuation lists and draft valuation lists and to appeals against decisions upon such objections, with respect to the revision or amendment of current valuation lists by means of proposals, supplemental lists or provisional lists and with respect to the making of returns by owners and occupiers shall not apply in the case of a hereditament for the time being shown in the railway valuation roll as a railway hereditament. B

I have referred to several of the detailed provisions of the Act of 1930, but I do not think that they are of any assistance in connection with the point which I have to decide. Sect. 12 (1) is colourless, for the entries on the valuation list to be made by reason of the contents of a new railway valuation roll apply to all entries in that list, whether or not they appear in that list by reason of the contents of a prior valuation roll. Sect. 18 (1) requiring entries made in the C valuation list by virtue of a railway valuation roll to be carried over to new valuation lists is perfectly general, but it has no bearing on the point of construction under consideration, for the necessity for some such provision arises from the lack of coincidence between the period for which a railway valuation roll is in force and the period for which a valuation list is in force. One merely has the fact that, while the railway valuation roll is to be in force for a particular quinquennium, there is no provision limiting the continuance of an entry on the D valuation list made in obedience to that roll. Again, on the view I take as to the meaning of sect. 11, a railway valuation roll which has ceased to be in force remains a document capable of alteration after the expiry of the quinquennium which it governs, but this fact has little bearing on the point of construction. To my mind, the only guidance as to the meaning of the phrase is to be obtained from a consideration of the general intendment of the Act.

As to this, it appears to me that the whole scheme of the Act of 1930 is that it E is the exclusive function of the railway assessment authority (subject, of course, to appeal), through the medium of the railway valuation roll, to determine for the purposes of the Acts what hereditaments are or are not railway hereditaments, and that it was intended to exclude the possibility of this question being raised before any other tribunal. If it was competent to raise before an assessment committee the question whether or not a particular hereditament was a railway F hereditament, it would be the duty of the assessment committee to deal with the question promptly and conceivably (as would be the case here) before the railway assessment authority had dealt with the matter. The committee might arrive at a conclusion different from that subsequently arrived at by the railway assessment authority, but its conclusion would be displaced by the retrospective action of the railway valuation roll when completed. Inconclusive proceedings before an assessment committee could not, in my opinion, have been con- G templated.

Next, one is met with the fact that the Act of 1930 itself contemplates, in sect. 17, that the valuation roll may not be completed until after the beginning of the quinquennium which it is to govern. Indeed, it may perhaps be surmised that this would normally be the case. So far as I can see, the Act would work without any capricious operation if a draft valuation roll were settled before the beginning of the quinquennium to be governed by the valuation roll (see the H provisions of sect. 11 as to the date to be taken into account for purposes of changes in occupation or nature of occupation), and if the valuation roll itself were completed an appreciable time before the expiration of the first year of the quinquennium which it was to govern (see the provisions of sect. 37 (10) of the Act of 1925 as to the date from which amendments of the valuation list are to have effect). Difficulties only arise if the valuation roll appears at a later date.

In my opinion, it would be wrong in the circumstances to construe the phrase "the railway valuation roll" in sect. 18 (3) as meaning the railway valuation

roll for the time being in force, inasmuch as such a construction would enable a rating authority, immediately on the expiry of any quinquennium governed by a railway valuation roll, to bring forward for consideration and determination as regards any hereditament appearing on the valuation list as a railway hereditament, the question whether or not it was a railway hereditament, provided only that the succeeding valuation roll had not then made an effective appearance. That could not have been intended. On the other hand,
A if one attributes to the phrase the meaning " railway valuation roll by virtue of which the hereditaments appears on the valuation list," one reaches a conclusion which gives effect to the general scheme of the Act and which does not—save in the case of a very late appearance of the roll—work any capricious result. The fact appears to be that the provisions of the Act are not directed to meeting the case of a very late appearance of the roll. If that is to be remedied, resort must be had to the legislature and not to the court. Accordingly, I
B declare that upon the true construction of the Rating and Valuation Acts, 1925 to 1930, and in the events which happened, the proposal dated Feb. 22, 1937, is ineffective and nugatory.

Declaration accordingly, plaintiffs to pay the costs of the second and third defendants.

Solicitors: *Sharpe, Pritchard & Co.* (for the plaintiffs); *H. L. Smedley* (for
C the first defendants); *Braby & Waller* (for the second defendants); *Waller, Neale & Houlston*, agents for *Marsh & Ferriman*, Worthing (for the third defendants).

[*Reported by* IRENE G. R. MOSES, *Barrister-at-Law.*]

STOKER *v.* ELWELL.

[CHANCERY DIVISION (Simonds, J.), **January 15, February 3, 1942.**]

Judgments—Charging order—Interest—Order not expressly providing for interest—
E *Judgments Act*, 1838 (*c.* 110), *ss.* 14, 17.

The plaintiff recovered judgment against the defendant in the Queen's Bench Division, and a charging order *nisi* was made on May 28, 1889, on certain shares of the defendant; and on June 18, 1889, the order was made absolute. No mention was made in the charging order as to the payment of interest, although the Judgments Act, 1838, s. 17, under which the order
F was made, provided for the payment of interest. The plaintiff and the defendant having both died, and on accounts being taken between their respective administrators, the question was raised as to whether interest was payable on the charging order, and if it was so payable, whether it was barred to any extent by any statute of limitations:—

HELD: (i) interest was payable on the charging order. The omission to mention the payment of interest could not exclude the general principle
G that a charge carries interest.

(ii) at the relevant date, May 7, 1940, no statute of limitations was applicable to a charge of personalty.

[**EDITORIAL NOTE.** The main argument here was that the form of charging order in SETON and in DANIELL expressly refer to interest, and that, therefore, there was an express omission of a charge of interest such as would rebut any implication
H under the general principle that a sum of money charged on property carries interest at an appropriate rate. It is pointed out that the forms used in the King's Bench Divi-Division do not contain such an express provision, and that argument is rejected.

AS TO INTEREST ON CHARGING ORDERS, see HALSBURY, Hailsham Edn., Vol. 19, p. 249, para. 555; and FOR CASES, see DIGEST, Vol. 30, pp. 172-178, Nos. 402-461.]

Cases referred to:

(1) *Re Drax, Savile* v. *Drax*, [1903] 1 Ch. 781; 35 Digest 299, *498*; 72 L.J.Ch. 505; 88 L.T. 510.

(2) *Re Kerr's Policy* (1869), L.R. 8 Eq. 331; 35 Digest 298, *496*; 38 L.J.Ch. 539.

(3) *Lippard* v. *Ricketts*, [1872] L.R. 14 Eq. 291 ; 32 Digest 292, *681* ; 41 L.J.Ch. 595.
(4) *Re Leavesley*, [1891] 2 Ch. 1 ; 21 Digest 650, *2280* ; 60 L.J.Ch. 385 ; 64 L.T. 269.
(5) *Re Stucley, Stucley* v. *Kekewich*, [1906] 1 Ch. 67 ; 35 Digest 194, *219* ; 75 L.J.Ch. 58 ; 93 L.T. 718.

Adjourned Summons to determine, *inter alia*. whether interest was payable on a charging order dated June 18, 1889.

The facts are fully set out in the judgment.

H. O. Danckwerts for the plaintiff.

H. A. Rose (for *J. G. Mavrogordato* on war service) for the defendant.

Simonds, J. : This summons raises the question whether interest is chargeable under a charging order, made as long ago as May 28, 1889. On that day Bessie Samms Foakes recovered judgment against Arthur Brin in the Queen's Bench Division in the sum of £1,870 17*s*. 7*d*., together with costs, which were taxed and allowed at £22 18*s*. 4*d*., and on the same day obtained a charging order *nisi*, charging with the payment of such sums certain shares standing in the name of the defendant in his own right. On June 18, 1889, the charging order was made absolute, except that the charge was made subject to a certain prior charge in respect of some of the shares. No mention of interest was made in the charging order. On May 17, 1892, Foakes died, and letters of administration with her will and codicil annexed were granted to the present plaintiff, William Henry Stoker. On July 8, 1894, Brin died, and on Feb. 18, 1931, letters of administration of his estate were granted to the present defendant, Harold Elwell, as attorney of Emile Leon Quentin Brin. The judgment debt has been reduced by the payment of £100, and certain of the debtor's shares were released from the charge, and the shares are now represented by certain stock.

On June 4, 1940, an order was made in this action for an account to be taken of what is due to the plaintiff as administrator of Foakes under the charging order, and for the stock to be sold with the approbation of the judge, and for the proceeds of such sale to be lodged in court. In the carrying out of the order the question was raised, and adjourned into court for my decision, whether any interest was payable under the charging order in respect of the principal sums of £1,770 17*s*. 7*d*. and £22 18*s*. 4*d*. and, if any interest was otherwise payable, whether it was to any and what extent barred by any statute of limitations. R.S.C., Ord. 46, r. 1, provides as follows :

> An order charging stock or shares may be made by any divisional court or any judge . . . and that the effect shall be such as is provided by the [Judgments Act, 1838, ss. 14, 15, and the Judgments Act, 1840, s. 1].

It is necessary only to refer to sect. 14 of the earlier Act, which, so far as is material to the present case, provides as follows :

> If any person against whom any judgment shall have been entered up in any of [the courts therein mentioned] shall have . . . any stock or shares in any public company in England . . . standing in his name in his own right . . . it shall be lawful for a judge of one of the superior courts, on the application of any judgment creditor, to order that such stock . . . or shares . . . shall stand charged with the payment of the amount for which judgment shall have been so recovered, and interest thereon ; and such order shall entitle the judgment creditor to all such remedies as he would have been entitled to if such charge had been made in his favour by the judgment debtor. . .

The plaintiff in these proceedings, claiming in right of the judgment creditor, contends that the effect of this section is that he is entitled to interest, notwithstanding that the charging order makes no mention of interest. He says that if the judgment debtor had himself made a charge on these shares for a principal sum without mentioning the interest, then the remedy of the judgment creditor would have included the right, upon enforcement of the security, to recover the principal sum and interest at 4 per cent. He claims the benefit of the general principle which was thus stated in *Re Drax* (1) by Lord Collins, M.R., who said, at p. 793 :

> It seems to me to be well established on the authorities and the result of those authorities does not appear to be disputed, that a court of equity has power to give interest, and in point of fact does so where a charge is created on land, although there are no words allowing interest in the instrument creating the charge.

In the case cited the charge was upon land, and the reference was to such a charge, but the same principle was stated and applied in *Re Kerr's Policy* (2), where the charge was created by a deposit of title deeds to a policy of life assurance to secure a principal sum without any stipulation as to interest. There James, V.-C., said, at p. 336 :

> I think that a deposit of title deeds to secure a loan is to be considered as an agreement to execute a mortgage of the property comprised in the deeds, with interest.

The same principle is exemplified in *Lippard* v. *Ricketts* (3). There the court had ordered that certain costs, to which a petitioner was entitled, should be
A added to the moneys secured by a certain deed and should " stand as a charge upon " the properties comprised in the deed. The order said nothing about interest, though the court had power under the Attorneys Act, 1870, expressly to charge interest if it thought fit. It was held by Bacon, V.-C., that upon the principal sum charged interest was payable. Bacon, V.-C., said, at p. 294 :

> The costs are charged on the security by the express order of the court. The effect
> B of that order is to increase the amount charged on the security ; and upon the sum so charged, I think, interest is payable. In the case of *Re Kerr's Policy* (2), the court seems to have proceeded on the theory that a debt secured by equitable mortgage will, unless something is said or may be implied to the contrary, carry interest ; and it seems to follow that, when the court has once decided that there is a charge, the sum charged must bear interest.

It is urged, on the other hand, by the defendant, who stands in the shoes of
C the judgment debtor, that the court, having power under the statute to charge principal and interest, deliberately abstained from charging interest. He points out that the appropriate forms in Seton, Judgments and Orders, and in Daniell, Chancery Forms, make express mention of interest, and contends that the omission of it from this order is deliberate and significant, and he claims that the remedy which the creditor would have had against the debtor, if he had made the charge, cannot include the right to recover interest deliberately excluded.
D I am unable to give effect to these contentions. It is true that in Seton and Daniell, which are commonly used in the Chancery Division, interest is expressly charged, but in the forms given in Appendix K to the Rules of the Supreme Court, which I am told are commonly used in the King's Bench Division, no mention is made of interest. It might well be thought that since the charge is in respect of a judgment debt, which by virtue of the Judgments Act, 1838, s. 17 itself carries interest, and since the charge is authorised by sect. 14 of that
E Act, it is superfluous to mention interest in the charging order. However this may be, I am not disposed to exclude a charging order from the operation of the general principle to which I have referred, merely because in one division of the High Court the practice has been more closely to dot the i's and cross the t's than in another.

I must refer, lest I should be thought to have overlooked it, to *Re Leavesley*
F (4), upon which counsel for the defendant relied. In that case the Court of Appeal had to consider the effect of a charging order where the judgment debtor was a lunatic, and rejected the contention that the effect of a charging order depended on the personal capacity of the debtor to execute a charge. I cannot derive any assistance from this case upon the question which I have to determine. I come to the conclusion that, though interest is not mentioned in the charging order, it is nevertheless payable, and the account must proceed accordingly.
G The appropriate rate is 4 per cent.

Then comes the question whether any statute of limitations operates to bar the claim to interest. This question presents no difficulty. It is conceded that for this purpose the relevant date is May 7, 1940, when the originating summons was issued, upon which the order of June 4, 1940 was made, and it is clear that at this date, whatever may be the effect of later legislation, there was no statute of limitations applicable to a charge on personal estate, whether by virtue of
H charging order, vendor's lien, or otherwise. (See *Re Stucley* (5)).

Declaration that interest payable under charging order at the rate of 4 per cent. Costs to be added to the security.

Solicitors : *Lloyd & Lloyd* for the plaintiff ; *Elwell & Binford Hole* for the defendant.

[*Reported by* Irene G. R. Moses, *Barrister-at-Law.*]

ARBON *v.* ANDERSON AND OTHERS.

[Court of Appeal (MacKinnon, Luxmoore and du Parcq, L.JJ.), **February 5, 1942.**]

Emergency Legislation—Detention under Defence Regulations—Action for ill-treatment during detention—Striking out statement of claim.

Practice—Striking out statement of claim—Action against heads of government department in respect of tort committed by subordinates—R.S.C., Ord. 19, *r.* 27*—R.S.C., Ord.* 25, *r.* 4.

The appellant had been detained under the Defence General Regulations, reg. 18B. In this action he claimed damages in respect of ill-treatment during his detention against the Home Secretaries who were in office during such detention and against each of the governors of the various prisons at which he was detained. The allegation in the statement of claim was that the defendants or their servants or agents had been guilty of breaches of statutory duty in that, in their treatment of the plaintiff, they had not observed the Prison Rules applicable to him as a person detained under the Defence General Regulations, reg. 18B. Particulars of the ill-treatment alleged were given; but it was not alleged that the heads of the department had expressly authorised the acts of subordinates complained of. All the defendants applied to have the statement of claim struck out as disclosing no cause of action and tending to embarrass the trial of the action:—

Held: (i) since the head of a government department is not in law responsible for torts committed by his subordinates and it was not alleged that the heads of the government department concerned had expressly authorised the acts complained of, the statement of claim should be struck out as against them with liberty to the plaintiff to put in an amended statement of claim.

(ii) there was an arguable case against the prison governors. Since there was clearly no cause of action in respect of some of the alleged breaches, the statement of claim must be struck out as embarrassing, with liberty to put in an amended statement of claim.

(iii) as against all the defendants the action ought not to be dismissed at the present stage.

[**EDITORIAL NOTE.** The secretary of state would be liable in action only (i) for acts of his own amounting to misfeasance; (ii) for acts of his own amounting to nonfeasance where it could be shown that the law cast upon him a specific duty to the plaintiff; (iii) for acts of his subordinates directly ordered by him in such a way as to make them his own acts. Since there was this residuum of liability, the action in the present case was not dismissed, but the statement of claim was ordered to be amended—that is, in effect, that acts for which there could be no liability should be struck out. Until that was done, the pleading was embarrassing and fell to be struck out under the rule. It is not for the court or for the defendant to say what parts of the pleading must be eliminated; it is for the plaintiff to produce a statement of claim which is not embarrassing.

As to Duties of Public Officers, see HALSBURY, Hailsham Edn., Vol. 26, pp. 266-271, paras. 579-585; and for Cases, see DIGEST, Vol. 38, pp. 61-66, Nos. 366-412, and pp. 74-77, Nos. 523-542. See also Yearly Practice of the Supreme Court, pp. 401-408.]

Cases referred to:

(1) *Dyson* v. *A.-G.*, [1911] 1 K.B. 410; 11 Digest 524, 292; 81 L.J.K.B. 217; 105 L.T. 753.

(2) *Mee* v. *Cruikshank* (1902), 86 L.T. 708; 38 Digest 75, *536*.

(3) *Raleigh* v. *Goschen*, [1898] 1 Ch. 73; 38 Digest 63, 379; 67 L.J.Ch. 59; 77 L.T. 429.

(4) *McKenzie-Kennedy* v. *Air Council*, [1927] 2 K.B. 517; 38 Digest 63, *387*.

Appeals by the plaintiff and by the prison governors from an order of Hallett, J., made in chambers on Nov. 7, 1940, varying an order of Master Baker. The facts and pleadings are fully referred to in the judgment of Luxmoore, L.J.

G. O. Slade and *J. W. Williamson* for the plaintiff.

Valentine Holmes for the defendants.

Slade: The case alleged against the secretaries of state is not incontestably bad. The duty to observe the Prison Rules is absolute and the Home Secretary is bound by statute to see that they are observed (Prison Acts, 1877 & 1898). [Counsel referred to *Dyson* v. *A.-G.* (1) and *Mee* v. *Cruikshank* (2).]

Holmes : The facts are accepted only for the purpose of arguing these appeals. The prison officials were not the servants of the Home Secretary (*Raleigh* v. *Goschen* (3)). No statutory duty is pleaded. The pleading only refers to a legal duty. There is no such duty imposed by statute. [Counsel referred to *McKenzie-Kennedy* v. *Air Council* (4).]

MACKINNON, L.J. : I have had the advantage of reading the judgments prepared by LUXMOORE and DU PARCQ, L.JJ. I have written a judgment arriving at the same conclusions as those at which they arrive, but I prefer their statement of the reasons for their conclusions. I, therefore, content myself with saying that I agree with them.

LUXMOORE, L.J. : On June 7, 1940, Sir John Anderson, who was then His Majesty's Secretary of State for Home Affairs, made an order for the detention of Frank Arbon under the Defence (General) Regulations, 1939, reg. 18B. In pursuance of that order the plaintiff was conveyed to the Central Police Station at Lincoln and there detained. He was subsequently transferred to and detained at Walton Gaol, Liverpool, Brixton Prison, Stafford Gaol and an internment camp at York.

On Apr. 30, 1941, Mr. Arbon instituted an action in the King's Bench Division against Sir John Anderson and his successor in office, Mr. Herbert Morrison, for breach of statutory duty. On June 26, 1941, the writ was amended by adding a claim for damages for false imprisonment. Subsequently, on Sept. 4, 1941, the writ was further amended by adding as defendants to the action the governors at all material times of His Majesty's Prisons, Walton Gaol, Liverpool, Brixton Prison, Stafford Gaol and Lincoln Gaol. The statement of claim in the action was delivered on Sept. 10, 1941. There are set out in para. 1 particulars of the various places of detention to which Arbon was conveyed or transferred between June 7, 1940, and Jan. 2, 1941. In para. 2 it is stated that Sir John Anderson, acting in pursuance of the authority contained in reg. 18B (8) issued Command Paper 6162, being instructions with regard to the detention in prisons of persons detained in pursuance of that regulation. Particular reference is made in the same paragraph of the statement of claim to para. 12 of the Command Paper, which provides in effect that the Prison Rules, 1933, are to apply to detained persons as if they were prisoners awaiting trial and also to paras. 119 to 1935 inclusive of the last-mentioned rules. It is also alleged in the same paragraph of the statement of claim that the Prison Rules generally applied to the treatment of persons detained under reg. 18B.

Paras. 3 and 4 of the statement of claim are as follows :

> It was the legal duty of the Secretary of State for Home Affairs for the time being (that is to say the first-named defendant until Oct. 3, 1940, and thereafter the second-named defendant), for the benefit of the plaintiff during his detention aforesaid to fulfil and observe or by his servants and agents to ensure the fulfilment and observance of the said instructions and rules. It was further the legal duty of each of the other defendants namely, the third-named defendant being the governor of Walton Gaol aforesaid, the fourth-named defendant being the governor of Brixton Gaol aforesaid, the fifth-named defendant being the governor of Stafford Gaol aforesaid and the sixth-named defendant being the governor of Lincoln gaol aforesaid for the benefit of the plaintiff during the plaintiff's periods of detention aforesaid to fulfil and observe or by his servants or agents to ensure the fulfilment and observance of the said instructions and rules.
>
> 4. The defendants have each of them severally by themselves and by their servants and agents committed breaches of their duty, whereby the plaintiff has suffered pain of body and of mind and has been damnified.

Para. 4 is followed by lengthy particulars of alleged breaches. They are divided into four groups under the letters A, B, C and D. Those referred to under the letters A, B and C are alleged to have been committed in each case by Sir John Anderson in conjunction with the governor of Walton Gaol, Liverpool, in the case of those under the letter A ; with the governor of Brixton Prison in the case of those under letter B ; and with the governor of Stafford Gaol in the case of those under letter C. The breaches referred to in the particulars under the letter D are alleged to have been committed in each case by Mr. Herbert Morrison and the governor of Lincoln Gaol.

On Oct. 14, 1941, all the defendants applied to have the statement of claim struck out on the ground that it discloses no reasonable cause of action and is frivolous and vexatious and tends to embarrass the fair trial of the action and that the action be dismissed. The application came before Master Baker on Sept. 30, 1941, when he ordered the statement of claim to be struck out and the action to be dismissed. The plaintiff appealed from this order. The appeal was heard by Hallett, J., on Nov. 7, 1941. The judge directed that the order of Master Baker should be varied and that the appeal should be allowed as against the defendants other than Sir John Anderson and Mr. Morrison. There are two appeals entered by leave of the judge against his order. One is by the plaintiff asking that so much of the order as directs that the action be dismissed as against Sir John Anderson and Mr. Herbert Morrison may be reversed and that it may be ordered that the action do continue against them. The other is by the four other defendants, asking that the order of Master Baker may be restored and the action dismissed as against them.

The application to strike out the statement of claim as against all the defendants was made under R.S.C., Ord. 19, r. 27, and R.S.C., Ord. 25, r. 4, while the application to dismiss the action was made under the last-mentioned rule. It is well-settled that it is only in plain and obvious cases that recourse should be had to the summary process of dismissing an action under R.S.C., Ord. 25, r. 4, and that an action will not be dismissed under it unless the case is beyond doubt. The fact that the case is weak and not likely to succeed is no ground for the dismissal of the action under R.S.C., Ord. 25. A pleading will not be struck out under either order unless it is not only demurrable but something worse than demurrable, i.e., such that no legitimate amendment can save it from being demurrable, or it is embarrassing. I propose to deal, first, with the appeal from the order dismissing the action as against Sir John Anderson and Mr. Herbert Morrison respectively. In their case the material allegations are (*a*) that it was the duty of the Home Secretary for the time being " for the benefit of the plaintiff during his detention to fulfil and observe or by his servants or agents to ensure the fulfilment and observance of " (to put it shortly) the appropriate Prison Regulations, and (*b*) that " each of them severally by themselves and by their servants and agents committed breaches of their said duty " to the detriment of the plaintiff. It is well-settled that a plaintiff cannot sue the representative head of a branch of the executive government on the footing that he is answerable for wrongs committed by some person or persons in the employment or under the control of the government or the particular department for which the representative is responsible, even though that person or those persons purport to act on behalf of the government or the particular department of it. A plaintiff can, of course, sue any person who actually commits the wrong in respect of which complaint is made, even though that person only acted on behalf of or by the authority of the government or of the representative of the particular department, but the plaintiff's right is not necessarily confined to an action against the person or persons committing the wrong, if the wrong is committed by the order or direction of some higher official so as in substance to have been the act of that official. In such case the higher official can be sued, not because he occupies an official position, but in spite of that fact. The higher official has no servants and is not responsible for the acts of an agent unless he expressly authorised the doing of the particular act. Counsel for the appellant appreciated this position and asked to be allowed to strike out from the pleading the words " by his servants or agents " in para. 3 of the statement of claim, and the words " and by their servants and agents " in para. 4. If this be done the allegations so far as Sir John Anderson and Mr. Herbert Morrison are concerned are : (*a*) it was the legal duty of the Secretary of State for Home Affairs for the time being, for the benefit of the plaintiff, during his detention to fulfil and observe or to ensure the fulfilment and observance of the Prison Regulations, and (*b*) the defendants have each of them by themselves committed breaches of that duty. The particulars of breaches set out at the end of para. 4 of the statement of claim fall into at least two classes, namely (1) cases where there has been failure to provide prison accommodation in accordance with the material Prison Regulations applicable to the plaintiff's case, (2) cases where the alleged breaches of the material Prison Regulations have resulted from improper management of the particular prisons or from acts done or allowed to be done during the plaintiff's detention.

So far as the first class of cases is concerned, it seems, in my opinion, to be arguable (though I express no opinion as to the validity of such argument) that the Home Secretary for the time being is responsible in law for the failure, if failure there be, to provide the requisite accommodation. So far as the second class is concerned, it is difficult to appreciate whether the plaintiff is seeking to allege that the acts complained of were done by the direction of either Sir John Anderson or Mr. Herbert Morrison or at least with their or his knowledge. In the absence of any such allegations, it appears to me that there is no arguable case against either of these defendants on this head, and if these matters stood alone and no amendment of the nature suggested were made, the action ought to be dismissed against them. I would allow the appeal of the plaintiff against the dismissal of the action at the present stage as against Sir John Anderson and Mr. Herbert Morrison, but I think that the statement of claim in its present form is embarrassing and should be struck out as against them with liberty to the plaintiff to put in an amended statement of claim. Although it may be argued that some part of the statement of claim is not demurrable, it is not for the court to go through the pleading in order to pick out what is or is not demurrable or to suggest what amendment or amendments is or are required.

With regard to the second appeal, namely, that by the governors of the respective gaols mentioned in the pleadings, I think that Hallett, J., came to the right conclusion in refusing to dismiss the action against them. To my mind there is an arguable case (though again I express no opinion as to the validity of such argument) as against each of them, for the custody of the plaintiff was at the material times referred to in the particulars in the respective governors there named. It may well be that with regard to some of the breaches alleged, there is no cause of action, but, as I have already said, it is not the duty of this court to go through the statement of claim in order to pick out what parts are and what parts are not demurrable or to suggest any amendments to meet possible objections. I think the proper order in the case of these defendants is to strike out the statement of claim as being embarrassing, giving to the plaintiff liberty to put in an amended statement of claim in its place.

In the result I think the proper order to make on the two appeals is to vary the order of Hallett, J., by refusing the application by Sir John Anderson and Mr. Herbert Morrison for the dismissal of the action as against them and by striking out the statement of claim as against all the defendants with liberty to the plaintiff to deliver an amended statement of claim, the amended statement of claim to be delivered within 21 days. I do not think that the order made by Hallett, J., as to costs should be altered. I think the proper order with regard to costs is to order the first two respondents to pay the costs of the plaintiff's appeal to this court, which will be allowed, and to order the remaining defendants to pay to the plaintiff his costs of their appeal, which will be dismissed.

du Parcq, L.J.: I have had the advantage of reading in advance the judgment which has just been delivered by Luxmoore, L.J., and I agree with it. As the matter is of some importance, I will state my reasons shortly in my own words.

As to the claim against the four prison governors, there are allegations in the statement of claim concerning the management of the prisons and the treatment of the plaintiffs which, if substantiated, might reasonably be held to support an action against them. The pleading in its present form is, however, gravely embarrassing. Various breaches of statutory duty are alleged which are said to have been committed by the defendants "and by their servants and agents." The statement of claim does not distinguish between the breaches assigned so as to show whether the governors are alleged to be personally responsible or only vicariously responsible in each particular instance. In so far as the statement of claim alleges vicarious responsibility, it is bad in substance as well as in form, because admittedly the subordinate officers were not by virtue of this office the "servants or agents" of the governors, and it is not alleged that their acts were expressly authorised by the governors. It would have been impossible for counsel for the defendants, and it is, in my opinion, no less impossible for the court, to pick out such parts of the statement of claim as, properly pleaded, will not be open to objection. Counsel for the plaintiff makes no application for leave to amend, though he expresses his willingness to omit the words "by their servants and agents." This omission would make the pleading unintelligible except on the view that the governors are under a duty to ensure the fulfilment of the Home Secretary's instructions and the Prison Rules, in the sense that they are liable for every breach of such instructions and rules, however powerless they may have been to prevent it. Such a contention cannot, in my opinion, be maintained; logically it would make the governors responsible for a breach of rules by a prisoner as much as for a breach by an officer. For these reasons I agree that the prison governors are entitled to have the statement of claim struck out and that it is not for this court to amend it.

As against the defendants, Sir John Anderson and Mr. Morrison, when the allegation of vicarious responsibility has been excluded, as it must be, it is difficult to extract anything from the pleading as it stands but an allegation of many wrongful or improper acts or omissions by third parties, who are servants of His Majesty. It is not alleged that these defendants directed or countenanced any of these wrongful acts. On the contrary, it is alleged that most of the acts and omissions were infringements of instructions given by these defendants. It is, I think, hopeless to contend that the secretary of state is liable in respect of every breach of instructions given by him. If the contention were correct, the more careful the Home Secretary and the more detailed and strict his instructions, the more likely he would be to be mulcted in damages. It may be that the secretary of state is under a duty to take proper steps to ensure that rules and instructions are observed, but (assuming that there is such a duty) there is from first to last no allegation in the statement of claim that he has failed to fulfil it. I have no doubt, therefore, that in its present form the statement of claim is embarrassing. Nevertheless, I agree that it may be possible to make a case against these two defendants, founded on some of the facts set out in the particulars and on the arguable contention (as to the validity of which I express no opinion) that the secretary of state is liable for a failure to provide fitting accommodation for internees.

For this reason I also agree with the conclusion arrived at by LUXMOORE, L.J., as to the plaintiff's appeal. In the result, as to both appeals, I concur in the orders which he has proposed.

Appeal of plaintiff allowed with costs and appeal of prison governors dismissed with costs.

Solicitors: *Oswald Hickson, Collier & Co.* (for the plaintiff); *Treasury Solicitor* (for the defendants).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

EVERSFIELD *v.* STORY.

[KING'S BENCH DIVISION (Humphreys, Wrottesley and Croom-Johnson, JJ.), **January 13, February 3, 1942.**]

Criminal Law—Punishment—Probation—Good character and antecedents—Deliberate refusal to comply with statutory obligation—Conscientious objector refusing to undergo medical examination—Probation of Offenders Act, 1907 (c. 17)—*Criminal Justice Administration Act*, 1914 (c. 58), *s.* 8.

Emergency Legislation—National service—Conscientious objector—Functions of tribunal and justices—Class of work—Refusal to undergo medical examination—Punishment—Probation—Probation of Offenders Act, 1907 (c. 17)—*National Services (Armed Forces) Act*, 1939 (c. 81), *ss.* 4, 5.

The respondent was a conscientious objector, who had been classified by the competent tribunal as a person liable to be called up for service, but to be employed only in non-combatant duties. He was served with a notice requiring him to submit himself for medical examination. He failed to comply with the notice, and subsequently a court of summary jurisdiction ordered him to submit himself for medical examination. At the appointed time he was taken by a constable to the appointed place and he then refused to submit himself for examination. He was then charged with an offence under the National Service (Armed Forces) Act, 1939, based on such refusal. At the hearing, the magistrates dealt with the case under the Probation of Offenders Act, 1907, and discharged the respondent as being of good character and antecedents and placed him on probation upon a recognisance requiring him to be of good behaviour and to seek ambulance or similar work or agricultural work :—

HELD : (i) the Probation of Offenders Act, 1907, has no application to a case of a deliberate refusal to obey statutory provisions. The magistrates were bound in such a case to convict the respondent and impose a sentence upon him.

(ii) it was no part of the duty of the magistrates to decide what work the respondent should be put to as a conscientious objector. That was the task of the special tribunal provided for by the National Service (Armed Forces) Act, 1939.

[**EDITORIAL NOTE.** The application of a discretionary jurisdiction, such as that given by the Probation of Offenders Act, 1907, no doubt presents considerable difficulties and it is probably very difficult, if not impossible, either with this or any other discretionary matter, to state general principles to be followed on all occasions. It does seem, however, that a case of a persistent and deliberate refusal to comply with plain and well-understood statutory provisions clearly binding on the accused is an offence which cannot in any event be regarded as a trifling offence and one which cannot be dealt with under the Act. Where the justices, though acting no doubt with the best intentions, here fell into error, was in assuming a jurisdiction which had been expressly given by statute to the tribunal.

AS TO PROBATION ORDERS, see HALSBURY, Hailsham Edn., Vol. 9, p. 232, para. 327 ; and FOR CASES, see DIGEST, Vol. 14, pp. 492, 493, Nos. 5412-5420.]

Cases referred to :

(1) *Phillips* v. *Adams*, [1896] 1 Q.B. 305, 39 Digest 246, *296* ; 65 L.J.M.C. 101 ; 74 L.T. 314.

(2) *White* v. *Hurrells Stores* (1941) Unreported.

(3) *Oaten* v. *Auty*, [1919] 2 K.B. 278 ; 33 Digest 407, *1172* ; 88 L.J.K.B. 1072 ; 121 L.T. 215.

APPEAL by an officer of the Ministry of Labour and National Service from a decision of a court of summary jurisdiction sitting at Norwich. The facts are fully stated in the judgment of HUMPHREYS, J.

The Solicitor-General (*Sir William Jowitt, K.C.*) and *W. Arthian Davies* for the appellant.

Lloyd Jones for the respondent.

HUMPHREYS, J. : This is a case stated by justices in the following circumstances. The respondent being a person liable to be called up for service in the armed forces of the Crown caused his name to be registered in accordance with the National Service Armed Forces Act, 1939, s. 5, as a conscientious objector to any form of military service. His case duly came before a local tribunal constituted under the Act. The tribunal rejected his claim to be placed in category (*b*) of sect. 5 (6), that is, that he should continue to be so registered so long as he undertook work specified by the tribunal of a civil character and under civilian control. It ordered him to be placed in category (*c*) of that subsection as a person liable to be called up for service, but to be employed only in non-combatant duties. From that decision the respondent appealed to the appellate tribunal constituted under the Act, which dismissed his appeal and upheld the order of the local tribunal.

Sect. 5 (12) of the Act provides as follows :

> No determination of a local tribunal or the appellate tribunal made for the purposes of this Act shall be called in question in any court of law.

In due course the respondent was served with a notice under sect. 3 (1) requiring him to submit himself on Apr. 21, 1941, to medical examination by a medical board. The respondent failed so to submit himself. An information was then laid by the appellant, an officer of the Ministry of Labour and National Service, charging the respondent with the offence under sect. 3 (4) of having on Apr. 21, 1941, failed to comply with the requirements of the said notice, upon which a summons was issued which, after adjournments, came on for hearing on Oct. 3, 1941, before a court of summary jurisdiction for the city of Norwich. The respondent pleaded guilty. The court without imposing any penalty in respect of that offence (the maximum penalty for which is £5), decided to proceed in accordance with the National Service Act, 1941, s. 4 (1). That section reads as follows :

> The court by which any person is convicted of an offence under the principal Act

> by reason of his failure to comply with a notice served on him by the Minister under sect. 3 (1) of that Act requiring him to submit himself to medical examination by a medical board may, without prejudice to any penalty which may be imposed on him, order him to submit himself to medical examination at such time and place as may be fixed by a notice served on him by the Minister, and any such order may include provisions that he shall be detained in custody until that time and taken by a constable to that place at that time.

The case sets out in para. 4 (*e*) the order which was made to that effect, and continues as follows : A

> On Oct. 3, 1941, a written notice was served on behalf of the Minister of Labour and National Service upon the respondent fixing the time and place for such medical examination as 2.30 p.m. on Oct. 3, 1941, at Martineau Hall, Colegate, Norwich. In accordance with the order set out in paragraph 4 (*e*) hereof the respondent was taken by a constable to a medical board at Martineau Hall aforesaid at 2.30 p.m. on Oct. 3, 1941, for medical examination, at which time and place the respondent refused to submit himself for medical examination. B

The case does not state very clearly the subsequent procedure adopted, but it appears, and we were informed by counsel that the fact is, that a further charge was then preferred against the respondent under the provisions of sect. 4 (2) based upon his refusal to submit himself to medical examination in accordance with the order of the court made on Oct. 3, 1941. Sect. 4 (2) reads as follows :

> A person who fails to submit himself for examination in accordance with any such order shall be guilty of an offence under the principal Act and liable on summary conviction to imprisonment for a term not exceeding 12 months, or to a fine not exceeding £50, or to both such imprisonment and such fine . . . C

or on conviction on indictment to a longer term of imprisonment and to a heavier fine. That charge was heard on Oct. 4. 1941, by a court composed of three magistrates. The respondent again pleaded guilty. The court by a majority decided to deal with the case under the provisions of the Probation of Offenders Act, 1907, and agreed to state a case for the opinion of this court. D

The question for our determination is whether the justices were entitled in law to adopt that course. Paragraph 5 of the case is as follows :

> Opinion.
>
> "We, with one dissentient, being of the opinion that the respondent was a man of good character and antecedents who had refused to submit to medical examination because of his conscientious objection to service in His Majesty's Forces in any capacity, non-combatant or otherwise, and that a conviction would not deter the respondent from repeating the offence, but would merely prevent him from doing the work he was willing to do, decided that in the proper exercise of our jurisdiction we ought not to convict the respondent and that it was expedient to release him on probation, accordingly ordered that the respondent be discharged conditionally on his entering into a recognisance in the sum of £5 subject to the following conditions : (i) that he be of good behaviour and appear before the court of summary jurisdiction sitting at the Guildhall, Norwich, for conviction and sentence when called on at any time during the period of 12 months next ensuing, (ii) that he seek ambulance work or similar work under the Society of Friends or the Peace Pledge Union or agricultural work." E F

In my opinion the majority of the justices completely misinterpreted their powers and duties in the matter of the charge upon which they were adjudicating with the result that they acted in excess of jurisdiction and contrary to law, and that is clearly shown by the wording of para. 5 itself. It was no part of their duty to decide whether and to what extent the respondent was a conscientious objector. That task is reserved by the Act to the local and appellate tribunals, and the opinion expressed by the majority of the bench is in direct contradiction of the findings of those two tribunals. Moreover, it is to be observed that, even if the respondent had been placed in category (*b*) of sect. 5 (6) of the Act, as the justices appear to have thought he ought to have been, it would be for the tribunal to direct the work of a civil character to be undertaken by him, while the condition imposed by the justices leaves to the respondent himself the choice of work which he is to seek, but which apparently he is not required to undertake. Counsel for the respondent admitted that the imposition of this condition could not be supported, but he contended that the fact that the respondent was shown to be a person of hitherto good character was sufficient to justify a court of summary jurisdiction in dealing with the case under the Probation of Offenders Act irrespective of the nature of the offence or the circumstances of its commission. In my judgment no support G H for that proposition is to be found in the language of the statute or the decisions of the judges.

It is unnecessary to refer in detail to the provisions of the Probation of Offenders Act, 1907, but the effect of the statute, as amended by the Criminal Justice Administration Act, 1914, s. 8, may be summarised as follows. The court of summary jurisdiction, before proceeding to apply the terms of the statute to any case, is to have regard to the individual before it, his age, character, antecedents and health, also to the nature of the offence, whether of a grave or trivial character, and to the circumstances in which the offence was committed, and is then to decide whether it is expedient to deal with the case in one of the ways indicated by the statute, remembering that one of the objects to be sought is the prevention of any repetition of the same or the commission of any other offence. In this case the justices had before them a person who was confessing for the second time in two days to a deliberate refusal to obey the law, and, in effect, announcing his intention to continue in that disobedience. The offence consisted in the failure to obey an order of the court itself, an offence regarded by the legislature as of so grave a character as to merit a maximum penalty, on summary conviction, of imprisonment for 12 months in addition to a fine of £50. To such a case in my opinion the Probation of Offenders Act has no application. Indeed I doubt whether the Act can be properly applied to any case of a deliberate refusal to obey the provisions of the National Service Acts, and I am clearly of opinion that it would be wrong for a court of summary jurisdiction not to convict any person proved to have been guilty of an offence against the National Service Act, 1941, s. 4 (2). That offence can only be committed by a person who has already been found guilty of a similar offence, and who, being given an opportunity by the court of purging his offence, has deliberately persisted in his defiance of the law.

The Probation of Offenders Act, 1907, is a valuable and useful piece of legislation. The discretion vested in courts of summary jurisdiction is a wide one, and this court will not interfere with the lawful exercise of that discretion; but the Act is not to be used as a means of evading the law or of encouraging persistent offenders in their contumacy.

We have been referred to some authorities. In *Phillips* v. *Evans* (1), the respondent, the owner of a dog, had been refused a certificate of exemption by the Commissioners of Inland Revenue. He refused, however, to take out a licence. On the hearing of an information charging him with keeping a dog without a licence, the justices heard evidence tendered to show that the respondent ought to have been granted a certificate of exemption, and, accepting that evidence, while finding the offence proved, held that the offence was of a trifling nature and dismissed the information under the Summary Jurisdiction Act, 1879, s. 16, the terms of which are similar to those of the Probation of Offenders Act, 1907. This court upon a case stated reversed the decision of the justices, holding that a refusal to take out a licence required by law cannot be a trifling offence.

In *White* v. *Hurrells Stores* (2) this court, on Jan. 17, 1941, remitted to justices with a direction to convict a case in which it appeared that the justices had dismissed under the Probation of Offenders Act, 1907, an information against the owners of a large stores for having committed a breach of the Rationing Order in selling bacon without receiving the appropriate coupon. The decision proceeded upon the ground that a deliberate evasion of the food regulations in time of war could not be properly described as a trivial offence, that being the ground on which the justices had purported to act.

Oaten v. *Auty* (3) was a case which arose during the last war, the facts of which are not unlike the present. The appellant was charged under the Military Service Acts then in force with failing to appear when called out for military duty. He claimed to be exempt as being a regular minister of a religious denomination. The justices overruled that contention, but, being of opinion that it was inexpedient to inflict any punishment, dismissed the information under the Probation of Offenders Act, 1907. The case decided by this court turned upon a different point, but every member of the court of five judges expressed the view that the Probation of Offenders Act, 1907, had no application to such a case. BRAY, J., at p. 285, observed:

> Part of the difficulty here is due to the fact that the justices have come to the absurd

> conclusion that the offence was proved, but did not deserve punishment. When the offence proved is failure to perform military service the justices should never act under the Probation of Offenders Act . . .

In the same case, Lawrence, J., said, at pp. 286, 287 :

> The truth is . . . that this was not a case for the application of the Probation of Offenders Act . . . If they [the justices] thought he was subject to the Military Service Acts they should have convicted him and they were wrong in trying to escape from this by applying the provisions of the Probation of Offenders Act.

In his judgment Avory, J., was most emphatic upon this point and said at p. 287 :

> . . . the order made under the Probation of Offenders Act, 1907, was erroneous in point of law or in excess of jurisdiction in the sense that the case was one to which it was erroneous to apply that Act.

After referring to *Phillips* v. *Evans* (1), he continued at p. 288 :

> It is impossible for anyone to suppose that the offence of being an absentee or a deserter from the Army is an offence of a trivial nature which can be dealt with under the Probation of Offenders Act.

Those observations confirm and strengthen the view which I have expressed.

In my opinion this appeal should be allowed, and the case should be remitted to the justices with a direction to convict the respondent. The amount of the penalty to be imposed is for the justices to determine.

Wrottesley, J. : I am so entirely in agreement with the judgment which has been just delivered that I find it unnecessary to deliver the judgment which I had prepared. I have only two observations to make. The first is that the justices here appear to have thought that they were dealing with a man of good character or good antecedents within the meaning of the Probation of Offenders Act, 1907. In relation to the Acts under which the respondent was charged, he had not a good character or good antecedents. He was what is known as a conscientious objector and took full advantage of the provisions of the Act and regulations passed for the benefit and protection of such persons ; but, when it came to obeying and complying with the obligations laid down by that legislation upon him, he consistently refused to obey them and preferred to defy the law. He is no more therefore a person of good character in this context than is a person who consistently exceeds the speed limit a person of good character when charged with an offence under the Acts dealing with the driving of motorcars on the highway. The only other thing I desire to say is this. As my Lord has pointed out, there can be no doubt from a study of the Act, or from the authorities, that the object and scope of the Probation of Offenders Act, 1907, is not to give comfort and encouragement to those who defy the law. On the contrary, it is there to give comfort and encouragement to those who, it is thought, are going to obey the law. That appears to me to be quite clear from the Act and from the cases cited by my Lord, and, perhaps, particularly from the opinions delivered in the case of *Oaten* v. *Auty* (3). Those opinions were *obiter*. For my part I think they ought now to become a ground for decision in these cases.

Croom-Johnson, J. : I have had the opportunity of reading the judgment delivered by my Lord and the reasons given for it, and I agree with it entirely. One of the objects which has to be borne in mind when considering what additional conditions, if any, are to be inserted in a recognisance under the Probation of Offenders Act, 1907, s. 2 (2) as amended by the Criminal Justice Administration Act, 1914, s. 8, is the prevention by the person to be bound over of a repetition of the same offence or the commission of other offences. That object seems in this case to have been ignored. The magistrates in the result have imposed conditions the result of which, if observed, would have been to ensure a repetition of the same offence or cause an offence of which the accused, but for the probation order, must have been convicted, and would be enabling, if not actually encouraging, him to disobey the particular statute and to set the law at defiance.

Case remitted with direction to convict.

Solicitors : *Solicitor to the Ministry of Labour and National Service* (for the appellant) ; *Bailey & Freeman*, Lowestoft (for the defendant).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

Applied. TULIP *v.* TULIP. [1951]
1 All E.R. 563.

MORTON *v.* MORTON.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P., and Hodson, J.), **January 14, 1942.**]

Divorce—Summary jurisdiction—Maintenance—Agreement to pay weekly sum in compromise of proceedings—Payments under agreement duly made—Whether jurisdiction to make new order.

In 1930, a wife brought proceedings against her husband in a court of summary jurisdiction for maintenance. These proceedings were compromised, the husband undertaking to pay £1 per week to the wife and 10*s.* per week in respect of a son then 11 years of age. The undertaking was set out in an informal form under the title of " heads of agreement." Its terms had never been embodied in a formal document but, at all material times, had been acted on by the husband. As soon as the son became a wage-earner, the husband ceased to pay the 10*s.* per week in respect of the boy. The wife unsuccessfully contested the matter both in the court of summary jurisdiction and the county court. In 1941, after the son had become of full age and the husband having continuously paid £1 per week to his wife in respect of her own maintenance, the wife applied to a court of summary jurisdiction for an order on the ground of wilful neglect to provide reasonable maintenance for herself. The magistrate made an order for a payment of 30*s.* per week :—

HELD : (i) the heads of agreement were a binding contract, and not a contract to make a contract. The existence of this contract was not necessarily a bar to making of a subsequent order, and, as its terms had been faithfully carried out, the husband could not be said to be guilty of an offence of wilful neglect to maintain and there was no ground on which the magistrate could make an order.

(ii) An agreement to provide maintenance for a child terminates upon the child attaining full age. *Quaere :* whether it terminates upon the child attaining 16 years of age.

[**EDITORIAL NOTE.** The question here is really whether it can be said that a husband who has regularly paid all sums due under an agreement for maintenance is guilty of neglect to maintain. The Act requires that the husband shall be found guilty of neglect to provide reasonable maintenance before an order can be made and, if, therefore, such payments rebut a charge of neglect, there is no jurisdiction to make such an order. It is not clear whether, if the circumstances had so changed as to make the terms of the agreement an unreasonable provision for the wife, an order could have been made. In most cases where there is such an agreement, the summons will have been withdrawn with leave of the court and no order made. It would seem advisable, therefore, to take an order of the court in all cases, which, if the circumstances can be shown to have changed, can be varied upon a proper application under the Act.

AS TO MAINTENANCE, see HALSBURY, Hailsham Edn., Vol. 10, pp. 838, 839, para. 1340 ; and FOR CASES, see DIGEST, Vol. 27, pp. 558, 559, Nos. 6134-6150.]

Cases referred to :

(1) *Whittaker* v. *Whittaker*, [1939] 3 All E.R. 833 ; Digest Supp.
(2) *Jones* v. *Jones*, [1924] P. 203, 27 Digest 565, *6241* ; 93 L.J.P. 94 ; 132 L.T. 63.
(3) *Diggins* v. *Diggins*, [1927] P. 88 ; Digest Supp. ; 96 L.J.P. 14 ; 136 L.T. 224.
(4) *Matthews* v. *Matthews*, [1932] P. 103 ; Digest Supp. ; 101 L.J.P. 41 ; 147 L.T. 240.
(5) *Morris* v. *Edmonds* (1897), 77 L.T. 56 ; 37 Digest 358, *1609*.
(6) *Briggs* v. *Burridge* (1924), 89 J.P. 75.

APPEAL by the husband from an order of the stipendiary magistrate sitting at Merthyr Tydfil against an order adjudging him guilty of wilful neglect to provide reasonable maintenance for his wife and ordering him to pay his wife 30*s.* per week. The facts are fully set out in the judgment of LORD MERRIMAN, P.

W. Latey for the appellant.

Ifor B. Lloyd for the respondent.

LORD MERRIMAN, P. : It is unnecessary to attempt, as other judges have consistently refused to do, to give an exhaustive definition of " wilful neglect to provide reasonable maintenance." I am not satisfied that cases dealing solely with the meaning of the word " wilful," or cases dealing solely with the meaning of the word " neglect," are of very great assistance. Justices have to be satisfied affirmatively that the husband has been guilty of the subject-matter of the complaint, which involves, in the words of the statute, that he has been guilty of something, and that something is "wilful neglect to provide reasonable maintenance." The phrase must be considered as a whole, and, as I have already indicated in *Whittaker* v. *Whittaker* (1), I agree with the view of Lord Merrivale, P., expressed in *Jones* v. *Jones* (2), that the phrase imports some element of matrimonial misconduct. Further than that, for the purposes of this case, it seems to me to be unnecessary to go. However, the fact that the charge is brought in a court of summary jurisdiction imports also that the offence has been committed, in whole or in part, within the six months preceding the complaint. As the complaint was made in Aug. or Sept., 1941, it follows that the six months fell wholly within that year, so that we have to see whether there is evidence that in the year 1941 the husband had been guilty of wilful neglect to provide reasonable maintenance for the wife.

In the present case, it is not disputed that, at all material times in 1941, the husband was punctually paying his wife maintenance at the rate of £1 per week, and that the only son of the marriage was then over the full age of 21 years. These facts being uncontroverted, we must go back to consider the other circumstances affecting the husband's position in that year. The parties were married in 1913, and beyond saying that the only two children were a daughter, who has long since been married, and the son to whom I have already referred, nothing calls for notice until the month of Aug., 1930. In that month the wife made a complaint in the local court of summary jurisdiction that her husband had been guilty of desertion and had been guilty of persistent cruelty, and asked, accordingly, for an order for maintenance for herself and the son. Although the parties attended at the court prepared to fight the case, it was, in fact, compromised. Both parties were represented by solicitors, and heads of agreement of the terms on which the wife withdrew her summons for maintenance, were drawn up and signed by the respective solicitors. Having regard to certain observations of the stipendiary magistrate upon this document, I must refer to it in detail. It begins as follows:

> In consideration of the wife withdrawing the summons for maintenance against the husband, the wife and the husband hereby mutually agree to enter into separation deed containing the following clauses (1) husband to pay wife £1 a week and boy 10*s*. a week, the first payment to be made on Saturday next; (2) while unemployed husband to pay the wife for herself and boy amount of dependants' benefit only.

I pause there. It might appear that the first stipulation provided for two separate liabilities, a liability to the wife and a liability to the boy. I do not so read it. All the articles are left out, and I think it is shorthand, so to speak, for an obligation on the husband to pay maintenance, which could only be payable to the wife, of £1 for herself and 10*s*. in respect of the boy, and that is how it is expressed in the second clause substituting the dependants' benefit if the husband were unemployed. Then the heads of agreement go on:

> (3) Husband to deliver to the wife her goods and furniture. (4) Wife to have custody of boy, with right of access by husband. (5) Usual clause that no proceedings be taken while terms of agreement kept. (6) Mutual *dum casta* clause. (7) Husband to contribute 3 guineas to wife's costs.

These terms have been carried out, except that no formal agreement has ever been prepared or executed. The stipendiary magistrate described this document in one place as being a mere *nudum pactum*, but has construed it as meaning plainly that the wife was entitled to receive 30*s*. in perpetuity, irrespective of the age of the son. He has held, putting it another way, that there was, in fact, no contract between the parties at all and has based his judgment on that ground, but he has held that, if there was a contract, it does not express any termination of liability in respect of the 10*s*., and that, if there was to be any such limitation, the contract should have said so. As I am in complete disagreement with the stipendiary magistrate on all those points, I will proceed at once to say why that is so. It seems to me to be vital, in the first instance, not merely to look at the surrounding circumstances in the broad general sense, but to see what the parties themselves said they were about when they drew up these heads of agreement. They were compromising a claim for maintenance under the Summary Jurisdiction (Married Women) Act, 1925, before a court of summary jurisdiction, and they were providing instead for a consensual separation, which, of course, included a provision for maintenance, and a provision for the custody of the boy and the like. The court, if the wife had proceeded, could have granted her a maintenance order, and could have included in that maintenance order provision for the custody of the boy, and, having given the wife the custody of the boy, could, under the statute, have given her a maintenance order in respect of the child of whom it was giving her the custody for a sum not exceeding 10*s.* a week, and, what is more important for our present purpose, could not have made that order in respect of the boy for one moment after he attained the age of 16 years. That is provided in the statute. That was the subject-matter of these heads of agreement, and I am bound to say that I cannot understand the decision that this was a *nudum pactum.* The commonest thing in the world, in these matrimonial causes, whether in courts below or in this court, is to draw up heads of agreement, which are afterwards to be put into more solemn form, if the parties so require ; but to say, in effect, that this is nothing more than a contract to make a contract seems to me to be impossible. Subject only to this question of the age of the child, with which I shall deal in a moment, every requisite of the agreement between the parties was here, and I think it is the clearest possible case of a concluded agreement, which no doubt either party could have insisted on being put into more formal shape. When it comes to this question of the maintenance in respect of the son, I agree that there is an ambiguity, because nothing is said about the age at which that provision is to cease ; but it seems to me to be impossible to infer from that that the agreement meant that that sum was to be payable in perpetuity, disregarding altogether the subject-matter with which they were dealing. If either party had insisted on a formal document, and there had been a dispute whether the age was to be limited to 14 or to 16, it might have been a question susceptible of some argument, but the point which impresses me is that it is inconceivable that any court, being asked to decide what the form of the deed should take, could possibly have ordered that the maintenance for the son should be payable after he had attained the age of 16 years at the latest. I am prepared to hold that there is no question about the enforceability of this contract, and that, if the question had arisen at the time, a court could very well have compelled the execution of a deed in that sense. Now, it was said by the wife before the magistrate (though he has not expressed any decision about the matter, but has merely alluded to the wife's evidence without comment), that she never signed the deed, and never assented to it. Again I must say I think it is impossible for her to put forward any such contention. I have already said that all the things which had to be done at once were done, and from the following Saturday, when the first payment was to be made, it is common ground that for three years, at least, the wife received this £1 and this 10*s.* regularly. Under what did she receive it if it was not under this agreement ? Under what did she get her furniture back, if it was not under this agreement ? It seems to me to be perfectly impossible for her to suggest that she was no party to the agreement. And that is not all. In 1933 the boy was 14. Erroneously, as I think, the husband took the view, based, I gather, on something which was said in the course of the negotiations between the solicitors at court, that the boy having become 14 and a wage-earner, his liability for the 10*s.* had ceased. From that time up to the time of the present complaint, he has paid the £1 for the wife, and no more. In Feb., 1934, she took out, in the same court, a summons for wilful neglect to maintain and, although the formal record does not show precisely what the issue involved was, it is clear from the wife's own evidence that she was maintaining that she was entitled to receive that 10*s.* in respect of the boy, and was not precluded from receiving it by the fact that the boy had become a wage-earner. That summons was dismissed, the magistrates holding, in effect, that the withholding of that 10*s.* disclosed no ground of complaint, but that, if she relied on the terms of the agreement, she could make such a claim in the county court. Accordingly, in Oct., 1934, she sued in the local county court for £18 10*s.* arrears of maintenance, and failed. Now, it is necessary to be a little precise here. It might well be that, on the lines which HENN COLLINS, J., and I discussed in this court in *Whittaker* v. *Whittaker* (1), it would have been possible to show that, so far as a court of summary jurisdiction was concerned, her right to recover anything in respect of that 10*s.* was completely barred, so far as it depended on the agreement, but, in my opinion—and I think that on consideration counsel for the appellant did not dissent from this view—in this case the elements were lacking from which such a conclusion could be arrived at. The claim in the county court and the affidavit of jurisdiction verify ing it do not show on the face of them that she was claiming in respect of the 10*s.* payable in respect of the son under the agreement. It is left vague, and there is nothing on the face of the certificate of judgment itself which shows that that was so. Evidence would, therefore, have had to be adduced to show that that was the matter decided. As no such evidence has been given, I think that she is not precluded from raising the question ; but, of course, it is really clear beyond the slightest doubt, on her own evidence again, that she was suing for the 37 weeks in which the husband had withheld the 10*s.* in respect of the boy, and I have not the slightest doubt in my own mind that that is what the county court judge decided. Of course, it is possible that he may have taken the view that it was not a contract at all, and that the case failed on that ground, but I doubt it. However, I say no more than that the matter is not shown to have been *res judicata.* This, at any rate, appears. Twice in 1934, according to her own story to the tribunal from whom we are hearing this appeal, she had tried to get an order for the 10*s.* payable in respect of the boy, and had failed, both parties knowing all the circumstances that I have related up to that moment. For 7 years after that, without a murmur, she accepted the £1 per week, the son, in the meanwhile, having become, first of all, 16 years of age, then ultimately 21 years of age, and, as he grew up, earning, no doubt, more and more, until shortly before the subject-matter of this complaint arose he was bringing in a nice wage, and he and his mother were living contentedly together. Then came the war, and the young man joined His Majesty's Forces, with the result that, instead of being able to pay his wages to his mother, he was only able to make her an allotment from his pay of 3*s.* 6*d.* a week. That was a very unfortunate change in her circumstances, and, without more ado, nothing else having happened, she took out this summons alleging that the husband, who has been paying her punctually and faithfully £1 per week, has been guilty of wilful neglect to provide her with reasonable maintenance.

After very helpful citation of the authorities by counsel on each side, I think that the position on this summons is now free from doubt. The existence of an agreement is not a bar to the jurisdiction of the magistrates, neither on the question whether the offence has been committed, or on the point of amount ; but I think it is desirable to emphasise, as applied to the circumstances of this case, how high a value such an agreement should have had in guiding the magistrate in the exercise of his jurisdiction, which unquestionably remains notwithstanding the agreement. I think that it might be helpful to cite two passages from judgments of Lord Merrivale, P. The first, in point of time, was in *Diggins* v. *Diggins* (3). I should like, first of all, to point out that this was a separation agreement providing for a weekly sum by way of maintenance, and that the husband, after two weeks, had made no payment at all, basing himself on the fact that the wife had, contrary to the terms of the agreement, so he alleged, molested him and that the weekly sum had therefore ceased to be payable. The maintenance, in fact, had not been paid. Of course, even if it were open to us, it would be quite absurd to doubt the propriety of the decision that the jurisdiction of the justices was not barred in those circumstances. Having alluded to the fact that the man had not paid that which he was liable to pay under the agreement, Lord Merrivale, P., said, at p. 92 :

> Apart from the deed, the case is clear. The husband has wilfully neglected to provide reasonable maintenance for the wife. What remains is to ascertain whether the deed excludes the jurisdiction of the justices. Then he says this : It must not be supposed that there is an unlimited right in a wife under the amended statute, wherever she has entered into a deed, at her volition to proceed to the justices to get the terms of the deed reviewed. That would be contrary to good sense, and I do not doubt, if any case arise where a wife who has entered into a deed proceeds in disregard of it to seek something different from the justices, that she will meet with an answer which will prevent the possibility of further question. If she does not meet with it at first instance, she may meet with it here.

What Lord Merrivale, P., was saying in the plainest possible language was, that, if it is shown that the deed provides for periodical payments which have been punctually made, the evidential value of that deed, as showing that the husband has, by making the payments regularly, been providing reasonable maintenance for his wife, is extremely high. To put it the other way, the wife will have the very greatest difficulty in making out a case in such circumstances ; but the jurisdiction, as such, is not excluded.

I now turn to *Matthews* v. *Matthews* (4). There the husband had, so to speak, attempted to contract out of liability to pay his wife by providing her with a lump sum in settlement. The details do not matter, but he had, in fact, provided her with money to help her to set up in business. Nevertheless, things had gone awry, and at the material time the wife was left with no support from her business, and, as a matter of fact, it was common ground that the husband having, as he thought, discharged all his liability, and having certainly discharged all his liability under the deed, had not provided her at the material period with any maintenance at all. LORD MERRIVALE, P., said, at p. 106:

> What he [the stipendiary] had to determine was whether the husband had been guilty of wilful neglect to provide reasonable maintenance for his wife, and in order to determine that, he had, of course, to look at what had taken place between the parties, and to look at the agreement and to see what the husband had done and was doing, but he still had to determine judicially whether the husband had been guilty of wilful neglect to provide reasonable maintenance for his wife. That depended on two things: First, whether he had failed to maintain her; secondly, whether he had done it wilfully.

He then deals with the question of the deed operating as an estoppel, and held that it did not. Of course, where, in fact, no maintenance has been provided, and there has been a complete change of circumstances, the wife is, no doubt, in a stronger position to succeed, in spite of the provisions of a deed, and I do not think it is necessary to cite authorities. I am content, as counsel were content, to deal with it on the basis that a deed like this, providing for periodical payments, the obligation to make which has been punctually performed, is very strong evidence indeed against a complaint of wilful neglect to provide reasonable maintenance. I think it is possible to put the matter in another way, but I prefer not to base my decision upon it. There are two cases which have arisen in the Divisional Court of the King's Bench Division, on what, I think, is an indistinguishable point, in one of which, *Morris* v. *Edmonds* (5), it was held that a mistaken belief *bona fide* held in the fact of the wife's adultery is an answer, while on the other hand, a mistaken belief on the question of law whether the husband was liable to maintain his wife at all has been held, in *Biggs* v. *Burridge* (6), to be no answer. Incidentally, that case emphasised the difference between the decision in *Morris* v. *Edmonds* (5), which was approved, and the facts then in question.

Now it seems to me to be quite clear that if the true construction of these heads of agreement was that in 1941 the husband was liable to pay the wife 10*s*. in respect of his 22-year-old son, the mistaken and genuine belief that the construction of the agreement did not provide for that would not help him, because that would be a matter of law. On the other hand, assuming that the construction which I have put upon the heads of agreement is right, and that he was not in law obliged to pay anything but the £1 per week under the deed, then I think it would be possible for the husband to say (though I am not deciding the case on this ground) that he had reasonable ground for believing that £1 per week was reasonable maintenance, and, therefore, having acted on that belief, he could not be found guilty of wilful neglect to provide reasonable maintenance. The question what is reasonable maintenance is a question of degree, which in turn is a question of fact to be decided having regard to all the circumstances of the case. However, I am not sure that that really advances the matter, as it seems to come back very much to the same point.

I am content to decide this case on the ground that it is, in my opinion, impossible, taking all the circumstances of the case into consideration—the heads of agreement, the two attempts by the wife to obtain orders for the payment of the 10*s*. in 1934, and her apparent acquiescence in those decisions for seven years thereafter, till her son, being of full age, joined the Army—to hold that this man has been guilty of the offence complained of. I am not overlooking the consideration that in the year 1934, if my view of the contract is right, there may have been no ground for the refusal of the 10*s*. per week, either by the court of summary jurisdiction or by the county court; but that does not seem to me to be either here or there. The question we have to consider is whether, taking this agreement into account, it is possible to hold him guilty of wilful neglect to maintain in 1941.

It is quite true that the magistrate appears, in the last paragraph of his findings, to say, in effect, that 30*s*. is the reasonable amount of maintenance: but, though, where there is nothing else, we are very reluctant to interfere with assessments of amounts as such, it is perfectly plain that this decision was arrived at on the basis that there was no separation agreement in existence at all. Since there was such an agreement, that conclusion, in my opinion, is wrong. It seems to me to be clear that the decision here on the mere question of amount is based upon an incorrect appreciation of the legal position. For these reasons I think that this appeal must be allowed.

Hodson, J.: On Aug. 19, 1930, an agreement was entered into between the parties to this appeal in compromise of proceedings before a court of summary jurisdiction. The agreement, on its true construction, having regard to the circumstances in which it was entered into, provided for the allowance of £1 per week to the wife and 10*s.* per week to the wife for the boy until he attained the age of 16 years. If I am wrong about that, at the most it provided for an allowance for the boy payable to the wife ceasing when he ceased to be a boy, namely, at 21 years of age. The agreement does not in terms provide for or preclude a subsequent application to a court of summary jurisdiction. Now, in 1941, the wife was receiving £1 per week for herself, and the boy was over the age of 21. The husband was, as he always had been during all the material time, from the time of the agreement, complying with the agreement in so far as the allowance to his wife for herself was concerned. In those circumstances, on Sept. 2, 1941, the wife applied to the stipendiary magistrate at Merthyr Tydfil for an order on the ground that the husband was guilty of wilful neglect to provide reasonable maintenance for her. It is quite clear that in order to determine that question one of the matters which the magistrate had before him for consideration was the existence of this agreement, as well as the amount, if any, of payments made to the wife by the husband under the agreement, or at all, and the stipendiary has found, in the reasons given in support of his decision, that there was no agreement at all, and that, if there was an agreement, that it was one providing for a payment to the wife of 30*s.* per week for an indefinite period. After consideration of this matter, and after consideration also, no doubt, of the husband's income, the stipendiary assessed the maintenance payable to the wife at the figure of 30*s.* per week.

In my judgment, the stipendiary was wrong in saying that there was no agreement at all, and he was wrong in construing it in the way in which he did. Taking the agreement into consideration on its proper construction, and taking into account, also, the history of this case which my Lord has stated, in particular taking into account the regular payments which have been made under the agreement by the husband to the wife, I do not think there was any evidence at all upon which the stipendiary could find that the husband had been guilty of an offence, namely, that of wilful neglect to provide reasonable maintenance for his wife, and for those reasons I agree that this appeal should be allowed.

Appeal allowed. Order discharged.

Solicitors: *Cunliffe & Airey*, agents for *Taliesin Griffiths & Son*, Merthyr Tydfil (for the appellant); *Gregory Rowcliffe & Co.*, agents for *Harry W. Hughes & Son*, Shrewsbury (for the respondent).

[*Reported by* D. Armstead Fairweather, Esq., *Barrister-at-Law.*]

Re BOWER'S SETTLEMENT TRUSTS, BOWER *v.* RIDLEY-THOMPSON.

[Chancery Division (Morton, J.). **November 28, 1941.**]

Settlements—Construction—Beneficial trusts—Accruer clause—Trusts for children and grandchildren in unequal shares—Accruing share accrues to other beneficiaries equally.

The terms of a settlement provided that the proceeds of sale of the property settled were to be divided into eight equal shares, and that the shares, or fractions thereof, were to be held on trust for the children and grandchildren of the settlor in unequal shares. The settlement went on to provide that, in the event of the trusts of any share failing, that share was to accrue "by way of addition to the other shares." The trusts of the share of one of the settlor's sons failed by reason of his death, and the question to be determined was whether his share accrued to the other beneficiaries equally or in proportion to their interest in the trust fund :—

HELD : in the absence of any indication in the settlement to the contrary, the deceased's share accrued to the other beneficiaries equally.

[**EDITORIAL NOTE.** It is strange that the simple question, the subject-matter of this summons, has not arisen for decision before this, but, so far as is known, this is the first time the matter has been before the court. The matter is treated as a construction of the particular words in the settlement here considered and no indication has been found in those words that the accruing share shall be divided among the beneficiaries otherwise than equally. The fact that the settlor has differentiated between the beneficiaries in their original gifts is held to be overridden by the terms of the accruer clause. The frequency with which such clauses occur in wills and settlements makes it necessary that draftsmen should note this decision, and, if necessary, after taking the instructions of the testator or the settlor as to his intention, use such additional words as will ensure the result being in accordance with the intention.

AS TO ACCRUER CLAUSES, see HALSBURY, Hailsham Edn., Vol. 34, pp. 366-368, para. 413 ; and FOR CASES, see DIGEST, Vol. 44, pp. 1215-1217, Nos. 10507-10533.]

ADJOURNED SUMMONS to determine, *inter alia*, the construction of an accruer clause under a settlement dated Feb. 15, 1922. One of the beneficiaries, Robert Bower, having died on Feb. 26, 1940, and the trusts of his share having failed, his share accrued to the other shares. All the material facts are set out in the judgment.

Wilfrid M. Hunt for the plaintiff, the trustee.

Ingram J. Lindner (for *J. Burgess* on war service) for the first defendant, Mrs. Ridley-Thomas.

J. Wolfe for the second defendant, Joshua Bower.

Raymond W. Jennings for the third defendant, T. K. Bower.

E. M. Winterbotham for the fourth and fifth defendants, grandchildren of the settlor.

M. G. Hewins for the sixth defendant, the widower of Mrs. E. Mercer.

MORTON, J. : By a settlement, dated Feb. 15, 1922, and made between Thomas Bower the elder of the one part (thereinafter called the settlor) and Marian Bower, spinster, and Joshua Bower of the other part (thereinafter called the trustees) certain properties were settled on trust for sale and out of the proceeds of sale to pay the costs of such sale and hold the residue on the trusts thereinafter declared. The settlement continued in cl. 4 as follows :

> The trustees or trustee shall divide the net proceeds of sale and the investments representing the same (hereinafter called the trust fund) into eight equal shares and shall hold the said respective shares upon the trusts hereinafter declared concerning the same respectively.

Then followed a protected life interest of Joshua Bower in one-eighth and one-third of one other eighth share of the fund and certain trusts are declared in cll. 5, 6, 7, 8, 9 and 11 in favour of Joshua Bower and his issue, conferring on him a power of appointment over income in favour of his wife for life and a power to appoint his share to his children. Cl. 12 was in the following terms :

> In case the trusts hereinbefore declared concerning the one-eighth share and one-third of one other eighth share of the said Joshua Bower shall fail then subject to the trusts powers and provisions herein declared and contained or by law vested in the trustees or trustee concerning the same share and to every or any exercise of any such powers the said share and any additional share or shares which may accrue or be added thereto by virtue of the present proviso and the income thereof respectively shall go and accrue by way of addition to the other shares and be held upon the trusts and subject to the powers and provisions herein declared and contained concerning the original share or as near thereto as circumstances will admit . . .

Clause 13 provided :

> The trustees or trustee shall stand possessed of one other eighth share and of one-third of one other eighth share of the trust fund upon trust for Robert Bower (son of the settlor) his children issue and otherwise similar to the trusts lastly hereinbefore declared in favour of the said Joshua Bower his children issue and otherwise in the same manner as if the same were here repeated with the name of the said Robert Bower inserted therein in the place of the name of Joshua Bower.

By cl. 14 Marian Bower was given an eighth share on trusts similar to those declared in favour of her brother Joshua. Then followed a similar settlement in favour of

Mrs. Elizabeth Mercer of an eighth share and of another eighth share in favour of Mrs. Ridley-Thomas and another eighth share in favour of Mrs. Anne Ward, all being daughters of the settlor.

The trusts declared by cl. 18 were in the following terms:

> The trustees or trustee shall stand possessed of one-half of one other eighth share and one-sixth of one other eighth share of the trust fund upon trust during the life of Thomas Kitchingham Bower (grandson of the settlor) or until he shall attain the age of 25 years or for 21 years after the date hereof whichever shall be the shortest to pay or apply the whole of such part as the trustees or trustee shall think fit of the income thereof for or towards the maintenance support education advancement or benefit of the said Thomas Kitchingham Bower in such manner in all respects as the trustees or trustee shall in their absolute discretion think fit and shall accumulate the surplus (if any) of the said income by investing the same and the resulting income thereof in manner aforesaid to the intent that the accumulations shall be added to the last mentioned shares of the said trust fund and from and after the termination of the shortest of the periods aforesaid the trustees or trustee shall stand possessed of the said last mentioned shares of the trust fund and the accumulations of income (if any) as aforesaid upon trust for the said T. K. Bower his children and issue similar to the trusts hereinbefore declared in favour of the said Joshua Bower his children and issue in the same manner as if the same were here repeated with the name of the said T. K. Bower inserted therein in the place of the name of the said Joshua Bower.

And a half of an eighth share and a sixth of a further eighth share were given also to Herbert Peter Middleton Bower, the trusts of this share being declared in cl. 20 by reference to the trusts which had been previously set out in favour of Thomas Kitchingham Bower.

Clause 21 was as follows:

> In case the trusts hereinbefore declared concerning the shares of both the said T. K. Bower and H. P. M. Bower shall fail then subject to the trusts powers and provisions herein declared and contained or by law vested in the trustees or trustee concerning the same shares and to every or any exercise of any such powers the said shares and any additional share or shares which may accrue or be added thereto and the income thereof respectively shall go and accrue by way of addition to the other shares in the trust fund upon the trusts and subject to the powers and provisions herein declared and contained concerning the original shares or as near thereto as circumstances will admit.

Now the scheme of the settlement is quite clear, the settlor in the first instance has stated that one eighth share and one third of another eighth share are to be held on trusts in favour of each of his two sons then living, and an eighth share in favour of each of his four daughters then living, and a half of an eighth share and a sixth of another eighth share in favour of each of his two grandchildren, the children of his deceased son Thomas.

Now I have to determine whether Robert's share accrued on his death to the other shares in equal proportions or in the proportions of the original shares of the settlement. It is strange that the question has not arisen before, but, in the absence of any authority, and on the words of the trust deed, it seems to me that the share would accrue to the other shares in equal proportions. If I were at liberty to guess what the settlor's wishes were, I might hold that Robert's share should accrue to the other shares in the proportions of the original shares. Counsel for the second defendant has said that the settlor has not given the original shares in equal proportions, and that all the shares under the settlement should be treated as a corporate whole, and, when Robert's share falls in to be divided amongst that corporate whole, it should be divided in the proportions of the original shares; but the words used in cl. 12 are simply "shall go and accrue by way of addition to the other shares," and I can find nothing in the settlement which would persuade me that the accruing share should not be divided equally amongst the other shares.

Declaration accordingly.

Solicitors: *Austin J. Wright*, agent for *Lawson, Lewis & Bairstow*, Eastbourne (for all parties except the last defendant); *Fisher and Dowson* (for the last defendant).

[*Reported by* Irene G. R. Moses, *Barrister-at-Law.*]

OWNERS OF THE STEAMSHIP CERAMIC *v.* OWNERS OF THE STEAMSHIP TESTBANK.

[COURT OF APPEAL (Lord Greene, M.R., and MacKinnon and Goddard, L.JJ., with Nautical Assessors), **February 6, 1942.**]

Tort—Joint tortfeasors—Apportionment of liability—Variation of apportionment by Court of Appeal.

The apportionment of liability to make good the damage caused by negligence is no more and no less open to review by the Court of Appeal than any other conclusion of fact by the trial judge. It is not a matter in the discretion of the trial judge.

[**EDITORIAL NOTE.** There are *dicta* in the *Karamea* (1) that the apportionment of liability for damage is a matter in the discretion of the trial judge. If that were so, it would limit the jurisdiction of the Court of Appeal to vary the proportion, as it could only do so where the judge had clearly acted upon a wrong principle or had made so wrong a decision as to amount to a miscarriage of justice. After careful consideration of the matter, the court has decided that the *dicta* do not correctly state the position, and that the court has as full a power to vary the apportionment as it has to vary any other conclusion of fact by the trial judge. The importance of the matter lies in the extension, in 1935, of the jurisdiction to apportion to ordinary actions for negligence.

AS TO APPORTIONMENT OF LIABILITY, see HALSBURY, Hailsham Edn., Vol. 32, pp. 188, 189, para. 282 ; and FOR CASES, see DIGEST, Supp., Tort, No. 72a.]

Case referred to :

(1) *Karamea* (*The*) [1921] P. 76 ; 41 Digest 784, *6448* ; 90 L.J.P. 81 ; 124 L.T. 653 ; *on appeal*, [1922] 1 A.C. 68.

APPEAL by the defendants from a judgment of LANGTON, J. The appeal is is reported only on the question of apportionment and for the purposes of this report the facts are not material.

R. F. Hayward, K.C., and *Owen L. Bateson* for the appellants.

G. St.C. Pilcher, K.C., and *Waldo Porges* for the respondents.

LORD GREENE, M.R. : LANGTON, J., apportioned the liability as to one-quarter to the Ceramic and as to three-quarters to the Testbank. I have formed a clear opinion that this apportionment is too favourable to the Ceramic, and the question arises whether I am at liberty to give effect to that opinion. Apart from authority, I should have no doubt as to the answer ; but, in the case of the *Karamea* (1), *dicta* are to be found which, if correct, impose a very strict limitation on the power of an appellate court to alter the proportions which have commended themselves to the trial judge in cases where the appellate court does not differ from him on the facts. LORD STERNDALE, M.R., said, at p. 78 :

> If we agree with the learned judge on the facts and come to the same conclusion as to the actions of the two ships, I think it would need a very strong case indeed to induce the court to interfere with his discretion as to the proportions of blame. We have power to do it, but I do not suppose that we should ever think of doing it.

The view expressed by WARRINGTON, L.J., was less emphatic. He said, at pp. 83, 84 :

> It may well be and probably is the case that, if the court arrives at the same conclusion both on the facts and in law, it would not interfere merely because the learned judge in his discretion has given proportions which this court thinks it would not have given.

At p. 89, SCRUTTON, L.J., said :

> . . . if the Court of Appeal agrees with the findings of fact and law of the learned judge below, and the only difference is that it attaches more importance to a particular fact than he did, it would require an extremely strong case to alter the proportions of blame which the learned judge below has attributed to the ships . . .

It is with some trepidation that I venture to make some comments upon these weighty observations. The duty of the court in apportioning blame is laid down in the Maritime Conventions Act, 1911, s. 1, which says that

> . . . the liability to make good the damage or loss shall be in proportion to the degree in which each vessel was in fault : Provided that (*a*) if, having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability shall be apportioned equally . . . .

The questions, therefore, which the trial judge has to answer are : "what was the degree in which each vessel was at fault ?" and "is it possible to establish different degrees of fault ?" The apportionment of liability follows automatically from the answers to these questions. Now it appears to me that these questions are questions of fact like any other question of fact. They are in their nature eminently suitable for submission to a jury, if such were the practice. They are not questions of law nor are they, with all respect to the view which LORD STERNDALE, M.R., and WARRINGTON, L.J., appear to have held, questions of discretion. It is true that the answer to them embodies the opinion of the judge as to the comparative degrees of fault to be attributed to two sets of negligence; but, if, for example, the trial judge finds that it is not possible to establish different degrees of fault, why should it not be open to an appellate court to find that it is possible, and to vary the apportionment? If, on the other hand, the trial judge finds that it is possible to do so, why should it not be open to an appellate court to find that, having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, or that the degrees that it is possible to establish are different from those found by the trial judge?

In my opinion, therefore, the *dicta* which I have quoted, if read strictly, impose an unjustifiable limitation of the powers of an appellate court. It must not be taken that the finding of a trial judge as to the degrees of fault is to be lightly interfered with. No conclusion of fact of a trial judge ought ever to be lightly interfered with, even where it is not aided by such matters as the demeanour of a witness; but this court is in as good a position as the trial judge to form an opinion. All that I am concerned to say is that the finding of the trial judge as to the degrees of fault is no more and no less open to review than any other conclusion of fact. If this court forms the clear opinion that the proportions ought to be altered, it is, in my opinion, its right and its duty to say so.

In the present case I have formed the clear opinion that the Ceramic ought to be held to have been at least equally to blame with the Testbank. There were more ways than one in which the Ceramic could, by good seamanship, have avoided a collision. She had ample time in which to decide what was the right action to take. Had there been any doubt as to what she ought to do, the position would have been very different; but there was no doubt whatever. The action which she in fact took was the one action which she ought not to have taken, and was, from the point of view of seamanship, quite unpardonable. In these circumstances, I have hesitated before deciding that the degree to which the Ceramic was in fault ought not to be fixed at more than one-half; but, on the whole, I think that the safer view is to hold that the two vessels were equally at fault, and that the liability ought to be apportioned equally between them.

MACKINNON, L.J.: My mind has fluctuated between the view that on the facts the Ceramic should be held three-quarters and the Testbank one-quarter to blame and the view that they should be held equally to blame. Upon the whole, perhaps influenced by the conclusion of the learned judge (though I cannot accept it in its entirety) I think this appeal should be allowed to the extent of varying the order below and substituting a declaration that both were equally to blame.

Our attention was rightly directed to the *dicta* of LORD STERNDALE, M.R., and SCRUTTON, L.J., in the *Karamea* (1), at pp. 78 and 89. They expressed the view that where the judge below has apportioned the degrees of blame, this court should be very slow to differ from him. LORD STERNDALE, M.R., said, at p. 78 that the Court of Appeal would not lightly interfere with the judge's discretion as to the apportionment of blame. SCRUTTON, L.J., said, at p. 89: "It would require an extremely strong case to alter the proportions of blame which the judge below has attributed to the ships."

These are weighty *dicta*; but not part of the decision of the court in that case. I confess I do not understand why the conclusion of the judge below can be said to be a matter in his discretion, or how his decision differs from any other decision that is subject to appeal. His decision is a fulfilment of the duty imposed by the Maritime Conventions Act, 1911, s. 1:

> Where, by the fault of two . . . vessels, damage is caused, the liability to make good the damage . . . shall be in proportion to the degree in which each vessel was in fault . . .

The decision of those degrees was a novel duty imposed by that statute. A similar duty has been still more recently imposed by the Law Reform (Married

Women and Tortfeasors) Act, 1935, s. 6 (2) :

> In any proceedings for contribution under this section the amount of the contribution recoverable from any person shall be such as shall be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage . . .

If a judge has fulfilled the duty imposed on him by either of those Acts, and his judgment is the subject of an appeal, I confess I do not see why the Court of Appeal has not as full a power of reviewing his finding as in the case of any other question arising on an appeal.

Goddard, L.J. : On the question of the apportionment of blame between the ships, the judge had apportioned three-quarters to the Testbank and one-quarter to the Ceramic. Counsel for the respondents has argued that we are precluded by the judgment of this court in the *Karamea* (1) from disturbing his findings in this respect, contending, as I understand him, that there is here nothing exceptional. I need not repeat the passages from the judgments which have already been read by Lord Greene, M.R. The first observation I would make is that these passages are clearly *obiter*; but, considering the eminence of the judges who formed the court, it is with some diffidence that I venture to be critical. I do not understand, however, why it is said that the apportionment of blame is a matter of discretion. It seems to me that, in deciding how much a ship is to blame for a collision, the court has to decide a question which is just as much one of fact as is the question whether she is to blame at all. It is no doubt true that one cannot apportion blame with anything approaching mathematical accuracy ; but that is a familiar difficulty in cases where the damages are at large. In an ordinary accident case, there is no yardstick by which the court can measure the amount to be awarded for pain and suffering or ensuing disability. While this court does not readily interfere with the amount which a judge may award, and indeed, has laid down certain principles with regard to the review of damages, it has, in recent times, not infrequently varied the amount awarded, either by way of increase or decrease. This apportionment, however, is a statutory obligation imposed by the Maritime Conventions Act, 1911, which also provides that, if the court cannot, in a case where both vessels are to blame, determine the respective degrees of responsibility, the liability to make good the damage is to be shared equally. If this court, therefore, is of opinion that the trial judge has taken a wrong view of the respective degrees of blame to be attributed to the colliding vessels, it has, in my opinion, not only the right, which the *dicta* in the *Karamea* (1) concedes, but the duty to give effect to its opinion. The effect of recent legislation has, I think, emphasised the necessity of this court retaining full liberty of action in this respect. Under the Law Reform (Married Women and Tortfeasors) Act, 1935, in the case of joint tortfeasors, the court has the duty of apportioning the liability among those defendants who are found to be liable ; and this duty has to be performed by the judge, though the case may be tried by a jury. There may well be cases in which the judge, if sitting alone, would have found for one of the defendants, though his view is not shared by the jury. In such a case, where the judge would naturally incline to place only a small part of the damages on that defendant, the other defendant ought to have the right of taking the opinion of an appellate court on the matter without being met with the objection that the apportionment is a matter of mere discretion. Clearly, this court should not lightly disturb the apportionment made by the judge who has tried the case, but I see no reason why a finding on this subject should be regarded differently from any other question of fact found by him. In the present case the judge has assessed the responsibility of the Testbank at three times that of the Ceramic. Making full allowance for the fact that it was the Testbank which made the first mistake, I find myself unable to agree that so large a share of the blame should be attributed to her, and I agree with Lord Greene, M.R., and MacKinnon, L.J., that the liability should be shared equally.

Appeal allowed as to apportionment of liability, appellants to have the costs of the appeal.

Solicitors : *Thomas Cooper & Co.* (for the appellants) ; *Middleton, Lewis & Clarke* (for the respondents).

[*Reported by* W. K. Scrivener, Esq., *Barrister-at-Law.*]

Re WOOLWICH EQUITABLE BUILDING SOCIETY'S APPLICATION. (T. HAYWOOD).

[Chancery Division (Farwell, J.), **February 10, 1942.**]

Emergency Legislation—Mortgage—Application for appointment of receiver—No person liable to perform obligation—Assignment of equity of redemption—Application to be made ex parte—Practice as to costs—Courts (Emergency Powers) Act, 1939 (*c.* 67), *s.* 1 (1), (4).

Where an equity of redemption has been assigned, neither the mortgagor nor the assignee are persons liable "to perform the obligation" within the meaning of the Courts (Emergency Powers) Act, 1939, s. 1 (4), and they are not proper persons to be made respondents to an application by a mortgagee under the Act for leave to proceed to exercise any remedy which may be available to him. In such a case, where there is no person liable to perform the obligation, the application should be made *ex parte.*

No order should be made as to the costs of such an application, and the applicant can add them to his security if it is proper for him to do so.

Where such an application is made *ex parte* under the Act, the court will require reasonable evidence that the equity of redemption has been assigned in such a form that the assignee is not directly liable upon the covenant in the mortgage to pay principal and interest.

[**EDITORIAL NOTE.** This decision, in effect, reverses the decision in *Re Hearts of Oak Building Society's Application* [1942] 1 All E.R. 46. The difficulty underlying the matter, as it is considered in the two cases, is one of costs. It is useless making a person a respondent to a summons if he is not in a position to oppose the order asked for, and the costs of making him a respondent are thrown away. For this reason, the court has now decided that in such a case, subject to reasonable proof that the person in whom the equity of redemption is vested is not liable on the covenant to pay, the application for leave to proceed can be made *ex parte.* This is obviously a very practical and useful ruling, but the final extension of the interpretation of the words "to pay the rent or other debt, or to perform the obligation in question" to an ordinary assignee of an equity of redemption is by no means so practical or useful. The assignee is in practice the person who pays and the person who requires relief of the very kind which the statute is designed to give. Many have said that the courts in recent times have been to prone to adopt a literal construction of statutes, but recent cases do not lend much support to so wide a contention. However that may be, a literal construction which fails to give effect to the intention of the legislature should, if possible, be avoided, as has recently been pointed out in a note on *Liversidge* v. *Anderson,* [1941] 3 All E.R. 338, in 58 Law Quarterly Review, at pp. 3, 4; and a more equitable result would, it is apprehended, have been reached, if the learned judge had brushed aside technicalities and decided this part of the case on the plain realities of the matter, as he did in the recent case of *Vandyke* v. *Adams* [1942] 1 All E.R. 139.

For the Courts (Emergency Powers) Act, 1939, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 32, p. 946. See also BUTTERWORTHS EMERGENCY LEGISLATION SERVICE, Statutes Volume, p. 206.]

Procedure Summons by a mortgagee under the Courts (Emergency Powers) Act, 1939, for leave to proceed to exercise any remedy which might be available to him. Both the original mortgagor and his assignee were made respondents to the summons. The facts are fully set out in the judgment.

R. J. Sutcliffe for the applicants, the building society.

R. W. Goff for the respondents, the mortgagor and the assignee of the equity redemption.

Farwell, J.: The first question to be decided is whether both the original mortgagor and the assignee of the mortgage or either of them ought to be respondents at all. So far as the mortgagor is concerned, I confess I find it difficult to see on what ground he can possibly be made a respondent to this summons. The relief claimed is not a relief against the mortgagor on his personal covenant to pay, but is a relief by way of the appointment of a receiver against the property. I cannot think that in these circumstances the mortgagor is a necessary party, or that he has any right to relief at all. The court does not make, or permit to be made, respondents to proceedings persons who have no right to claim or seek relief at all. They are not necessary parties, and ought not to be made parties at all. Since the applicant is not entitled to name as defendant or respondent somebody who has no interest whatsoever in the question which is to be determined, it seems to me that, where there has been an assignment of the equity of redemption, and no attempt is being made to enforce the personal covenant against the mortgagor, relief being sought only against the property, the mortgagor is not a person who can be entitled to claim relief, and, therefore, is not a person who ought to be made a respondent to the summons.

The other respondent is the assignee. The position with regard to him is a
A little more difficult. The assignee is not under any personal obligation at all to the applicant. It is said, however, that he is under an obligation to pay the mortgage debt, not to the mortgagee, but to the mortgagor, which the mortgagor is entitled to enforce, and thus relieve the property from the burden which has been placed upon it. It is said that the assignee is a person liable to him "to satisfy the judgment or order, or to pay the rent or other debt, or to perform the obligation, in question." He is not liable to perform any obligation as far
B as the mortgagee is concerned; though he may be made liable to perform an obligation, that is to pay off the mortgage debt, either by reason of an implied or an express covenant between himself and the mortgagor. Sect. 1 of the Act provides:

> (1) Subject to the provisions of this section, a person shall not be entitled, except with the leave of the appropriate court, to proceed to execution on, or otherwise to the enforcement of, any judgment or order of any court . . .
>
> C (4) If, on any application for such leave as is required under this section for the exercise of any of the rights and remedies mentioned in subsections (1), (2) and (3) of this section, the appropriate court is of opinion that the person liable to satisfy the judgment or order, or to pay the rent or other debt, or to perform the obligation, in question is unable immediately to do so by reason of circumstances directly or indirectly attributable to any war in which His Majesty may be engaged, the court may refuse leave for the exercise of that right or remedy . . .

D To say that a person who is not liable to the applicant to "perform the obligation" nevertheless comes within this subsection, because there is an obligation arising from an implied or express covenant as between himself and the mortgagor, seems to me to be departing from the language of the Act itself, which, as I read it, is an Act to enable persons who are under an obligation to the applicant to perform any particular obligation to satisfy the court that their inability to perform such obligation arises from circumstances indirectly
E or directly due to the war; and it can have no application as between a person who is the person entitled to enforce the obligation and some person who is, so far as the first person is concerned, under no obligation at all. No doubt, it is true that any persons interested in the equity of redemption are interested in the property, and, therefore, are interested to preserve the property; but, except in the case of a specific mortgagor, they do not seem to me to be persons
F who come within this section. They are not persons who are under the obligation in question, unless it can be said that, through the mortgagor, they have brought themselves under an obligation, not to the mortgagee directly, but to the mortgagor. The result may be that there is some difficulty, so far as the persons interested in the equity of redemption are concerned; and there is, perhaps, a *casus omissus* in the case of an assignee; but, if the Act is to be construed as strictly as it seems to me it must be construed, then I am unable to
G see that there is, in a case of this sort, any person who is entitled to seek relief under the Act.

If that be so, the person who desires to enforce his rights must get the leave of the court, though he is in a position of not being able to make any person respondent to his summons, because there is no person who is in a position to claim relief which the Act gives. In those circumstances, the proper course to be followed on a summons of this kind, and the only course to be followed is,
H in my judgment, to take out a summons *ex parte*. The result may be unfortunate, and it may be that the Act requires amendment; but so long as the Act remains as it is, that appears to me to be the only practical course.

The whole policy in the practice under this Act has been that the court does not inquire into the general merits of the case. For instance, on an application of this sort, the court does not inquire whether the power of sale has arisen. All that the court is concerned with is to see whether there is any person who, under the terms of the Act, can claim relief for the reasons stated in the Act itself. If there is no person who is entitled to claim relief, then all the court does is to say to the applicant: "You are entitled to exercise such remedies as you may have." If the applicant proceeds to sell when the power of sale has not arisen, he cannot shelter behind the leave given by this Act. It remains open to the mortgagor to take such steps as he may think right to prevent the mortgagee proceeding to exercise some power which he in fact has not got, by proper proceedings in the appropriate court. The practice on an application such as is now before the court is not to inquire into any merits at all, except to consider whether there is sufficient reason why the court should say to the applicant: "You cannot take any step to enforce your rights." The court does not go on to say: "You are entitled to take any particular step." That is a matter for the applicant to consider. He can take any step which he likes; but he takes it at his own risk, dependent on whether he is entitled to enforce the particular remedy which he enforces. It is not, as I have said, an Act that is intended to safeguard in any way the applicant; but it is intended to give a respondent an opportunity of showing that there are sufficient reasons, owing to the war, to entitle the court to say that the applicant ought not to be able to take any, or some particular remedy, assuming that he has a remedy at all. In these circumstances, in my judgment the proper practice, in a case of this sort, is that the court will not require any person, nor will it permit any person, to be made respondent to the summons; and, therefore, the summons must be *ex parte* except, of course, when you have the case of a person who is under an obligation to the applicant to enforce the obligation.

As far as the costs of such summonses taken out *ex parte* are concerned, it seems to me that it would not be right to make any order as to costs in the order which the court makes, because, as I have already pointed out, the court does not enquire into the merits of the application. If the application for leave is a proper application, I think, under the ordinary law, the applicant is entitled to add the costs of the application to his security. However, that is a matter to be considered in due course when the accounts are taken of the amount due to the mortgagee, who will have to satisfy the court, if necessary, that the costs are costs which can properly be added to the security. In my judgment, it is not a matter which will be entertained, or ought to be entertained, under an application under the Courts (Emergency Powers) Act. The matter is one which is regulated by the ordinary law. In my opinion, therefore, the proper way of dealing with cases such as the present is to make the application *ex parte*, when the court will give leave, because there can be no person objecting to leave being given. No order as to costs will be made, the applicant being left to add his costs to his security if he can properly do so.

In the present case the position is a little different, so far as costs are concerned, because the applicant has thought it right and desirable, in order to raise the question, to make respondents two persons who, in my judgment, were not necessary parties at all. I have held that they are not necessary parties, though they have been brought before the court. There was some justification for that proceeding, which is to be found in earlier decisions given at a time when the practice of the court had not been finally determined. In the circumstances I think the proper order to make is that there be no order as to costs.

I think, however, it is most desirable that the costs of these applications should be kept down as far as it is possible to do so. That is one of the reasons why no evidence by the applicant in the first instance is necessary. Although the court does require the actual mortgage to be produced, it does not require the mortgagee to satisfy the court that he has got the power which he is asking to exercise. It is, however, desirable that the mortgagee should prove an assignment; but he need not prove it strictly. He must satisfy the court that there has in fact been an assignment, in order to justify the summons being *ex parte*.

Application treated as an ex parte application and leave to appoint a receiver granted. No order as to costs.

Solicitors: *A. E. Shrimpton* for the applicants; *Harold Kenwright & Cox* for the respondents.

[*Reported by* IRENE G. R. MOSES, *Barrister-at-Law.*]

HOWARD DE WALDEN (LORD) *v.* INLAND REVENUE COMMISSIONERS.

[COURT OF APPEAL (Lord Greene, M.R., and Clauson and du Parcq, L.JJ.), **November 11, 12, December 16, 1941.**]

Income Tax—Sur-tax—Avoidance of tax—Transfer of assets to company in Canada—Power to enjoy income—Income operative to increase the value of taxpayer's assets—Finance Act, 1936 (*c.* 34), *s.* 18 (3).

As a result of a series of transactions, assets belonging to the appellant and consisting of shares in and debts owing by an English company became vested in four Canadian companies. The only interests which were held by the appellant in respect of the consideration payable under these transactions consisted of a life interest in notes issued to him by the Canadian companies, part of sums of cash deposited with the companies, and repayable on demand, a small number of shares in two of the companies, and annuities payable to himself or his wife by the companies. The Crown claimed that under the Finance Act, 1936, s. 18, the appellant should be assessed to income tax on the whole of the income of the four Canadian companies :—

HELD : the receipt of income by the companies operated to increase the value of assets held by the appellant within sect. 18 (3) (*b*) of the Finance Act, 1936, and the payments made or due to be made to him in respect of the notes and deposits were " benefits " within sect. 18 (3) (*c*). The whole income of the companies was, therefore, to be deemed the income of the appellant for the purposes of income tax, since it was traceable to the assets transferred by the appellant.

[**EDITORIAL NOTE.** LORD GREENE, M.R., in the judgment of the court delivered by him in this case, says that for years a battle of manoeuvre has been waged, between the legislature and those who are minded to throw the burden of taxation off their own shoulders on to those of their fellow-subjects. The manoeuvre here considered is the transfer of assets to a company outside the United Kingdom, and the main contention here is how much of the income of the company is to be the income of the transferee. The court seemed inclined to think that the whole income of the company might be considered to be the income of the transferee, even though it could not be definitely traced to the assets transferred, but, in the present case, it was not necessary to make so extreme a decision, since the whole income of the company could be traced to those assets.

AS TO EXEMPTION OF INCOME TAX, see HALSBURY, Hailsham Edn., Vol. 17, pp. 79-81, paras 161, 162 ; and FOR CASES, see DIGEST, Vol. 28, pp. 82-84, Nos. 469-483.]

Cases referred to :

(1) *Latilla* v. *Inland Revenue Commissioners*, [1942] 1 All E.R. 214 ; Digest Supp.

(2) *Howard de Walden* (*Lord*) v. *Beck* (1940), 23 Tax Cas. 384 ; Digest Supp.

(3) *Beatty's Executors* v. *Inland Revenue Commissioners* (1940), 23 Tax Cas. 574 ; Digest Supp.

APPEAL by the taxpayer from an order of MACNAGHTEN, J., dated July 25, 1941. The facts are fully set out in the judgment of the court delivered by LORD GREENE, M.R.

J. Millard Tucker, K.C., and *J. S. Scrimgeour* for the appellant.

The Solicitor-General (*Rt. Hon. Sir William Jowitt, K.C.*), *J. H. Stamp* and *Reginald P. Hills* for the respondents.

LORD GREENE, M.R. [delivering the judgment of the court] : This is an appeal by a taxpayer against assessment made under the Finance Act, 1936, s. 18. The facts are extremely complicated, but fortunately it is only necessary to refer to them in the most summary manner in order that the short point which arises may be understood. We need not repeat what we have said in our judgment in the *Latilla* case (1) with regard to the purpose of the section, and no useful purpose will be served by a full quotation of those of its elaborate provisions which are relevant to the present controversy. The point in issue arises in this way. As the result of a series of transactions extending over a number of years, certain valuable assets belonging to Lord Howard de Walden, and consisting of shares in and debts owing by an English company, became vested in four Canadian companies. It is not disputed that these transactions were of the kind described in the preamble to sect. 18, and it is admitted that their sole purpose was to avoid liability to taxation. The only interests which, during the relevant periods, were held by Lord Howard de

Walden in respect of the consideration payable under these transactions consisted of (i) a life interest in certain notes issued to him by the Canadian companies, (ii) part of certain sums of cash on deposit with the Canadian companies and repayable on demand, the remainder being stated to be sums actually deposited by the appellant, (iii) a comparatively small number of shares in two of the companies, and (iv) certain annuities payable to himself or his wife by one or other of the companies. The remainder of the consideration, or what represented it, he had effectively put out of his control. It is admitted that the whole of the A income of the Canadian companies would be chargeable to income tax if it were the income of Lord Howard de Walden received by him in the United Kingdom. The annuities and the interest element in each payment of the notes (*Howard de Walden* (*Lord*) v. *Beck* (2)) have borne tax in the usual way. The assessments which were upheld (subject to adjustment of figures) by the special commissioners and by MACNAGHTEN, J., on appeal, were based on the view that the whole of the income of the four Canadian companies is, under the section, to be deemed B to be the income of Lord Howard de Walden for all the purposes of the Income Tax Acts.

Apart from the extended meaning given to the words "power to enjoy" by sect. 18 (3), the only income of the Canadian companies which Lord Howard de Walden has power to enjoy can consist at the most of a very small part of the actual income of the companies. Therefore, the only question which arises is whether the assessment should be based on that part only or (as has been held C below) on the whole income of the four companies. We have come to the conclusion, without any hesitation, that the latter is the true view. The income of a person resident or domiciled out of the United Kingdom, which under subsect. (1) is deemed to be income of the taxpayer, is described as "that income," a phrase which refers back to the income mentioned in the earlier part of the subsection in the following words : D

> . . . where such an individual has . . . power to enjoy . . . any income of a person resident or domiciled out of the United Kingdom.

"Power to enjoy income" includes the cases mentioned in subsect. (3), and in particular the cases where :

> . . . (*b*) the receipt or accrual of the income operates to increase the value to the individual of any assets held by him or for his benefit
>
> (*c*) the individual receives or is entitled to receive, at any time, any benefit provided E or to be provided out of that income or out of moneys which are or will be available for the purpose by reason of the effect or successive effects of the associated operations on that income and on any assets which directly or indirectly represent that income.

In the present case, it appears to us clear beyond the possibility of doubt that both (*b*) and (*c*) apply. The receipt of the income by each company operates to increase the value of the notes and of the deposit debt, which are clearly "assets" held by Lord Howard de Walden or for his benefit, the notes in fact being held F by trustees. Similarly, the payments made and to be made in respect of the notes and deposits are "benefits" within the meaning of (*c*), since "benefit," as defined by subsect. (5), includes a payment of any kind.

An examination of the language of subsect. (3) in conjunction with subsect. (1) (into which, being a definition clause, it must be read) makes it clear that the power to enjoy income with which subsect. (1) is dealing need not by any means necessarily extend to the whole of the income of the non-resident person. Thus, G the benefit which is derived by the taxpayer from the increase in value of assets held by him may be very small compared either with the total income of the company or with so much of that income as is derived from the assets transferred. We are unable, therefore, to accept the argument that the income which is caught by subsect. (1) is limited to the income which the taxpayer is, in fact, entitled or able to receive. Counsel for the appellant argued that subsect. (3) does not deal with the *quantum*, but deals only with the character, of the income H which the taxpayer is to be deemed to have power to enjoy. The real question, however, depends upon the meaning of the words "any income" in subsect. (1), words which, in our opinion, are, in the context of the subsection when read together with subsect. (3), incapable of being construed as limited to income which the taxpayer is entitled or able to enjoy in fact.

Our conclusion on this matter can be tested by writing (for example) the provisions of subsect. (3) (*b*) into subsect. (1), which will then run as follows : "Where such an individual has, by means of any such transfer . . . acquired any rights by virtue of which the receipt or accrual of any income of a person resident or domiciled out of the United Kingdom operates to increase the value to the individual of any assets held by him or for his benefit . . . that income shall . . . be deemed to be the income of that individual . . ." It seems to us hopeless to suggest that, as a matter of language, the income which is deemed to be the income of the taxpayer is to be confined to such part of the income as represents the increased value of the assets.

A Here, however, a difficulty is raised by counsel for the appellants, the nature of which we can best explain by stating the three possible constructions of the relevant provisions which were discussed before us. At one end of the scale lies the argument of counsel for the appellant in the present case. At the other end of the scale lies the argument favoured by counsel for the Crown that, however small the benefit in fact enjoyed by the transferor of the assets, and however large the income of the non-resident person or company, the whole of that income B is to be deemed to be income of the transferor, even if only part of it is traceable to the assets transferred. An intermediate suggestion favoured by neither side was to the effect that the only income of the non-resident which is to be deemed to be income of the transferor is that part of the income which is traceable to the assets transferred. No doubt, in the majority of cases which in practice come within the scope of the section, the transferee will have been constituted, C either individually as a trustee or as a corporation, for the sole purpose of carrying out the transaction, and will have no other income, but cases might arise where the transferee selected was, for example, an existing corporation with very large assets and income of its own, and the income attributable to the assets transferred might be a very small proportion of its total income. It cannot be supposed, argues counsel for the appellant, that the legislature can have intended to produce such an extreme result as might be produced upon the second of the D three constructions, since it would impose an entirely disproportionate penalty on the taxpayer, and, rejecting the intermediate view, which, he said, could not be reconciled with the language used, he arrived, by a process of elimination, at his own construction as being the only possible one.

We find it impossible to accept the argument of counsel for the appellant. If, as it seems to us, the language of the section clearly does not limit the income of the non-resident, in respect of which the taxpayer is charged, to the actual E benefit which he draws from the income of the non-resident—a construction, be it observed, which would largely defeat the expressed purpose of the section—it is illegitimate to force upon that language a strained construction merely because it may otherwise lead to a result which to some minds may appear to be unjust. However, even if the only alternative to the construction of counsel for the appellant is the second of the three constructions, we are not prepared to F say that it is necessarily as unjust as he contends. The section is a penal one, and, whatever its consequences may be, they are intended to be an effective deterrent to practices which the legislature considers to be against the public interest. For years a battle of manoeuvre has been waged between the legislature and those who are minded to throw the burden of taxation off their own shoulders on to those of their fellow-subjects. In that battle the legislature has often been worsted by the skill, determination and resourcefulness of its opponents, of G whom the present appellant has not been the least successful. It would not shock us in the least to find that the legislature has determined to put an end to the struggle by imposing the severest of penalties. It scarcely lies in the mouth of the taxpayer who plays with fire to complain of burnt fingers. It is not, however, necessary for us to choose between the second and third constructions. We would rather defer that choice until a case which raises the issue can be considered on its own facts. In the present case, it is sufficient to say that the H appellant is, in our opinion, chargeable in respect of the entire income of the Canadian companies, the whole of which is to be traced to the assets originally transferred to them.

One further point taken by counsel for the appellant may be mentioned. He pointed out that, in so far as the right to enjoy income of the four companies is vested in the appellant's son, who holds the majority of the shares, income received by the son will be taxed in his hands in the ordinary way, and at the same time the appellant will be liable to tax on the whole income of the companies, which is deemed to be his. This, said counsel for the appellant, involves double taxation, since no relief is afforded by the Finance Act, 1936, Sched. II, para. 3. There is a short answer to this argument. There is no double taxation, since the subject-matter of tax is different, the income of the son being one thing and the income of the companies being another. Quite apart from this, however, the argument based on hardship leaves us unmoved. The son will bear tax in the ordinary way upon his own income, and the father will be taxed on the companies' income, because he is the person against whom the deterrent action of the section is directed. The fact that the section has to some extent a retroactive effect again appears to us of no importance when it is realised that the legislation is a move in a long and fiercely-contested battle with individuals who well understand the rigour of the contest.

There is one further argument advanced by counsel for the appellant which we mention only in order to say that we disagree with it entirely. By the Finance Act, 1938, s. 28, certain amendments were made in sect. 18 of the Act of 1936. In particular, provision was made by a new section to meet devices by which a transferor took care to give himself no power to enjoy any income of a non-resident transferee company within the meaning of sect. 18, but obtained the money he required, for example, by borrowing from the company, all the shares being vested (for example) in his children. In this new section, the phrase " power to enjoy " did not, and obviously could not, appear, as the best and the natural method of taxing the transferor was by taxing him on the amounts he in fact obtained out of the company's coffers. This new section, which charges with tax only the benefit in fact obtained, shows, according to the argument, that the legislature understood sect. 18 as imposing the same limitations on the *quantum* of income charged with tax under that section. Quite apart from the fact that the new section is dealing with a different type of transaction, it is, in our opinion, quite illegitimate to use subsequent legislation to construe previous legislation in this way, even where the subsequent legislation forms part of the same code. The argument, which in any event is inadmissible, is particularly so in the present case, which is dealing with assessments for periods before the amendment came into force.

Questions similar to those raised in the present case were considered by LAWRENCE, J., in *Beatty's Executors* v. *Inland Revenue Commissioners* (3) LAWRENCE, J., answered these questions against the taxpayers, and the decision is, therefore, an authority against the arguments submitted in the present case by counsel for the appellants, who contended that the decisions in those cases were wrong and ought to be overruled. It follows from what we have already said that those decisions were, in our opinion, correct in so far as they deal with the same questions as those raised in the present appeal. We agree with the conclusions of MACNAGHTEN, J., and the appeal must be dismissed with costs.

Appeal dismissed with costs. Leave to appeal to the House of Lords.

Solicitors: *Charles Wright* (for the appellant); *Solicitor of Inland Revenue* (for the respondents).

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

ROOMWOOD INVESTMENTS, LTD. *v.* INLAND REVENUE COMMISSIONERS.

TITCHFIELD (MARQUESS) *v.* INLAND REVENUE COMMISSIONERS.

PENANG AND GENERAL INVESTMENT TRUST, LTD., AND RAMSDEN (SIR JOHN) *v.* INLAND REVENUE COMMISSIONERS.

[COURT OF APPEAL (Lord Greene, M.R., and Clauson and du Parcq, L.JJ.), **November 19, 20, 21, December 12, 1941.**]

Income Tax—Sur-tax—Undistributed income—Apportionment of income—Apportionment to members on register of company—Apportionment to members not liable to sur-tax—Apportionment according to members' interest in *assets—Finance Act*, 1922 (*c*. 17), *s*. 21—*Finance Act*, 1937 (*c*. 54), *s*. 14 (3) —*Finance Act*, 1938 (*c*. 46), *s*. 41 (4) (*a*) (*ii*)—*Finance Act*, 1939 (*c*. 41), *s*. 38.

In cases which fall within the Finance Act, 1922, s. 21, (i) the commissioners have power to apportion the company's income to members on the register who are not liable to sur-tax, e.g., trustees of settlements and incorporated bodies; (ii) in determining the respective interests of the members for the purpose of apportioning income, the commissioners have an unfettered discretion to attribute to each member an interest corresponding to his interest in the assets of a company available for distribution among the members in the event of a winding up.

[**EDITORIAL NOTE.** The questions here discussed arise solely under the Finance Act, 1922, s. 21, and the subsequent legislation upon the same matter, that is undistributed income of companies. The first point is founded on the words in the section: "in such manner as to render the amount distributed liable to be included in the statements to be made by the members of the company of their total income for the purposes of super-tax." From this it was argued that the section had no application where the member of the company in question was not liable to super-tax, e.g., a trustee of a settlement. This contention is rejected. The other contention was that there was some restriction on the right of the commissioners to base their apportionment on a member's capital rights. No doubt where his income rights are negligible and his capital rights considerable, the commissioners would rightly have regard to the capital rights, but it was sought to be said that that could not be so in all cases. The Court of Appeal has held that there is no such limitation on the right of the commissioners and the matter is one within their sole discretion.

AS TO APPORTIONMENT OF INCOME, see HALSBURY, Hailsham Edn., Vol 17, p. 295, paras. 583, 584; and FOR CASES, see DIGEST, Supp., Income Tax, Nos. 674g-674r.]

APPEALS by the taxpayers from orders of MACNAGHTEN, J., dated July 15, 1941. The facts and the arguments are fully set out in the judgment.

Cyril King, K.C., and *Frederick Grant* for the appellants in the first two cases.

J. Millard Tucker, K.C., and *Leonard Stein* for the appellants in the third case.

The Solicitor-General (*Rt. Hon. Sir William Jowitt, K.C.*) and *Reginald P. Hills* for the respondents in all three cases.

CLAUSON, L.J. [delivering the judgment of the court]: These appeals involve the consideration of the Finance Act, 1922, s. 21, as amended by various later Acts and of the Finance Act, 1939, s. 38. It is convenient to deal with the construction and operation of these sections before applying them to the facts of the three cases under appeal. Sect. 21 of the Act of 1922 recites that it is enacted with a view to preventing the avoidance of the payment of super-tax through the withholding from distribution of income of a company which would otherwise be distributed. The section applies to certain companies the characteristics of which have been varied from time to time by the amendment of the section, but we need not burden this judgment with the varying details of these characteristics, since it is admitted that the two companies which come into consideration in these three cases are possessed of the characteristics required for the applicability of the section. If we assume the section to be applicable to a particular company, the section does not become operative in regard to it unless it appears to the commissioners that for a year or period ending after Apr. 5, 1922, for which accounts have been made up, the company has failed to distribute to its members:

> . . . In such manner as to render the amount distributed liable to be included in the statements to be made by the members of the company of their total income for the purposes of super-tax [a reasonable part of its actual income for the year or other period].

Here emerges the first point material to these appeals. A corporate body is not liable to super-tax, and cannot be called upon to make a statement of its total income for super-tax. Further, an individual is not liable to super-tax in respect of income which he receives as a trustee, and cannot be called upon to include such income in a statement of his total income for super-tax. It was admitted for the purposes of argument, as we understand it, that, if among the registered members there were to be found a single one who was an individual owning his shares beneficially, and thus liable to have to make a super-tax return which would include any dividend paid on his share, and if the company failed to pay a reasonable dividend, it could be predicated of the company that it had failed to distribute a reasonable part of its income

> . . . in such manner as to render the amount liable to be included in the statements to be made by the members of the company of their total income for the purposes of super-tax.

It was suggested, however, that, if all the registered members of the company were either corporate bodies or persons holding their shares as trustees, it would be impossible for the company to distribute to its members a reasonable part of its income

> . . . in such manner as to render the amount distributed liable to be included in the statements to be made by the members of the company of their total income for the purposes of super-tax.

Thus, the conclusion was reached that the condition for the operation of the section impliedly required that at least one member should be an individual holding his shares beneficially. We agree with the view expressed on this matter by MACNAGHTEN, J., in his judgment in the Penang case. The language used appears to us to be amply accounted for by the desire of the legislature to prevent the avoidance of super-tax by the process of making a "capital" distribution, whether by the device of bonus shares or otherwise. We cannot accept the view that the words used by the legislature were in substance a suggestion to those who might desire to frustrate the intention of the section to achieve that object by placing the shares in the names of corporate bodies or trustees. The words seem to us to bear a meaning which we can paraphrase thus: "In such manner as to render the amount distributed super-taxable in the hands of a person whose income is super-taxable."

The next step to be taken in order to bring the section into operation in regard to a company is that the commissioners should direct that, for purposes of assessment to super-tax, the company's income should for the relevant period be deemed to be the income of the members. This direction having been given, the amount of this income is to be apportioned among the members. By virtue of sect. 21 (7), the expression "member" is to include any person having a share or interest in the capital or profits or income of a company. By virtue of sect. 21 (8), the provisions in Sched. I of the Act of 1922 are to have effect, in regard to apportionment and otherwise, for the purpose of carrying into effect and in connection with sect. 21. It is to be noted that, under Sched. I, para. 8, the apportionment is to be made in accordance with the respective interests of the members, that under Sched. I, para. 9, the income apportioned to a member is to be deemed to have been received by him on the date to which the accounts of the company for the relevant period were made up, and that under Sched. I, para. 10, the commissioners are to notify the apportionment to the company by serving on it a statement of the income apportioned and either the amount apportioned to each member or the amount apportioned to each class of shares, as they think fit.

It was suggested in the arguments in these cases that the effect of the provisions which we have so far mentioned was such that no apportionment could be made to a member unless he were a person who would be liable to super-tax, and that, therefore, an apportionment to a member who is a corporate body, or is found to be a trustee, would not be a valid apportionment. We agree with the view expressed by MACNAGHTEN, J., in his judgment in the Roomwood Investments case that this is an erroneous view of the provisions in question. We see no difficulty at all in holding that the provisions to which we have so far referred plainly authorise the commissioners to apportion the company's income to members on the register though they may not be liable to super-tax. We do not find it necessary to fortify the point by referring to the provisions of later legislation, but it is quite plainly the fact that the legislature in subsequent Acts assumed that such an apportionment would be a good one.

The apportionment having been made, the next step is to assess the super-tax chargeable in respect of the amount of the company's income apportioned to a member. This is to be done (sect. 21 (2)) by assessing it upon the member in the name of the company, and it is to be payable by the company. For the purposes of the present case, it is sufficient to say that since 1927 the statutory provisions to which we have referred must for all relevant purposes be read as referring to sur-tax in place of super-tax.

We do not propose to burden this judgment by going through the subsequent legislation in detail, but it is necessary to note that, by virtue of the Finance Act, 1937, s. 14 (3), the commissioners are given power, in determining the respective interests of the members for the purpose of apportioning income, to attribute to each member an interest corresponding to his interest in the assets of the company available for distribution among the members in the event of a winding up. It was suggested in argument before us that this power was one which must be read as subject to some implied limitation, and was other than a power given by the legislature to the commissioners without control or fetter. We do not appreciate what implied fetter or limitation is suggested. In our opinion, the power thus given to them is quite unfettered.

We now turn to the Finance Act, 1938, s. 38, which is in Part IV of the Act under the heading "Income Tax (Settlements)." It was common ground that the settlements with which the present cases are concerned were of such a character that, by reason of sect. 41 (4) (*a*) (ii) of the Act of 1938, any income of a company apportioned to the trustees of the settlement under sect. 21 of the Act of 1922 must be treated as "income arising under the settlement," and, accordingly, must, in view of sect. 38 (2), be treated as income of the settlor, in the one case Lord Titchfield and in the other Sir John Ramsden.

We now turn to the facts of the three cases. In the Roomwood case, the income of the company for the financial year ending July 8, 1937, was £101,692. In Feb., 1939, the commissioners issued a direction, admittedly valid, that that income should be deemed to be the income of the company and that the amount should be apportioned. In the first instance, the whole amount was apportioned to the Marquess of Titchfield, but this was admittedly inaccurate, and, by arrangement, the apportionment must now be treated as having been made, as to £6,500 on the Marquess as a loan creditor under certain provisions of the Finance Act, 1936 (with which it is unnecessary to deal, as no point is raised in this part of the apportionment), as to £48 to the Marquess as a preference shareholder, as to £9 to certain other preference shareholders, and, as to £94,835 to certain members holding the whole of the ordinary shares who are in fact the trustees of a settlement of those shares made by the Marquess. No question is raised on the validity of the apportionment to the Marquess or to the other preference shareholders. The validity of the apportionment to the settlement trustees is, however, questioned on the ground that, on the true construction of the Acts, no apportionment can validly be made except to an individual who would be under liability to pay sur-tax on a dividend received by him on the shares held by him, and the trustees would admittedly not be so liable. We have already expressed our views on this point. For the reasons we have given, the contentions of the company and of the Marquess on this point must fail.

We now turn to the Penang case. In this case, the company's capital is divided into 749 A ordinary shares of £1 each, 100 B ordinary shares of £1 each, and 151 C voting shares of 1s. each. The A ordinary shares carry no dividend rights but take all surplus assets in winding up after repayment of the capital paid up on the other shares. The B ordinary shares are entitled to all dividends and to repayment of their capital in winding up. The C voting shares are entitled to repayment of capital in a winding up, but to nothing more, and, accordingly, to no dividends. The commissioners exercised the power given to them by sect. 14 (3) of the Act of 1937, and, finding that the company came within sect. 21 of the Act of 1922 and had not made such a distribution as would save them from the operation of that section, apportioned the relevant income of the company to the extent of the capital paid up on the B shares and the C voting shares to the holders of those shares, and, as to the balance, to the holders of the A ordinary shares, who were in fact the trustees of a settlement made by Sir John Ramsden and of such a character that, under the statutory provisions, which we need not again particularise, the amounts apportioned to the trustees were sur-taxable in Sir John Ramsden's hands. The points taken for the company and Sir John Ramsden were these. First, it was said that the direction was bad because this company could distribute its income only to the holders of the A ordinary shares—that is, to the settlement trustees—and that, as they would not be liable to sur-tax in respect of shares which they did not hold beneficially, it was not possible for the company to distribute its income in such manner as to make it liable to be included in its members' statements for super-tax. We have already expressed our views as to the meaning of this part of the section, and, on what we conceive to be the true construction of the section, this point must fail. Secondly, it was said that no apportionment to trustees was authorised by the section. We have already dealt above with this point, and, on the view of the Act which we have already expressed, it must fail. We ought to mention that counsel for the company and Sir John Ramsden were apparently prepared to admit that, if the trustees would be bare trustees of a dividend for an individual entitled to immediate payment from them, the apportionment to them might be valid, but the point, having regard to the terms of the settlement, did not arise. Thirdly, it was said that the commissioners were not justified in exercising their discretion in apportioning the income according to capital rights. We have already expressed our opinion that the discretion left to them in this matter by the Act is wholly unfettered, and, accordingly, in our view, this point also fails. The three appeals will be dismissed, with the usual result as to costs.

Appeals dismissed with costs. Leave to appeal to the House of Lords.

Solicitors: *Baileys, Shaw & Gillett* (for the appellants in the first two cases); *Capel, Cure, Glynn, Barton & Co.* (for the appellants in the third case); *Solicitor of Inland Revenue* (for the respondents in all three cases).

[*Reported by* W. K. Scrivener, Esq., *Barrister-at-Law.*]

HERRMANN *v.* METROPOLITAN LEATHER CO., LTD.

[Chancery Division (Uthwatt, J.), **January 27, 28, 1942.**]

Landlord and Tenant—War damage—Multiple lease—"Adapted for use"—Disclaimer of demised premises as a whole—Landlord and Tenant (War Damage) Act, 1939 (*c.* 72), *s.* 15—*Landlord and Tenant (War Damage) (Amendment) Act,* 1941 (*c.* 41).

Premises used for the purpose of a warehouse and factory of a leather-tanning business were the subject of a lease commencing May 9, 1937, and terminating Mar. 24, 1950. The lease comprised two buildings which were separate units, one facing the street and the other at the back, the only communication between the two buildings was a gangway on the second floor. The lessees used the premises as a single factory and all manufacturing operations were carried on partly in one building and partly in the other. On Sept. 12, 1940, the front building was demolished by enemy action and the lessees wished to disclaim the whole lease under the Landlord and Tenant (War Damage) Acts, 1939 and 1941. The landlords contended that the lease was a "multiple" lease within the meaning of s. 15 of the Act of 1939, and that the lessees were only entitled to disclaim in respect of the damaged building:—

Held: (i) the lease was a "multiple" lease within the meaning of the section as comprising buildings "adapted for use" as two separate tenements. The words "adapted for use" do not refer to structural adaptation, but mean that the separate buildings are reasonably suitable for use in the ordinary course of carrying on the tenants' business.

(ii) notwithstanding the fact that the lease was a "multiple" lease, the lessees were entitled to disclaim the whole lease; it was not possible, on the facts, for them to get reasonable accommodation sufficiently near the undamaged building which would enable them to continue carrying on their business in the latter.

[**EDITORIAL NOTE.** The second point of this case is largely a question of fact turning upon the particular facts of this case, but, at the same time, it serves to show the general lines upon which the discretion of the court will be exercised in such matters. The real question of law in the case is the construction of the words "adapted for use" in subsect. 1 of the section here considered. The contention that these words must connote a physical or structural adaptation is rejected and it is found to be sufficient that the separate buildings are suitable for use together in the ordinary course of the tenant's business.

For the Landlord and Tenant (War Damage) Act, 1939, s. 15, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 32, pp. 996, 997; and see BUTTERWORTH'S EMERGENCY LEGISLATION, Statutes Volume, pp. 336-338.]

Summons to determine whether a lease was a "multiple" lease within the meaning of s. 15 of the Landlord and Tenant (War Damage) Act, 1939, and to what extent the lessees were entitled to disclaim the premises comprised therein. All the facts are set out in the judgment.

R. F. Roxburgh, K.C., and *F. W. Wallace* for the plaintiffs.
W. P. Spens, K.C., and *J. Pennycuick* for the defendants.

Uthwatt, J.: This case raises certain questions under the Landlord and Tenant (War Damage) Act, 1939, s. 15, as amended by the Landlord and Tenant (War Damage) Act, 1941. The first question is whether the lease is a multiple lease within the meaning of the Act, and the second question, assuming the first question is answered in the affirmative, is as to the nature of the relief which it is equitable to grant to the tenants in the circumstances.

The lease, dated May 9, 1937, demised two adjacent properties for a term of years beginning on May 9, 1937, and ending on Mar. 24, 1950, subject to a right given to the tenants of determining the lease on June 24, 1945, by six months' notice. The premises were demised for that term at a yearly rent of £650. The lease contained a covenant by the tenants not to use the demised premises for any illegal or immoral purposes, or for any purpose other than that of a warehouse, factory and offices in connection with the tenant's business, which includes, amongst other things, the tanning, currying and dressing of leather, all of which users were thereby expressly authorised, and then there followed covenants forbidding other forms of user in particular. The point of that covenant is that it defines what was then, and still remains, the business of the tenants. The two premises in question are situate in Bermondsey Street, the premises first demised facing the street, and the other premises being at the back of them, and to a large extent contiguous with them. The only communication between the two premises is a gangway on the second floor. Each building, looked at apart from the purpose for which it is being used by the tenants, is a self-contained unit. There can be no doubt about that upon the facts. The two buildings have, however, been used by the tenants as a single factory, and in neither building taken by itself has any single one of the operations comprised in the tenants' business been carried through completely to its end. Having regard to certain admissions made by counsel for the tenants in the course of his argument, it is unnecessary to go further at this moment into details as to the position of the factory. I propose to turn at once to the consideration of the question whether the lease is a multiple lease within the meaning of the Act.

A multiple lease is defined as a lease comprising buildings which are used or adapted for use as two or more separate tenements, and it is clear that it is not necessary that there should be both "adaptation" (whatever that may mean) and "use." It is sufficient if one or other of those conditions is satisfied. Confining myself for the moment to the latter half of the definition, it was argued by counsel for the tenants that the physical meaning should be attached to the word "adapted" contained in the section, that is to say, that it would not be true to say of the buildings that they had been adapted for use unless some actual physical work of adaptation in the sense of alteration had been carried on in respect of the buildings. That meaning I reject. It seems to me impossible to adopt it. I do not propose to attempt to give an exhaustive definition. Framing my words only for use in reference to the facts of this case, it seems to me that a building is adapted for use as two or more separate tenants within the meaning of this section, if it is reasonably suitable for use as two or more tenements in the ordinary course of business. In that case a lease comprising buildings possessing that character would, in my opinion, be a multiple lease. Attributing that meaning to the words "multiple lease," it was conceded by counsel for the tenants that, on the facts of this particular case, the lease with which I have to deal is a multiple lease. Indeed, it was impossible for him on that view to advance any argument to the contrary on the particular facts of this case.

That being so, the second question which has to be considered arises under subsects. 2, 3 and 4 of sect. 15. These subsections provide as follows:

(2) Where a notice of disclaimer or a notice to elect is served with respect to the lease (*a*) the person serving the notice or the person on whom it is served; or (*b*) any other person having an interest in or derived out of the term created by the lease, or having an interest in the reversion immediately expectant on the determination of the lease; may apply to the court, within one month from the service of the notice, to determine the question whether the tenant should be allowed to disclaim the lease, whether wholly or as respects one or more of the separate tenements comprised therein or at all. (3) If on such an application the court is satisfied that, having regard to the extent of the war damage suffered by the land comprised in the lease as a whole and all the circumstances of the case (including any offers made by the landlord for an extension of the term of the lease or for an alteration of the rent reserved thereby or for any other modification of the terms of the lease) it is equitable to allow the lease to be wholly disclaimed . . .

(4) If on such an application the court, having regard to the matters referred to in the last foregoing subsection, is not satisfied that it is equitable to allow the lease to be wholly disclaimed, but is satisfied that it is equitable to allow it to be disclaimed as regards one or more of the separate tenements comprised therein (hereafter referred to as "the disclaimable tenements"), the court (*a*) shall order that the lease shall be treated as if it were two separate leases, one comprising the disclaimable tenement or tenements, and the other comprising the remainder of the tenements; and (*b*) shall give such consequential directions as to the apportionment of the rent and otherwise as it thinks just . . .

In this particular case on Sept. 12, 1940, the premises suffered war damage, with the result that the front block was completely destroyed. The damage done to the block at the back was so small as to be inconsiderable and need not be taken into account. Following on that, the tenants on Oct. 9, 1940, served a notice of disclaimer under the Act, the effect of which the landlord disputed. Proceedings were taken in the county court and ultimately were transferred to the High Court.

One comes, therefore, to the real question which I have first to consider under sect. 15 (3)—that is, whether I am satisfied that, having regard to the extent of the war damage suffered by the land comprised in the particular lease as a whole and all the circumstances of the case, including any offer made by the landlord for the extension of the term of the lease or for an alteration of the rent, it is equitable now for the tenants to exercise the right of disclaimer of the lease as a whole, if they desire to exercise it in this case. On the construction of the section, the burden is upon the tenants to satisfy me that it is equitable to allow them to exercise the right. It is for them to make out their case. That is the first observation. The second observation is that I am entitled to look at all the circumstances of the case without limit. Before dealing with the matter of the exercise of discretion, it is necessary just to say a few words about the actual facts of the case. Since the lease was taken the tenants have used these premises as a single factory laid out and used as one factory unit. There were interconnecting factory operations, I understand, as regards all three classes of articles which they manufactured. The ordinary course of work in the factory in making the goods involved that materials should be transferred from one building to another for the purpose mainly of the rough drying which was carried on in the front building. I do not propose to go into detail about the interrelation between the two buildings, because it is sufficient for my purpose to take the general fact that this factory was one unit and that operations in both buildings were necessary in the ordinary course of business in order to enable the tenants to turn out their goods.

The second fact is as to the extent of the damage. The whole of the front building was destroyed. The superficial area of the space which was lost was something less than a half, but more than a third, of the whole superficial area embraced in the factory buildings. The rental value of the two sets of buildings was very much the same, though the back premises may have been slightly more valuable. The damage suffered by the tenants, was therefore, extensive, and so extensive that, having regard to the layout of their factory as they had it, it was impossible for them to continue to carry on their business in the way in which they had been accustomed to do. It is clear that the remaining premises of the tenants taken alone were not sufficient for the purposes of their business. All those three facts are, I think, very important, and they are the three main facts (subject to one other which I am going to mention in a moment) to be taken into account in exercising a discretion, the extent of the damage, the user to which the tenants were, at the date of the damage, putting their premises in the ordinary course of business, and the fact that, as a result of the damage, the remaining premises could not be sufficient to carry on business at all. There is one other matter of great importance, and that is this : was it reasonably possible or practicable for the lessees to obtain any further accommodation in the neighbourhood on which their trade could be reasonably carried out in connection with their undamaged buildings ? If it were reasonably practicable for them to do that, I do not think it would be right to say that it is equitable to allow the tenants to exercise their right of disclaimer in respect of the lease as a whole. It is no doubt true that the Act as a whole is designed for the relief of tenants, but in the case of this particular section, which does not work automatically as most of the other sections do, what the court has to decide is what should be done, taking into consideration the position of both parties. This part of the case has given me considerable trouble. What the tenants in fact did was that they rescued some of the machinery which had been damaged, put it together, took some adjacent premises—I think the first premises were some two miles off—and they continued by the use of the two premises to use up the stock which had been salvaged from war damage and also the stock which they had in hand. Notwithstanding that they had served their notice of disclaimer, they continued without asking the permission of the landlords to use the premises at the back. Now, of course, they are trying to say that they can disclaim the whole. Moreover, they tried at the outset to negotiate for a lease of the back part of the premises after notice of disclaimer had been served. Those negotiations broke down for some reason which, on the correspondence, is not very clear, but the nature of which can be easily imagined. Taking the evidence as a whole, however, I am pretty clear that the manager did his best to see whether he could get reasonable alternative accommodation, in which, in conjunction with the undamaged premises, the business of the tenants could be carried on. Various sites were suggested to him of places which he might have looked at, but he did not look at them, because they were some distance away. It is not quite apparent that they could have been used for his purposes for drying space, which is what he wanted, as it would involve a new boiler and a place to put it, and the use of different premises would involve a good deal of trouble and cost in transport between the remaining premises and the acquired premises. Viewed as a whole, I am satisfied that it was not reasonably practicable to obtain premises in the neighbourhood which could, from a business point of view, be said to be properly suited to the purposes of the tenant's business. The landlords in this case have always been ready to modify the terms of the lease by relieving the tenants from the obligations as to user contained in the lease in any reasonable fashion, and I have not the slightest doubt they would meet the tenants as regards any other reasonable alteration in the lease.

Taking into consideration the conduct of the tenants and the disturbance and inconvenience to them in having to carry on their business in the undamaged part of the demised buildings and other buildings probably unsuitable and situated some distance away, I have to decide whether it is equitable to allow the tenants to disclaim this lease as a whole. The general background of the Act, apart from this section, is that it is designed to give relief to tenants. It is true that landlords, like tenants, are exempted from the liability to make good and repair where lack of repair is the result of war damage, but my view is that the whole framework is, generally speaking, that the burden of the loss which results from war damage is to fall on the landlords and not the tenants. In those circumstances, it appears to me that my right course in this case is to hold that it is equitable to allow the tenant to exercise his right of disclaimer in respect of the lease as a whole, and I propose to make an order to that effect.

Declaration accordingly.

Solicitors : *Huntley, Son & Phillips* for the plaintiff ; *Constant & Constant* for the defendants.

Reported by IRENE G. R. MOSES, *Barrister-at-Law*]

REDPATH BROWN & CO., LTD. *v.* HAYES.

[Court of Appeal (Lord Greene, M.R. and MacKinnon, and Goddard, L.JJ.), **February 10, 11, 1942.**]

Workmen's Compensation—Incapacity—Refusal of workman to undergo operation—Reasonableness of refusal—Operation necessitating provision of artificial limb.

A workman met with an accident in 1938, as a result of which a large part of the bonework of one of his feet was badly crushed and had to be removed. The condition of the foot enabled him to walk for a distance of about 2 miles with the aid of a stick. The employers made him weekly payments by way of compensation. In 1941 a surgeon who examined the workman on behalf of the employers advised him to have the foot amputated, and on the workman's failure to assent to this course the employers applied for a review and termination of the weekly payments on the ground that he had refused to undergo a surgical operation of a reasonable nature. The workman consulted another surgeon who advised him not to have the foot amputated. The employers made no definite offer to provide the workman with an artificial limb :—

Held : the question to be considered was not whether the proposed operation was reasonable, but whether the workman was unreasonable in refusing to undergo it. There was no evidence upon which it could be found that the workman's refusal was unreasonable, particularly in view of the fact that no proper provision was made for supplying the workman with an artificial limb and the replacement of those supplied when worn out or damaged.

[**EDITORIAL NOTE.** The judgments herein consider for the first time the case of an operation which, if it is to benefit the workman operated on, necessitates the provision of an artificial limb. In such a case it is necessary, in considering the reasonableness of the workman's refusal to undergo such an operation, to consider what arrangements are made for the provision of the necessary artificial limbs, both immediately after the operation and subsequently throughout the workman's life.

As to Refusal to Undergo Surgical Operation, see HALSBURY, Hailsham Edn., Vol. 34, pp. 921,922 ; and for Cases, see DIGEST, Vol. 34, pp. 349-350, Nos. 2807-2820. See also WILLIS'S WORKMEN'S COMPENSATION, 33rd Edn., pp. 273-276.]

Cases referred to :

(1) *Donnelly* v. *Baird & Co., Ltd.*, [1908] S.C. 536 ; 34 Digest 349, *2807ii* ; 1 B.W.C.C. 95.

(2) *O'Neill* v. *Brown (John) & Co., Ltd.*, [1913] S.C. 653 ; 34 Digest 349, *2807iii* ; 6 B.W.C.C. 428.

(3) *Tutton* v. *Majestic (Owners)*, [1909] 2 K.B. 54 ; 34 Digest 349, *2808* ; 78 L.J.K.B. 530 ; 100 L.T. 644 ; 2 B.W.C.C. 346.

(4) *Fife Coal Co., Ltd.* v. *Cant* (1921), 90 L.J.P.C.69 ; 39 Digest 349, *2811* ; 124 L.T. 545 ; 13 B.W.C.C. 449.

(5) *Griffin* v. *Smith (Thomas) & Co., Ltd.* (1933), 26 B.W.C.C.

(6) *Marshall* v. *Orient Steam Navigation Co., Ltd.*, [1910] 1 K.B. 79 ; 34 Digest 349, *2807* ; 79 L.J.K.B. 204 ; 101 L.T. 584 ; 3 B.W.C.C. 15.

(7) *Warncken* v. *Moreland (R.) & Son*, [1909] 1 K.B. 184 ; 34 Digest 350, *2817* ; 78 L.J.K.B. 332 ; 100 L.T. 12 ; 2 B.W.C.C. 350.

(8) *Earl Fitzwilliam's Collieries* v. *Crossley* (1925), 133 L.T. 495 ; 34 Digest 348, *2815* ; 18 B.W.C.C. 109.

(9) *Fyfe* v. *Fife Coal Co., Ltd.*, (1927) 138 L.T. 65 ; Digest Supp. ; 20 B.W.C.C. 548.

(10) *Purvis* v. *Goole Steam Shipping Co. (London Midland and Scottish Railway)*, [1937] 4 All E.R. 345 ; Digest Supp., 30 B.W.C.C. 330.

Appeal by the workman from an award of His Honour Judge Richardson, at the Newcastle-upon-Tyne County Court, dated Nov. 12, 1941. The facts are fully set out in the judgment of Lord Greene, M.R.

Gilbert Paull, K.C. and *S. R. Edgedale* for the appellant.

F. A. Sellers, K.C. and *W. H. Duckworth* for the respondents.

Paull, K.C. : It is no proof of unreasonableness for the injured workman to say that he prefers the opinion of one doctor rather than that of another. The question as to whether a workman's compensation can be stopped depends upon there being *novus actus interveniens.* The employer should show a new cause which entitles him to say that the injuries are due to the workman's own conduct. In *Donnelly* v. *Baird* (1) and *O'Neill* v. *Brown* (2), there was uncontradicted medical evidence that the proposed operation was a simple or minor one. There does not appear to be a single case in which it has been held to be unreasonable for a man to refuse to undergo a major operation. The workman is entitled to say that he prefers the opinion of his own medical adviser. The court has not to balance up the opinions of two doctors. The onus is upon the employers to show that the workman is unreasonable. The fact that the workman's doctor has advised against an operation is conclusive against the workman being found to be unreasonable, unless there are circumstances which show that no reasonable man would follow that advice: *per* Cozens-Hardy, M.R., in *Tutton* v. *Majestic (Owners)* (3), at p. 349, and *per* Lord Atkinson and Lord Shaw in *Cant* v. *Fife Coal Co., Ltd.* (4). In *Griffin* v. *Smith* (5), Lord Hanworth, M.R., says, at p. 60, that the test is whether or not the workman was reasonable. It is not a question as to whether or not the operation is reasonable, but whether or not the refusal to undergo the operation is unreasonable. That makes a considerable difference when the facts have to be applied. In the present case the workman went to a very eminent surgeon who has the highest qualifications. It is going too far to say that he has been unreasonable in following that surgeon's advice. In *Marshall* v. *Orient Steam Navigation Co.* (6), Cozens-Hardy, M.R., repeats what he said in *Warncken* v. *Moreland* (7) as to its being for the judge to say whether or not a refusal is reasonable. In *Earl Fitzwilliam's Collieries* v. *Crossley* (8), it is said by Atkin, L.J., that where unreasonable refusal is set up, it is for the employer to show why the compensation should not continue. [Counsel also referred to *Fyfe* v. *Fife Coal Co., Ltd.* (9).]

Sellers, K.C.: The question of the artificial limb was not dealt with in the county court. If it had been, I am sure that the matter would have emerged satisfactorily. In our view, the two doctors were in agreement as to what would result from the artificial limb. There is no evidence as to the supply of the artificial limb. The point does not arise until the workman says that he is willing to have an amputation. The medical evidence was all one way in its effect. It was inherent in the presentation of the case in the county court that the artificial limb would be provided. It is usual for insurers to provide artificial limbs when they are necessary. The insurers are willing to enter into such undertaking as the court thinks proper, if the workman is willing to undergo an operation. If the judge was right in his findings as to the unreasonableness of the workman's refusal, it would appear from *Earl Fitzwilliam's Collieries* v. *Crossley* (8) that the liability to pay compensation would be terminated entirely as from the date of the hearing. The operation in the present case was attended by no danger or risk to life whatever and the result of it would be that the workman would be able to take his full part in industry. On the evidence, the judge was entitled to say that the workman was unreasonable. In *Fife Coal Co., Ltd.* v. *Cant* (4) and in *Fyfe* v. *Fife Coal Co., Ltd.* (9), Lord Dunedin said that the question whether a refusal was reasonable or unreasonable is a question of fact. In *Purvis* v. *Goole Steam Shipping Co.* (10) the court took the view that the workman had been unreasonable in not having had an operation. In the present case, there is evidence on which it can be said that the judge could find that the refusal was unreasonable, and that being a finding of fact, it cannot be disturbed.

Lord Greene, M.R.: This case presents some novel features. It is, so far as counsel have been able to discover, the first case which has come up for consideration in this court, or indeed in any other court whose judgments are reported, where a workman is alleged to have been guilty of unreasonable conduct in refusing to submit to an operation of a particular gravity. The special feature of the operation lies in the circumstance that, if it were carried out and the man's foot were amputated, he would have to be supplied with an artificial limb for the rest of his life. The accident took place as long ago as Jan. 5, 1 38. One of the man's feet was crushed so badly that a large part of the bone-work of his foot had to be removed, and it left him in a state in which, at the date of the hearing in Oct., 1941, he was still suffering considerable pain, which he thought, nevertheless, would get "dimmer," as he put it. He could walk two miles slowly with a stick. He was, therefore, a man to whom for ordinary purposes of life his foot was of some practical use in the sense that he could walk with a stick; he could stand, and he did not have to use crutches. On Feb. 3, 1939, he was examined by Mr. Gordon Irwin, a very eminent surgeon practising at Newcastle. Mr. Irwin in his evidence said that he had then expressed the opinion that the foot ought to have been removed and he had suggested to the workman that he should have further treatment. He saw him again in May of the same year, when he found no material change, and suggested it would be wise to have the foot removed; and he said that the workman was certain that he would not have it amputated. On Jan. 31, 1940, he found the conditions exactly the same; the only thing to do was to remove the foot; and he apparently left the workman undecided as to what he should do. He saw him again on Apr. 28, 1941, and again tried to persuage him to undergo the operation. He told the workman that, if the foot was removed, he would be able to walk for miles; that modern limbs were good and he would be able to do practically anything; that he found that there was no chance of improvement and that the workman's condition was stationary. On July 10, 1941, the employers made a request for arbitration under the Workmen's Compensation Acts with a view to the review and termination of the weekly payments which were being made to the workman, and the ground on which that was claimed was stated to be the refusal to undergo a surgical operation of a reasonable nature. On Sept. 23, 1941, the workman consulted another very eminent surgeon practising at Newcastle, Mr. John Gilmore, whose evidence was to the effect that the foot was fixed, with little movement. He agreed with Mr. Irwin's descriptions; he said that, unless the foot deteriorated, it would be high-handed to insist on having it off; he thought that progress might continue, but did not think that the man could improve very much; he did not advise him to have the foot off as he was not totally incapacitated at present and could do a sitting-down job. He agreed, however, that, if the foot was removed, the man would be more efficient. He would be able to get about better and do bench work or attend machines. That was the evidence before the county court judge, in addition to the evidence of the man himself, who stated that he was not willing to have the foot removed. On that evidence the county court judge came to the conclusion that the workman was acting unreasonably in refusing to have the operation.

At the outset there is one matter which seems to me to make it impossible for the county court judge's decision to stand. This was not a case of an operation, such as the removal of a finger, or an operation for hernia or something of that kind, which does not necessitate an artificial limb. This was a case of a major operation which unquestionably would leave the man worse than he was before, unless, in addition to the operation, he was supplied, and supplied for the rest of his life, with an artificial limb, probably with two artificial limbs, because it is notorious that in such cases one artificial limb is not enough and that there must be a change. The question in these cases always is not whether the operation proposed is a reasonable one, or is one which is reasonably likely to be successful; the question is whether the workman is unreasonable in refusing to undergo the operation. It is, therefore, important to remember that the operation which the workman has refused to undergo is an operation which will deprive him of a foot which at present is, at any rate, of some use to him. That is what he has refused to undergo. However, no attention seems to have been paid to the fact that under no circumstances could it be unreasonable for a man to refuse to have his foot amputated. Whether or not it might be unreasonable for a man who is advised to have a foot amputated to refuse to undergo the operation when proper and effective provision is made to supply him with the necessary artificial limb is another question altogether. For myself, I cannot appreciate how it can possibly be said that a man who is invited to have his foot amputated and is left with no assurance and no security for obtaining the necessary artificial limb can be said to be acting unreasonably in refusing to undergo the operation. Counsel for the respondents said that at the hearing before the county court judge no attention was paid to that matter, because, as he said, it must have been assumed that some sort of provision would be made either by the employer or by the insurance company, or that, at any rate, he would probably be able to get an artificial limb from the hospital or something of that kind. Speaking for myself, I think that it is not only highly improper, but not permissible, in cases where the provision of an artificial limb is necessary that the workman should be held to be acting unreasonably in refusing to undergo amputation where no proper provision is made for the supply of an artificial limb. The man would be left without a foot; he might or might not get his artificial limb; it might be provided not in pursuance of any legal obligation by the employer or by the employer's insurance company. Why should the man be left in that state of uncertainty, and be told that he is unreasonable if he does not submit himself to such a state of uncertainty for the rest of his life? The appellant is 28 years of age, and, according to the respondents' contention, he will lose his compensation unless he submits to the operation of having his foot removed, notwithstanding the fact that he might, in 2, or 5, or 10 years, find himself in a position where he would have to provide himself, at his own expense, with an artificial foot. I think it cannot be too clearly stated that, in cases where the provision of an artificial limb is necessary, that matter must be most strictly attended to. That seems to me to be a matter of which the county court judge ought himself to have taken notice, and on the facts before him he ought to have held that the employers had not discharged the burden of proving that the refusal to undergo the operation was, in the circumstances, unreasonable.

Quite apart from that, it seems to me that upon the facts of this case there was no evidence upon which the county court judge could find that the man had acted unreasonably. Counsel for the appellant put before us a very interesting argument in which he submitted certain propositions which, he said, as a matter of law, should rule the decisions of arbitrators in these cases. I do not find it necessary to examine those submissions. I content myself with saying that in the present case, in my opinion, there was no evidence upon which the county court judge could find that there was an unreasonable refusal on the part of the workman. As I have pointed out already, the question is not whether the operation is a reasonable one or whether it is one which is reasonably likely to succeed. The question is whether the workman is unreasonable in refusing to submit himself to it. On the facts of the present case the workman refused to undergo the operation at a time when he had received no independent advice. When the matter comes to the hearing, he persists in his refusal and he says: "By way of showing that my refusal is not unreasonable I call a surgeon of the greatest eminence who advises that the operation should not be performed at present." It must be borne in mind that, on the facts of this case, we are dealing not with some minor operation, not with some comparatively trivial matter, but with something which is irrevocable, the removal of a limb; and it seems to me that, if in such cases unreasonable conduct on the part of the workman is to be held to be established, it can only be held to be established on really strong and exceptional evidence. In the present case I find it impossible to say that, where two eminent surgeons give diametrically opposite advice to a workman in respect of a major operation of this kind, it can be said that the workman is unreasonable if the attitude which he takes up is one which follows the advice of one surgeon rather than the other. It is not a case of weighing the probabilities of the result of the operation. It is a question whether the man is reasonable. When a surgeon, in these circumstances, comes forward and says that he would not advise the opreation, it seems to me that, as a matter of law, it is impossible upon that evidence to hold that the man acted unreasonably. I want to make it perfectly clear that I am dealing with the facts of this particular case, the evidence that was given, the nature of the accident and the injury, and the operation proposed. What might be the result in some other case is neither here nor there; but, on the facts of this case, I have come to the conclusion that there was no evidence upon which the county court judge could hold as he did. The result is that I would allow the appeal.

MACKINNON, L.J.: I agree. I think it is sufficient for the purpose of deciding this appeal to say that what was said to be the unreasonable refusal on the part of the workman was the refusal to have his foot amputated; but, when the facts are examined, the employers can succeed only if they establish that the man unreasonably refused to accept the offer to have an artificial foot supplied to him for the rest of his life in place of the injured natural foot which he had. There was no evidence before the county court judge that any offer of that sort had ever been made to the man; therefore, there could be no evidence that he ever refused that offer, reasonably or otherwise. In those circumstances, there was no evidence upon which the county court judge could find that he had unreasonably refused to accept such an offer, and it was wrong to diminish his compensation on the basis that he had done so. This is sufficient to dispose of this case, and I think it is unnecessary and undesirable to consider any of the other possible questions that have been debated before us.

Goddard, L.J.: I agree with the judgment of Lord Greene, M.R. I think there was here an utter absence of any evidence which would justify the county court judge in holding that there had been an unreasonable refusal by this man to undergo a surgical operation. Our attention has been called to the fact that the ground on which the employers based their application for a review was a refusal to undergo a surgical operation of a reasonable character. I cannot help thinking that throughout his judgment the county court judge was directing his mind to the fact that the operation had to be one of a reasonable character. That is wrong. No doubt it has to be shown in this class of case that the surgical operation is of a reasonable character, because, if it was not of a reasonable character, the refusal to undergo it could not be unreasonable. However, the question which has to be decided is a very different one. It is whether or not there has been, on the part of the workman, an unreasonable refusal to undergo a surgical operation. If the only question for the decision of the county court judge had been whether or not this surgical operation was a reasonable one, not only was there evidence upon which he could find that it was, but I should find myself in agreement with him. It is one thing, however, to say that the operation is reasonable; it is quite another thing to say that the man is acting unreasonably in refusing to undergo the operation. As Lord Greene, M.R., has pointed out, this is the first case in which there has arisen the question of the amputation of a major limb. I say "major limb" because we are here considering a very different case from the removal of a finger or a toe. Moreover, an operation for hernia, although it is a serious operation, is a very different thing from an operation which involves a man in the loss of a major limb such as a leg, a foot, or an arm. Speaking in this respect entirely for myself, I think it requires a very strong case to justify a finding that a man is unreasonable in refusing to undergo an operation of this description, unless, indeed, it be clear that the amputation is necessary for the saving of life. I do not want it to be understood that I am saying that, in my opinion, unless the operation is necessary for the saving of life, a refusal to undergo it would be reasonable; I do not mean that in the least. I mean that, in my opinion, it requires a much stronger case to justify a finding that a man is acting unreasonably in refusing to undergo an operation which is going to deprive him of a limb, which, if it remains in its existing condition, is of some use, than in a case where it is only a matter of removing a finger or toe or curing a rupture. In this case the employers were advised by a surgeon of eminence that the operation was reasonable and that it would cure the man. Whether Mr. Gilmore, a surgeon of at least equal eminence, communicated his opinion to the workman or not—and I should think it highly unlikely that he did not tell him what he thought—the workman having refused to accept amputation, at any rate at the moment, he is supported by the opinion of Mr. Gilmore who said: "I myself would not advise it." In those circumstances, even if both surgeons had said: "We think it is a reasonable operation," and one surgeon of the eminence of Mr. Gilmore had said: "I do not advise this man to have it at present," how can it be said by any stretch of the imagination that the man is unreasonable in refusing to undergo it? In *Fife Coal Co., Ltd.* v. *Cant* (4), Lord Atkinson said, at p. 72:

> . . . how a man believing in the doctor he consults, though he may be a general practitioner, can be said to be guilty of unreasonable conduct passes my comprehension altogether.

How a man who accepts the view, or takes the same view as, one of the most eminent surgeons in the north of England—not a mere general practitioner, but a consulting surgeon—or finds his view supported by the opinion of that gentleman can be said to be guilty of unreasonable conduct certainly passes my comprehension. If the county court judge had applied his mind to the proper question as to whether this refusal was unreasonable, and not to the question, as I think he did in the main, whether the operation was reasonable, I cannot doubt that he would have found there was no evidence at all upon which he could have said that this man's conduct was unreasonable in any degree.

Both LORD GREENE, M.R., and MACKINNON, L.J., have dealt with the point as to the artificial limb, and I agree with all that has been said. It seems to me that if cases do arise in the future in which it becomes necessary that an artificial limb should be provided before compensation can be terminated, or before an operation can be envisaged, the most careful consideration must be given as to what provision is to be made for the workman being provided with an artificial limb for the rest of his life, more especially where, as in the present case, he is young. . It certainly is not enough for the insurance company or the employer to say to the judge at the hearing: "We are going to give him an artificial limb;" nor is it enough to say: "We are going to give him two artificial limbs." These artificial limbs may meet with accidents. They may, and they will, wear out in time, as everyone knows. They may become destroyed by accident, and so forth. If it is necessary that the man should be supplied with an artificial limb, and if it is part of the employer's case that the amputation is desirable because the injured limb can be replaced by a more useful artificial limb, some security must be looked for and provided so that the man will be able to have the benefit of an artificial limb throughout the term of his life. That is by no means an easy thing to arrange. It certainly is not enough, however, for the insurance company to make an offer of an artificial limb; and, as was pointed out during the argument, there may come a time when, in spite of his having an artificial limb, it may be found that this man cannot work, and then it would be open to the employer to say: "You cannot get along with an artificial limb, therefore we will resume paying you your full compensation and that is the total measure of our liability." That is no compensation at all to a man for having lost a limb.

There was another point raised which, in view of the decision on these other two points, really becomes immaterial; but I have great difficulty in understanding how the county court judge came to make the exact order that he did. As I read his judgment, I think he meant to find that a further refusal by the man after the hearing would be unreasonable. His words were:

> "If he refuses on the facts of this case he is, in my opinion, acting unreasonably."

He certainly does not say that he finds that he was acting unreasonably at an earlier period than at the time when the man was actually before him. If he did mean to find that he was acting unreasonably at some earlier time, I think the county court judge should have found at what time the refusal was unreasonable, because, admittedly, if an operation was necessary, some time, and possibly a considerable time, would have to be allowed for him to recover from the operation. The surgeon who advised the operation said it would be reasonable to give a further six months after he had recovered from the effects of the operation, which I suppose means the healing of the stump sufficiently for the artificial limb to be fitted. Therefore, it is clear that there might have to be a period of 8 months—perhaps shorter, perhaps longer—from the time of the operation before the man would be regarded as a fit man with the existence of the artificial limb. The county court judge did not fix any time as from which this man's refusal must be regarded in his view as unreasonable. In any case, even if we had upheld his view, I do not think on that part of the case that the order could have stood. For all these reasons I agree that the appeal should be allowed.

Appeal allowed with costs.

Solicitors: *W. H. Thompson* (for the appellant); *Carpenters* (for the respondents).

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

FOSTER *v.* GILLINGHAM CORPORATION.

[Court of Appeal (Lord Greene, M.R., and MacKinnon and Goddard, L.JJ.), **February 2, 3, 16, 1942.**]

Highways—Obstructions—Lighting of obstruction—Barrier placed across road on account of bomb damage—Towns Improvement Clauses Act, 1847 (*c.* 34), *ss.* 78, 81, 83—*Public Health Act,* 1875 (*c.* 55), *ss.* 145, 160.

Negligence—Erection of obstruction in highway by local authority—Barrier placed across road on account of bomb damage—Duty to light obstruction.

A local authority erected a barrier across a highway near a crater made by a bomb. Hurricane lamps were placed upon the barrier, but the lights were extinguished by a strong wind. The man whose duty it was to attend to the lamps failed to visit them on the night in question. The respondent, who was riding a bicycle along the street, received injuries through colliding with the barrier. The local authority contended that the barrier was erected without negligence and that they had not been negligent in leaving it unlighted:—

Held: the appellants, having placed the obstruction in the highway, were under a duty to keep it lighted. There was evidence of negligence for which they were in law responsible, and the respondent was entitled to recover damages in respect of the injuries received.

[**EDITORIAL NOTE.** There have been a number of cases decided on the question of lighting obstructions on the highway in war-time. The present is distinguished from the previous cases in that the obstructions in those cases were erected under statutory authority to erect that particular type of obstruction. Here the Court of Appeal appear to have come to the conclusion that the obstruction was erected under a duty, imposed by the Towns Improvement Clauses Act, 1847, to enclose dangerous holes in streets. It will be noted that the Court of Appeal state that, in their view, it is desirable that the previous decisions should be reconsidered.

As to Obstructions in Highway, see HALSBURY, Hailsham Edn., Vol. 16, pp. 323, 324, para. 436; and for Cases, see DIGEST, Vol. 26, pp. 392-395, Nos. 1187-1212.]

Cases referred to:

(1) *Penny* v. *Wimbledon Urban Council*, [1899] 2 Q.B. 72; 26 Digest 410, *1308*; 68 L.J.Q.B. 704; 80 L.T. 615.

(2) *Great Central Ry. Co.* v. *Hewlett*, [1916] 2 A.C. 511; 26 Digest 419, *1383*; 85 L.J.K.B. 1705; 115 L.T. 349.

(3) *Wodehouse* v. *Levy*, [1940] 2 K.B. 561; [1940] 4 All E.R. 14; Digest Supp.; 109 L.J.K.B. 807; 163 L.T. 227.

(4) *Fox* v. *Newcastle-upon-Tyne City Council*, [1941] 2 K.B. 120; [1941] 2 All E.R. 563; Digest Supp.; 110 L.J.K.B. 649; 164 L.T. 90.

(5) *Baldock* v. *Westminster City Council* (1918), 88 L.J.K.B. 502; 26 Digest 392, *1190*; 120 L.T. 470.

(6) *Lyus* v. *Stepney Borough Council*, [1941] 1 K.B. 134; [1940] 4 All E.R. 463; Digest Supp.; 110 L.J.K.B. 75; 164 L.T. 195.

(7) *Morrison* v. *Sheffield Corpn.*, [1917] 2 K.B. 866; 26 Digest 445, *1623*; 86 L.J.K.B. 1456; 117 L.T. 520.

(8) *Greenwood* v. *Central Service Co., Ltd.*, [1940] 2 K.B. 447; [1940] 3 All E.R. 389; Digest Supp.; 109 L.J.K.B. 799; 163 L.T. 414.

Appeal by the defendants from an order of His Honour Judge Clements made at the Rochester County Court and dated Nov. 19, 1942.

The plaintiff claimed damages for negligence. He was cycling after dark along a road within the area of the defendant corporation when he ran into an unlighted barrier erected across the road and suffered injury. On the night before the accident a bomb had fallen in the road and the defendants had erected the barrier to prevent persons using the highway falling into the hole caused by the explosion of the bomb. The barrier was, during hours of darkness, lighted by hurricane lamps, but, on the night of the accident these had been extinguished by a high wind. It was the duty of an employee of the council to visit these lamps at intervals, and it was proved in evidence that he had failed in that duty.

S. R. Edgedale and *D. Weitzman* for the appellants.

G. H. Oliver for the respondent.

Edgedale: The county court judge held that the appellants, by lighting the obstruction, had taken upon themselves a self-imposed duty to keep the lights burning, and to take care that no member of the public was injured by it. So far as the appellants are concerned, there is statutory power to light the obstruction, but there is no statutory obligation: *Wodehouse* v. *Levy* (3) and *Fox* v. *Newcastle-upon-Tyne City Council* (4). There was no suggestion that the barrier was improperly erected or that it constituted a nuisance. In the present case, the action of the local authority diminished the existing danger, since the barrier, even if unlighted, was a less danger than the hole due to the explosion of the bomb. The only duty of a local authority in a matter of this nature is to exercise their powers reasonably and within the limits allowed by the law. [Counsel referred to *Baldock* v. *Westminster City Council* (5), *Lyus* v. *Stepney Borough Council* (6) and *Morrison* v. *Sheffield Corpn.* (7).]

Oliver: The county court judge was entitled on the evidence before him to make the findings which he made. So far as the principle upon which *Baldock* v. *Westminster City Council* (5) was decided, *Greenwood* v. *Central Service Co., Ltd.* (8) is no bar whatever. *Greenwood* v. *Central Service Co., Ltd.* (8) related to obstructions erected under statutory authority. The appellants in the present case had taken upon themselves the duty of lighting the obstruction which they had erected. In the present case, the erection of the obstruction was an exercise by the local authority of their powers as a highway authority. The question, therefore, is whether the present case falls under *Greenwood* v. *Central Service Co., Ltd.* (8) or *Penny* v. *Wimbledon Urban Council* (1). From *Fox* v. *Newcastle-upon-Tyne City Council* (4) it would appear superficially that a local authority can erect almost anything and not be liable in respect of negligence. The present case, however, can be distinguished from *Fox* v. *Newcastle-upon-Tyne City Council* (4) in that, although there may be no specific obligation to light, the local authority is under a common law liability to take reasonable care when exercising their statutory powers. If it is necessary to light, the local authority is not prohibited from doing so.

Lord Greene, M.R.: In this case I have read the judgment which will be delivered by Goddard, L.J. I agree with it and do not wish to add anything.

MacKinnon, L.J.: I think this is a very plain case. The defendants erected a dangerous obstruction across a highway. They left it unlighted in the dark and the plaintiff ran into it and was injured. Unless the defendants can show that the obstacle they erected was left unlighted without negligence on their part, they seem clearly liable to pay damages to the plaintiff. The case is as simple as that of *Penny* v. *Wimbledon Urban Council* (1). The judge has found that the failure to keep the lamps on the obstruction lighted was due to the negligence of the defendants or their servants. There was ample evidence on which he could so find, and I think the appeal fails and must be dismissed with costs.

It is said by the appellants that there have been other cases in which a local authority has erected an obstruction on a highway and has left it unlighted. In those cases they have been held not to be liable to light the obstruction, and the same result ought to follow in this case. There is an essential difference between those cases and the present one. In each of those cases the authority concerned was empowered by statute to erect the specific obstruction in question. In each of those cases the authority was given direct statutory authority to erect an obstacle in the highway. The question involved was whether, having such statutory authority to erect the particular obstacle, they were under a duty to light it after dark. I thought, and still think, they were not, and that chiefly because of the decision of the House of Lords in *Great Central Railway Co.* v. *Hewlett* (2).

In the present case the defendants put an obstruction on the highway without having in any sense the authority of Parliament to put it there. That seems to me to be the essential difference between this case and *Hewlett's* case (2), and, as a consequence, between this case and the cases to which I have referred. I agree that the appeal should be dismissed with costs.

Goddard, L.J.: As a result of enemy action, one of the streets of the borough was in a condition that would cause danger to passengers along the street. Accordingly, the defendants, as the local authority, closed the street temporarily by placing a barrier across the entrance. Two red hurricane lamps were put on the barrier at night. These lamps had been lit, but had gone out, and during the hours of darkness the plaintiff, who was cycling to work, ran into the barrier and was injured. He brought this action alleging negligence in the corporation in not keeping the lamps lit, just the sort of action that in days before the war was so often brought against local authorities and their contractors in which the only question for decision, other than damages, was whether there had been negligence. However, in this case, I suppose because the accident happened in war-time, or because the street had been damaged by enemy action, a variety of topics appear to have been raised and discussed which were really quite irrelevant. Though no mention was made of them in the defence, it was said that the council was acting under statutory powers, though neither the court below nor this court has been told on what statute reliance was placed. In this court, however, we were invited to consider the Defence (General) Regulations, reg. 51, a regulation as inappropriate to the facts of this case as can well be conceived. It deals with the requisition of land for defence purposes by a competent authority. Who requisitioned what was not explained, the fact being, of course, that nothing was requisitioned by anyone. That regulation had as little relation to this case as the order of the Minister of Agriculture, to which we were also referred, for what that had or could have to do with closing a side street in a dockyard town I will not attempt to consider. It is, however, material just to see what powers a local authority has to close a street because its condition gives rise to danger. In an urban district the Public Health Act, 1875, s. 145, vests streets in the urban authority to whom sect. 144 of that Act transfers the duties of the surveyor of highways. Sect. 160 incorporates the provisions of the Towns Improvement Clauses Act, 1847, relating to, among other things, precautions to be taken during the construction and repair of sewers, streets and houses. Sect. 83 of the Act of 1847 provides that, if any building or hole or any other place near any street be for want of sufficient repair, protection or inclosure dangerous to passengers along such street, the authority shall cause the same to be repaired, protected or inclosed so as to prevent danger. This section, therefore, authorised the council to close the street so as to prevent danger. In an emergency it can probably be done in no other way than by the erection of a barrier. While that section, unlike sects. 78 and 81, contains no specific directions as to lighting what may be an obstruction of the highway, it is obvious that, if whatever means they use for the protection of the public does form an obstruction, the council must light it; otherwise they would be exercising their powers not so as to prevent, but to promote accidents. The lighting order made under the Defence (General) Regulations, reg. 23, imposes no difficulty, as it expressly exempts from the provisions of the order lights of a certain power and construction such as indicate an obstruction in the road. Had this accident happened before the war, no one would have thought of contending that it was not the duty of the council to light this barrier, and, as their duties are unaffected by the lighting regulations and orders, it follows that the only question is whether they were guilty of negligence in this respect. There was ample evidence on which the county court judge could find that they were; indeed, considering that it was known that the type of lamp used is liable to go out in a wind, in view of the fact that there was a strong wind on the night in question and that the man whose duty it was to visit the lamps during the night did not do so, no other conclusion could have been reached. The discussion in this case does, however, show that it is desirable that the cases decided during the present war relating to collisions with street refuges, sandbins and the like during the hours of black-out should receive further consideration, but we need not consider those cases for the purpose of deciding this case, because we are here dealing with a case of a class familiar before the war where a temporary barrier has been erected, the lighting of which is expressly permitted, although in this case it is true that it was erected after the black-out regulations were in force. Although the judgment under appeal dealt with many matters which it is not necessary to decide in the present case, in my opinion the result was right and the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors: *William Charles Crocker* (for the appellants); *Mowll & Mowll*, agents for *Mowll & Mowll*, Canterbury (for the respondent).

[*Reported by* W. K. Scrivener, Esq., *Barrister-at-Law.*]

LONDON FAN AND MOTOR CO., LTD. *v.* SILVERMAN.

[KING'S BENCH DIVISION (Stable, J.), **January 14, 1942.**]

Emergency Legislation—Landlord and tenant—War damage—Recovery of rent payable in advance—Retrospective operation of statute—Landlord and Tenant (War Damage) (Amendment) Act, 1941 (*c.* 41), *s.* 13.

Statutes—Retrospective operation—Landlord and Tenant (War Damage) (Amendment) Act, 1941 (*c.* 41), *s.* 13.

The plaintiffs were tenants of premises from the defendant at a rental of £575 per annum, payable quarterly in advance. On Mar. 25, 1941, the plaintiffs paid the rent for the quarter ending June 24. The premises were subsequently damaged by enemy action, and on Apr. 23, the plaintiffs served a notice of disclaimer on the defendant under the Landlord and Tenant (War Damage) Act, 1939 ; as a result the lease was deemed to have been surrendered on that date. By sect. 13 of the Landlord and Tenant (War Damage) (Amendment) Act, 1941, which came into operation on Aug. 24, a tenant may recover rent paid in advance by him and apportionable to the period for which the surrender takes effect, and the plaintiffs claimed the return of that part of the quarter's rent which was apportionable to the period from Apr. 23 to June 24 :—

HELD : sect. 13 of the Landlord and Tenant (War Damage) (Amendment) Act, 1941, was not retrospective in its effect so as to vest in the plaintiffs a right to recover the part of the quarter's rent due in respect of a period before the coming into force of the statute.

[**EDITORIAL NOTE.** The sole question here is whether or not the provisions of the Landlord and Tenant (War Damage) (Amendment) Act, 1941, s. 11 are retrospective. There is, of course, a strong presumption that statutory provisions are not retrospective, and the judge has been unable to find in the provisions of the section here in question any sufficient indication of a retrospective operation.

AS TO THE RETROSPECTIVE EFFECT OF STATUTES, see HALSBURY, Hailsham Edn., Vol. 31, pp. 513-516, para. 670 ; and FOR CASES, see DIGEST, Vol. 42, pp. 693-700, Nos. 1083-1168.

FOR THE LANDLORD AND TENANT (WAR DAMAGE) AMENDMENT ACT, 1941, see BUTTERWORTHS EMERGENCY LEGISLATION SERVICE, Statutes Supp. No. 11.]

Cases referred to :

(1) *Ellis* v. *Rowbotham*, [1900] 1 Q.B. 740 ; 31 Digest 263, *4042* ; 69 L.J.Q.B. 379 ; 82 L.T. 191.

(2) *Turner* v. *Stella Bond, Ltd.*, [1941] 1 K.B. 569 [1941] 1 All E.R. 449 ; Digest Supp. ; 110 L.J.K.B. 385 ; 164 L.T. 414.

(3) *Hildebrand* v. *Lewis*, [1941] 2 K.B. 135 [1941] 2 All E.R. 585 ; Digest Supp. ; 110 L.J.K.B. 570 ; 165 L.T. 178.

(4) *R.* v. *Chandra Dharma*, [1905] 2 K.B.D. 335 ; 42 Digest 699, *1158* ; 74 L.J.K.B. 450 ; 92 L.T. 700.

(5) *Lauri* v. *Renad*, [1892] 3 Ch. 402 ; 42 Digest 696, *1116* ; 61 L.J.Ch. 580 ; 67 L.T. 275.

ACTION for the recovery of £97 13*s.* being part of a quarterly payment of rent made by the plaintiffs to the defendants and alleged to be apportionable to a period for which the lease of the premises in question had been surrendered by the operation of the Landlord and Tenant (War Damage) Act, 1939, s. 8. The facts are fully set out in the judgment.

A. A. Watson for the plaintiffs.

S. A. Kyffin for the defendant.

STABLE, J. : The plaintiffs were the tenants of premises which they held from the defendant under an underlease made on July 1, 1940, for a term of seven years from June 24, 1940, at a quarterly rent of £143 15*s.*, payable in advance. On Mar. 25, 1941, the plaintiffs, in performance of their covenant under this lease, paid the defendant £143 15*s.*, representing a quarter's rent payable in advance for the quarter ending June 24, 1941.

In Apr., 1941, the premises were damaged by enemy action, and in consequence the plaintiffs, on Apr. 23, 1941, served on the defendant a notice of disclaimer of the tenancy. No counter-notice was served by the defendant on the plaintiffs. The result was that, under the provisions of the Landlord and Tenant (War Damage) Act, 1939, s. 8, the underlease was deemed to have been surrendered on Apr. 23, 1941. Thus, the plaintiffs, in performance of their covenant, had paid the rent which would entitle them to enjoy possession of the property to June 24, but, in fact, had no subsisting tenancy after Apr. 23, 1941. If the quarterly rent is properly apportionable, the plaintiffs are entitled to recover from the defendant £97 13*s*., and that is the sum which they are claiming in this action.

The position of the law up to the passing of the Landlord and Tenant (War Damage) (Amendment) Act, 1941, is quite plainly disclosed in a series of cases. *Ellis* v. *Rowbotham* (1) decided that where rent is payable in advance and the tenancy comes to an end during the period in relation to which the advance payment was made, the Apportionment Act, 1870, has no application, with the result that, if the tenant has paid, he cannot recover the proportionate part, and if he has not paid, he is liable to be sued by the landlord for the whole quarter's rent, regardless of the fact that the tenancy has come to an end during the quarter in question. The next case is *Turner* v. *Stella Bond* (2). There the rent was payable quarterly in advance. The rent due on Sept. 29, 1940, was not paid, and on Nov. 6 the premises were damaged by blast from a bomb. On Nov. 9, the tenant served a notice of disclaimer upon the landlord. On Nov. 25, the tenant paid the amount of rent due at the date of the notice of disclaimer. On Dec. 4, the landlord served a notice to avoid disclaimer, and subsequently took proceedings in the county court to recover the balance of the rent for the period beginning Nov. 9, 1940, the date on which the notice of disclaimer was served, and ending on a date prior to the date on which the premises were rendered fit for occupation. The Court of Appeal held that the tenant was not liable to pay the balance, because he was protected by the provisions of the Landlord and Tenant (War Damage) Act, 1939, s. 11 (1) (*b*).

The material words of sect. 11 (1) (*b*) are as follows :

> . . . no rent shall be payable by the tenant under the lease in respect of the period beginning with the date of the service of the notice of disclaimer and ending with the date on which the land is rendered fit . . .

Now that subsection deals only with cases in which the notice of disclaimer is followed by a counter-notice. It does not deal at all with the situation that arises where, owing to the nature of the damage, or for some other reason, the landlord serves no counter-notice, with the consequence that the lease is deemed to have been surrendered as from the date of the disclaimer. Two of the members of the Court of Appeal in *Turner* v. *Stella Bond* (2) expressed the view that, if the tenant had paid the balance for which he was not bound, he could have recovered it. The observations on that matter were *obiter*, as the point did not arise for decision, but, as I have said, two members of the court quite clearly expressed the view that, if the tenant had paid, the effect of the subsection was to give him the right to recover.

The next case which was cited was *Hildebrand* v. *Lewis* (3). That case was substantially on all-fours with the present case. There were more points than one that called for decision in that case, and the effect of the decision was that the notice of disclaimer had not been followed by any counter-notice, at all events so far as the rights and obligations of the parties to the action were affected. The Court of Appeal further held that sect. 11 (1) (*b*) of the Act of 1939, had no application to the case where the notice of disclaimer was not followed by a counter-notice, and that, accordingly, the ordinary law as stated in *Ellis* v. *Rowbotham* (1) applied. The rent payable in advance for the quarter during which the surrender had occurred, was, therefore, payable in full.

After dealing with the effect of sect. 11 on the facts as they existed in *Turner* v. *Stella Bond, Ltd.* (2), Luxmoore, L.J., (who was delivering the judgment of the court), proceeded, at p. 139 ([1941] 2 All E.R. at p. 588) :

> All that sect. 8 [of the Landlord and Tenant (War Damage) Act, 1939], provides is that the lease disclaimed shall be deemed to have been surrendered. It is well-settled law that, where a lease containing a personal covenant for the payment of rent is surrendered, the personal covenant is independent of the estate in the property, and, as to the rent previously due, is not affected by the surrender, but the landlord remains a special creditor for the rent due and payable before the surrender.

It is quite clear from that decision that, if the law had remained where it was when *Hildebrand* v. *Lewis* (3) was decided, this action could not have been brought with the slightest hope in the most optimistic mind of a successful issue, at all events short of the House of Lords. However, the law was not left where it was. The Landlord and Tenant (War Damage) (Amendment) Act, 1941, s. 13, which came into operation on Aug. 7, 1941, contains this provision :

> Where (*a*) any lease is deemed to have been surrendered by virtue of sect. 8 of the principal Act . . . the rent payable in respect of the period during which the surrender takes effect or the rent ceases to be payable as aforesaid shall be apportionable, whether the rent under the lease is payable in advance or otherwise, and any rent paid by the tenant in respect of that period in excess of the amount apportionable to the part of the period preceding the date on which the surrender takes effect or the rent ceases to be payable, as the case may be, shall be recoverable by him.

Now the particular rent, the sum of money with which I am concerned, was money which became due and payable on Mar. 25, 1941, in respect of the quarter ending on June 24, 1941 ; that is to say, the money was due and payable and paid considerably before the coming into operation of the Landlord and Tenant (War Damage) (Amendment) Act, 1941. The question which I have to decide is whether the effect of sect. 13 is retrospective, so as to vest in the plaintiffs for the first time the right to recover from the defendant a debt which throughout—certainly up to Aug. 7, 1941—had been due from the plaintiffs to the defendant, and which had been punctually paid.

I have been referred to two cases which deal with the retrospective effect of Acts of Parliament—*R.* v. *Chandra Dharma* (4) and *Lauri* v. *Renad* (5). In the latter case, Lindley, L.J., said, at p. 421 :

> It is a fundamental rule of English law that no statute shall be construed so as to have a retrospective operation unless its language is such as plainly to require such a construction ; and the same rule involves another and subordinate rule to the effect that a statute is not to be construed so as to have a greater retrospective operation than its language renders necessary.

Counsel for the plaintiffs relied very strongly on the concluding words of the section :

> . . . and any rent paid by the tenant in respect of that period in excess of the amount apportionable . . . shall be recoverable by him.

He argued, with some force, that those words created for the first time an entirely fresh right to recover from a creditor a debt which, up to the passing of the Act, had been due and which had in fact been discharged. He argued that, unless I gave that meaning to the words, they were mere surplusage, and that the antecedent words were more than sufficient, or at least amply sufficient, to confer on the tenant who had paid the rent in advance, subsequent to the passing of the Act, the right to recover any sum which by virtue of some event happening after the date of payment had ceased to be a binding obligation falling on the tenant. Now, although I fully appreciate the force of that argument, I do not think that the wording of sect. 13 is such (to borrow the words of Lindley, L.J.), as plainly to require me to give a retrospective effect to it. I think that counsel for the defendant is right in submitting that the words may have been inserted, perhaps *ex abundanti cautela*, to make the tenant's right to recover beyond question ; and there is the further possibility that the words may (I do not decide that they are, because the question does not arise) be apt to cover a case in which an unwary tenant has paid a sum for rent in ignorance of the somewhat special rights which this legislation has conferred, at a time when, owing to the change in the law, it was no longer due and payable. The words may be apt to protect a tenant who has made such a payment in ignorance of his legal rights. However that may be, I am not satisfied that here I could properly construe this section so as to enable a tenant to set up, by virtue of the Act, an entirely new right to recover from his landlord a sum of money which had been paid, and which, unless the Act has this retrospective effect, was properly payable. It seems to me that if the draftsman or the legislature had intended this section to have retrospective effect, it would have been the simplest thing in the world to have inserted " (whether before the coming into operation of this Act or afterwards) " after the words " and any rent paid by the tenant."

Action dismissed with costs.

Solicitors : *Sidney Pearlman* (for the plaintiffs) ; *Amery-Parkes & Co.* (for the defendant).

[*Reported by* D. K. Belcher, *Barrister-at-Law.*]

WILLIAMS-ASHMAN *v.* PRICE & WILLIAMS AND ANOTHER.

[Chancery Division (Bennett, J.), **December 19, 1941.**]

Trusts and Trustees—Breach of trust—Action by beneficiary—Constructive trustee —Solicitor acting for trustees—Solicitor drawing trust deed—Solicitor acting honestly on instructions of trustees.

Proceeds of the sale of certain church property were vested in trustees on trust to pay the income thereof to the incumbent for the time being of a parish. The incumbent, who was eventually the sole surviving trustee, misapplied these funds. After his death the incumbent for the time being brought an action for breach of trust to recover these monies against the firm of solicitors and their managing clerk, who had paid the trust money over to the incumbent. The partner of this firm had drawn up the trust deed some ten years before the matter complained of, and the deed was immediately placed in the firm's safe. He did not see the deed again until a short time before the action. The managing clerk did not know the terms of the deed at all. The trust money was invested in a mortgage in 1927, and the mortgage money was called in in 1937. It was then invested in preference shares and a loan to a son of the incumbent. The loan proved irrecoverable and the value of the preference shares was seriously affected by the war. The plaintiff contended that the defendants, knowing that this money was trust money, were liable to the present beneficiary for its misapplication:—

Held: neither the solicitor nor the managing clerk were liable as trustees *de son tort*, as they had only acted as the agents of the incumbent. They had, moreover, acted honestly and, although they were aware that the money was trust money, they did not know what the trusts were.

[**EDITORIAL NOTE.** It has been said that where trusts funds come into the custody and under the control of a solicitor with notice of the trusts, he can only discharge himself of liability by showing that the funds were duly applied in accordance with the trusts. The present case places a gloss upon that statement. Where the solicitor acts for the trustees of the fund and acts throughout in accordance with their instructions, not intermeddling in any way in the execution of the trust, and at the same time acts honestly, he is under no such liability. The present case is a strong one, for the solicitor concerned actually drew the trust deed, but that is not held to fix him with such notice of the trust that he was bound to warn the trustees that, in lending money on note of hand, they were making an improper investment. At the same time it must be remembered that this action is concerned only with the remedy of the beneficiaries against the solicitor so acting. The decision does not concern the remedy of the beneficiaries against the trustees themselves, nor, indeed, that of the trustees against the solicitor.

As to Liability of Trustee *de son tort*, see HALSBURY, Hailsham Edn., Vol. 33, p. 328, para. 566; and for Cases, see DIGEST, Vol. 43, pp. 989, 990, Nos. 4309-4315.]

Cases referred to:

(1) *Blyth* v. *Fladgate*, [1891] 1 Ch. 337; 42 Digest 378, 4261; 60 L.J.Ch. 66; 63 L.T. 546.

(2) *Morgan* v. *Stephens* (1861), 3 Giff. 220; 43 Digest 716, *1546*; 4 L.T. 614.

(3) *Barnes* v. *Addy* (1874), 9 Ch. App. 244; 43 Digest 715, *1539*; 43 L.J.Ch. 513; 30 L.T. 4.

(4) *Mara* v. *Browne*, [1896] 1 Ch. 199; 43 Digest 715, *1534*; 65 L.J.Ch. 225; 73 L.T. 638.

(5) *Fyler* v. *Fyler* (1841), 3 Beav. 550; 43 Digest 946, *3857*.

Action for breach of trust.

The plaintiff was the vicar of the parish of Holy Trinity, Kingsway, London. He had been the vicar of that parish since 1939, when he succeeded the Rev. Dr. William Stuart MacGowan, who died in office on July 6, 1939. The first defendants were a firm of solicitors practising under the name of Price & Williams, and were sued as a firm, but, at all material times, the practice had been carried on by Alfred Williams alone under the same firm name. The second defendant was the managing clerk of that firm of solicitors. He had always been connected with the firm's common-law business and had no connection with their conveyancing work. He had, however, been a personal friend of the late Dr. MacGowan and had been his churchwarden from 1925 to 1928.

In 1927 Dr. MacGowan, as the incumbent of the parish of Holy Trinity, was in possession of a sum of £965 1*s.* 8*d.* which belonged to him as incumbent and was not his own personal property, being, in fact, the proceeds of sale of certain church property. On Oct. 1, 1927, that sum was by a declaration of trust vested in Dr. MacGowan and Edward Streather as trustees up n trust to invest it upon such securities as should from time to time be authorised by law for the investment of trust funds and to pay the income to the incumbent for the time being of Holy Trinity church. This sum was invested in a mortgage of freehold property which was a perfectly proper trustee investment. In the early part of 1936 the second defendant was asked by Dr. MacGowan to arrange for the repayment of a sum of £200 part of the mortgage debt. The sum was duly paid by the mortgagor and handed to Dr. MacGowan. It was found as a fact that both Dr. MacGowan and Streather approved of the calling in of the £200 and acknowledged the receipt of the money. Subsequently Dr. MacGowan wished to find an investment for this sum of £200 and consulted the second defendant as to a suitable investment. The latter recommended an investment in the 6 per cent. preference shares of £1 each in a company called the Regional Investment and Development Co., Ltd., of which the second defendant was then and at the time of the trial a director. The investment was duly made and 200 shares were allotted to Dr. MacGowan. Dr. MacGowan's co-trustee, Streather, died on Nov. 26, 1936. On Apr. 14, 1937, notice was given calling in the sum of £700, the remainder of the principal sum outstanding on the mortgage. This was done, of course, solely on the instructions of Dr. MacGowan, who was then the sole trustee. This £700 was applied, £300 as a loan to Dr. MacGowan's son and £200 in obtaining a further allotment of another 200 preference shares in the Regional Investment and Development Co., Ltd. The remaining £200 was later also invested in the preference shares of the Regional Investment and Development Co., Ltd. It appeared that the first two investments were made on the instructions of Dr. MacGowan and that the investment of the last £200 was the subject of some correspondence between Alfred Williams and Dr. MacGowan. In the course of a letter Alfred Williams suggested that Dr. MacGowan might invest in further preference shares in the Regional Investment and Development Co., Ltd., or might take some shares in a building society, or might, when the £300 loan was repaid, make a further investment on mortgage. The sum lent to Dr. MacGowan's son proved to be irrecoverable. The preference shares were valued at 15*s.* a share in 1939, when Dr. MacGowan died, and valuation was made for probate. The company ceased to pay a dividend on those shares in 1940, and it was possible that its difficulties were due to the outbreak of war.

It appeared that from 1927 until 1939 that the existence of the declaration of trust, which had been placed in the solicitor's safe, had been forgotten, although all parties quite realised that the money was trust money. On Oct. 13, 1939, Alfred Williams found the declaration of trust in the firm's safe, and at once sent it to the solicitors who were acting in the administration of the estate of Dr. MacGowan, who had died intestate in Sept., 1939. This action was then brought, claiming that the firm of solicitors had been guilty of a breach of trust. There was a similar claim against the second defendant, but that failed upon the facts and is not dealt with in this report. It was found as a fact that Alfred Williams was not aware of the fact that either Dr. MacGowan or Streather was committing a breach of trust or that he was assisting them to commit a breach of trust, and that at all material times he was not aware of the precise terms of the trust, though he could have easily ascertained them. The investments were not made in any way through consultation with the solicitors and had been made by the trustees after a suggestion by the second defendant. The latter, however, had not induced them to invest in the company, and the investment was made upon the sole responsibility of the trustees.

The contention put forward on behalf of plaintiff, which is here dealt with, was that the £900 repaid on the mortgage came into the possession of the solicitors with the knowledge that the money was trust money and that, therefore, the solicitors owed a duty to the persons beneficially interested in the money to see that it was dealt with in accordance with the terms of the trust to which it was subject.

C. E. Harman, K.C., and *E. M. Winterbotham* for the plaintiff.

H. B. Vaisey, K.C., and *W. Raymond Jennings* for the defendants.

BENNETT, J.: It is clear that Alfred Williams knew that this money was trust money. The question is whether that knowledge saddles either the firm or Alfred Williams with the responsibilities of a trustee. Does the knowledge of that fact give rise in equity to any duty to the persons beneficially interested in the trust money ? The defendant firm answers this question in the negative. Their answer is based partly on fact and partly on law. Price & Williams say that in point of fact Alfred Williams acted honestly ; he was not a party to any breach of trust by the express trustees ; the firm received the money as agents for principals ; the firm dealt with the money in accordance with the directions of their principals ; and the firm did not deal with the money otherwise than in accordance with the directions of their principals. On these facts the firm contend that, as a matter of law, they never came under any duty to the persons beneficially interested in the money.

The line of difference between the parties seems to me to be very clearly marked. The plaintiff affirms that, when an agent receives, on behalf of a principal, money which he knows to be trust money, he becomes a constructive trustee of that money, and can only discharge himself by showing that the money was duly applied in accordance with the trust. The defendant affirms that, in such circumstances, so long as he acts honestly, an agent owes no duty to anyone except his principal, and that he only becomes liable as a constructive trustee if he intermeddles in the trust by dealing with or disposing of the trust money without his principal's instructions. The plaintiff's argument was based upon a passage in Underhill, Law of Trusts and Trustees, 9th Edn., at p. 548, in these terms :

> Where trust funds come into the custody and under the control of a solicitor, or indeed of anyone else, with notice of the trusts, he can only discharge himself of liability by showing that the property was duly applied in accordance with the trusts.

The authority for this statement is a passage from the judgment of Stirling, J., in *Blyth* v. *Fladgate* (1).

In *Morgan* v. *Stephens* (2), Stuart, V.-C., says, at p. 226 :

> If a trustee employs an agent, so long as the acts done by the person so employed are confined to mere agency on behalf of his employer, the trustee, generally speaking the agent cannot be accountable as trustee. But where the agent obtains possession of the trust funds and his acts are not in strict conformity with his duty as agent he ceases to be a mere agent.

Lord Selborne, in an oft-cited passage from his judgment in *Barnes* v. *Addy* (3), says that the responsibility of a trustee

> may no doubt be extended in equity to others who are not properly trustees if they are found either making themselves trustees *de son tort* or actually participating in any fraudulent conduct of the trustee to the injury of the *cestui que* trust. But on the other hand strangers are not to be made constructive trustees merely because they act as the agents of trustees in transactions within their legal powers, transactions perhaps of which a court of equity may disapprove unless those agents remain and become chargeable with some part of the trust property or unless they assist with knowledge in a dishonest and fraudulent design on the part of the trustees.

The authority which seems to me to be most instructive and which, I think, is decisive of the present case is *Mara* v. *Browne* (4), a decision of the Court of Appeal. In that case the beneficiaries sought to make liable for breaches of trust two solicitors, Hugh Browne and Arthur Browne, who carried on business in partnership. The breaches of trust complained of were advances of trust money upon eight separate mortgages, suggested as securities by Hugh Browne, and which were alleged to be speculative, risky and not such as could be justified for investment by a trustee. The moneys so advanced amounted in all to £9,200, and before they were advanced they came into the hands of Hugh Browne and were paid by him into his own bank account. He then made the advances to the respective mortgagors upon the authority of persons purporting to act as trustees of the settlement. The trial judge came to the conclusion that the investments were not proper for trustees to make and were breaches of trust, and with this conclusion of fact the Court of Appeal agreed ; but the Court of Appeal exonerated the solicitors from liability on the ground that they never became constructive trustees. The following passage from the judgment of A. L. Smith, L.J., states the grounds upon which the decision went [p. 209] :

> North, J., found, and I agree with him, that eight of the mortgages taken for the trust funds were speculative and risky, and not such as could be justified by a trustee —in fact, these investments constituted breaches of trust. Although this might well render the trustees liable for a breach of trust, it certainly does not *per se* render their solicitor so liable.
>
> But it is said that the facts show that there should be imputed to Hugh Browne

the character of a trustee, or, in other words, that he was a trustee *de son tort*, and upon this ground the learned judge has held him liable. It is not contended on behalf of the plaintiffs that Hugh Browne has been guilty of any fraudulent or dishonest conduct to the injury of the *cestuis que* trust, nor, to use Lord Langdale's words in *Fyler* v. *Fyler* (5) did he, being a solicitor, " take advantage of his position to acquire a benefit for himself at the hazard, if not to the prejudice, of the trust " ; but it was said that he had made himself a constructive trustee, which, so far as I know, is the same thing as a trustee *de son tort*. Now, what constitutes a trustee *de son tort* ? It appears to me if one, not being a trustee and not having authority from a trustee, takes upon himself to intermeddle with trust matters or to do acts characteristic of the office of trustee, he may thereby make himself what is called in law a trustee of his own wrong—that is to say, a trustee *de son tort*, or, as it is also termed, a constructive trustee.

Mara v. *Browne* (6) seems to me to be a decision that an agent in possession of money which he knows to be trust money, so long as he acts honestly, is not accountable to the beneficiaries interested in the trust money unless he intermeddles in the trust by doing acts characteristic of a trustee and outside the duties of an agent. After all, the beneficiaries have their remedy against the persons who are the real trustees.

I have stated that in my judgment Alfred Williams acted throughout the transactions honestly ; indeed, the contrary is not suggested. He acted throughout on the instructions of his principals. He never acted without instructions. He never intermeddled in the trust. He has, I think, acted incautiously. Many people might take the view that he ought to have ascertained by reference to the declaration of trust what the trusts were before he did what he was asked to do first by Dr. MacGowan and Streather and afterwards, when Streather had died, by Dr. MacGowan alone. However, considerations of this kind do not assist the plaintiff unless he can establish that when the money came into the possession of the firm, Alfred Williams or the firm came under a duty to him as a beneficiary interested in the trust fund. It is only if the plaintiff can establish the existence of such a duty that he can establish a liability upon the firm arising out of the breaches of trust committed by the express trustees.

The plaintiff is, I think, trying to use the passage from the judgment in *Blyth* v. *Fladgate* (1) and the statement in Underhill's Law of Trusts and Trustees to support a proposition which neither Stirling, J., nor the late Sir Arthur Underhill could have had in mind when they used the words relied upon. *Blyth* v. *Fladgate* (1) was, I think, quite plainly a case where the defendants, a firm of solicitors, were saddled with the liability of trustees, because they had dealt with trust moneys in breach of trust and without instructions from their principals ; and the passage in the judgment of Stirling, J., occurs in a case in which he was deciding the rights of the parties in such a case. The facts in *Blyth* v. *Fladgate* (3) were that, at a time when there was but one trustee of a marriage settlement, trust moneys had been invested in Exchequer bills which had been deposited with the bankers of the solicitors and were so deposited when the sole trustee died. Afterwards, whilst there was no trustee, the bills were sold and the proceeds of sale placed to the credit of the solicitors with their bankers. Whilst there were still no trustees, the proceeds of sale were paid by the solicitors to a mortgagor who, as security for their repayment, executed a mortgage in favour of three gentlemen who were afterwards appointed to be trustees of the settlement. The advance upon this mortgage was held improper and a breach of trust, and for this breach the solicitors were held to be responsible as constructive trustees because, having in their possession money which they knew was trust money, they had made an improper investment of it without instructions from, or the authority of, any principal. The observations of Stirling, J., must be read in relation to the facts with which he was dealing.

In *Mara* v. *Browne* (6), the Court of Appeal laid down quite clearly, as I think, the principles which govern the rights of the plaintiff and defendant in respect of the two sums of £200 and £700 received by the firm from the mortgagor. On the facts as I find them to be, the firm is not responsible to the plaintiff for the breaches of trust committed by the express trustees of the declaration of trust of Oct. 1, 1927, in respect of these two sums.

Action dismissed with costs.

Solicitors : *Waterhouse & Co.* (for the plaintiff) ; *Price & Williams* (for the defendants).

[*Reported by* Irene G. R. Moses, *Barrister-at-Law.*]

Re W. FOSTER & SON, LTD.

[Chancery Division (Bennett, J.), **February 16, 1942.**]

Companies—Winding up—Distribution of surplus assets—Rights of preference shareholders—Right to dividend—Right to share in surplus assets pari passu with ordinary shareholders.

The capital of a company consisted of preference and ordinary shares, the memorandum of association providing that the preference shares should rank before the ordinary shares both as to capital and dividends. The articles of association provided that the preference shareholders were to be entitled to a cumulative preferential dividend on the amount paid up on their shares and to a preference in the distribution of the assets in a winding up. The directors were to have power, with the sanction of the company, to declare dividends, but no larger dividend than recommended by them was to be paid. The company's financial year ended on Aug. 31, and on Aug. 31, 1940, it paid dividends on both classes of shares. No dividend was declared subsequently, and on July 21, 1941, the company went into voluntary liquidation. After repayment of the paid-up capital there was a surplus of assets, and the question arose as to whether the preference shareholders were entitled (i) to any payment by way of dividend or interest in respect of the period from Aug. 31, 1940, to July 21, 1941, and (ii) to share in the distribution of the surplus assets *pari passu* with the ordinary shareholders :—

Held : (i) the provisions in the articles of association with respect to the dividend on preference shares applied only while the company was a going concern. The right of the preference shareholders to the payment of a dividend came to an end with the commencement of the liquidation on July 21, 1941, and nothing was payable to them in respect of the profits earned between the end of the previous financial year and that date.

(ii) upon the proper construction of the memorandum and articles, the preference shareholders were not deprived of their right as contributories to share in the distribution of the surplus assets *pari passu.*

[**EDITORIAL NOTE**. Surplus assets are what remains over after all the debts of the company have been paid and all capital, both in respect of the preference and the ordinary shares, has been repaid. Where there is such a surplus the question whether it is distributable according to the shareholders' rights under the articles of association or *pari passu* had been previously settled in favour of *pari passu* distribution. A question not previously settled, however, was whether the preference shareholders were entitled to a dividend in respect of the broken period of less than a year between the date to which their last dividend was calculated and the date of the winding up. Right to a dividend depends upon a declaration of the dividend by the company, and no declaration can be made after a resolution to wind up. It is held that the preference shareholders have no right to any sum in respect of that broken period and their only right is to share *pari passu* in the surplus assets.

As to the Distribution of Surplus Assets of a Company, see HALSBURY, Hailsham Edn., Vol. 5, pp. 702, 703, para. 1172 ; and for Cases, see DIGEST, Vol. 10, pp. 1002-1008, Nos. 6961-6991.]

Cases referred to :

(1) *Re Crichton's Oil Co.*, [1902] 2 Ch. 86 ; 10 Digest 1006, *6980* ; 71 L.J.Ch. 531 ; 86 L.T. 787.

(2) *Bond* v. *Barrow Hæmatite Steel Co.*, [1902] 1 Ch. 353 ; 9 Digest 175, *1112* ; 71 L.J.Ch. 246 ; 86 L.T. 10.

(3) *Re Metcalfe (William) & Sons, Ltd.*, [1933] Ch. 142 ; Digest Supp. ; 102 L.J.Ch. 121 ; 148 L.T. 82.

Summons to determine questions arising as to the distribution of surplus assets on the liquidation of a company. The facts are fully set out in the judgment.

G. D. Johnston for the liquidator.

M. L. Gedge for the preference shareholders.

A. G. N. Cross for the ordinary shareholders.

Bennett, J. : This company was incorporated in 1892 with a nominal capital of £30,000 divided into 3,000 shares of £10 each. Of those 3,000 shares, 1,000 were preference and the remaining 2,000 were ordinary shares. The preference shares are wholly paid up ; the ordinary shares have been paid up to the extent of £7 per share. The company is now a private company, and its financial year ends on Aug. 31 in each year. On Aug. 31, 1940, it paid its preference dividend, and no subsequent dividend has been declared; on that date the profit available for dividend was £1,899, and out of this it paid the dividend at the rate of 10 per cent. on the preference shares and a dividend of 5 per cent. on the ordinary shares, and carried forward £522 4*s*. 9*d*. The company made profits in the period which followed after Aug. 31, 1940, and on July 21, 1941, it passed a resolution by which it went into liquidation, the liquidation commencing on that date. The assets of the company have realised enough to repay to the holders of the preference shares the whole of their paid-up capital and to repay to the holders of the ordinary shares the whole of their paid-up capital and to leave a substantial surplus.

The first question asked by the summons is:

> Whether any payments by way of dividend on shares or interest on capital ought to be made to the holders of the preference shares in respect of any period since Aug. 31, 1940, and if so whether the dividend or interest on or in respect of such preference shares ought to be paid down to the commencement of the winding up of the company or down to the date of repayment of the capital on such preference shares or down to some other and what date and at what rate the same ought to be paid.

For the purpose of deciding that question it is necessary to look first of all at the company's memorandum of association, cl. 5 of which provides as follows:

> The capital of the company is £30,000, divided into 3,000 shares of £10 each, whereof 1,000 are preference shares entitling the holder thereof to a fixed cumulative preferential dividend at the rate of 10 per cent. per annum on the capital paid up thereon, and also to a preference in the distribution of assets in a winding up of the company, and the remaining 2,000 shares are ordinary shares.

The relevant articles of association provide as follows:

> 7. The holders of the preference shares shall be entitled to receive out of the profits of each year a fixed cumulative preferential dividend, at the rate of 10 per cent. per annum on the amount for the time being paid up on the preference shares held by them respectively, and shall also be entitled to a preference in the distribution of assets in a winding up of the company.
>
> 108. Subject to the rights of members entitled to shares issued upon special conditions, the profits of the company shall be divisible among the members in proportion to the amount paid up on the shares held by them respectively; provided nevertheless that where capital is paid up in advance of calls, upon the footing that the same shall carry interest, such capital shall not, while carrying interest, confer a right to participate in profits.
>
> 109. The directors, with the sanction of the company in general meeting, may declare a dividend, to be paid to the members according to their rights and interests in the profits.
>
> 110. No larger dividend shall be declared than is recommended by the directors, but the company in general meeting may declare a smaller dividend.
>
> 113. The directors may, before recommending any dividend, set aside out of the profits of the company such sum as they think proper as a reserve fund . . .
>
> 137. If the company shall be wound up, and the surplus assets shall be insufficient to repay the whole of the paid-up capital, such surplus assets shall be distributed so that, as nearly as may be, the losses shall be borne by the members in proportion to the capital paid up, or which ought to have been paid up, on the shares held by them respectively at the commencement of the winding up, but this clause is to be without prejudice to the rights of the holders of shares issued upon special conditions.

The real question, in my opinion, is whether, as a matter of principle, the court can, in dealing with surplus assets after the company has gone into liquidation, regard any part of the surplus assets as being profits and so available for distribution amongst the shareholders in accordance with their rights under the company's articles of association, or whether, once the company has gone into liquidation, everything that the company has, after it has satisfied its debts, is to be regarded as surplus assets and to be distributed amongst the members without regard to the particular provisions in the articles dealing with the payment of dividends which, *prima facie*, apply only while the company is a going concern. Counsel for the ordinary shareholders, relying upon a decision of the Court of Appeal in *Re Crichton's Oil Co.* (1), has argued that once the company has passed a resolution for liquidation, the provisions in the articles with regard to the declaration of dividends come to an end, and that after the debts have been paid, all that the company has is to be regarded as surplus assets and disposed of in accordance with the provisions of the articles of association dealing with surplus assets. When one examines the grounds of the decision in *Re Crichton's Oil Co.* (1), that is the principle upon which that decision is based. *Prima facie*, when a winding up has commenced, a dividend is no longer payable. *Prima facie*, a dividend is a payment made to the shareholders whilst the company is a going concern, and when, as is the case with this company, there is a provision in the articles of association which enables the directors to declare a dividend, and which gives the shareholders no right to a dividend unless the directors declare it, the shareholders have no right as against the A company to be paid a dividend. That was the view expressed by **Farwell, J.**, in *Bond* v. *Barrow Hœmatite Steel Co.* (2), at p. 362, where he says that the necessity for the declaration of a dividend is a condition precedent to an action to recover. When the decision of the Court of Appeal in the *Crichton Oil Co.* case (1) is carefully considered, *prima facie* where a dividend is being declared either by the directors with the sanction of the company, or by the company itself in general meeting, a shareholder's right to a dividend comes B to an end as soon as the company ceases to be a going concern, and as soon as the liquidation of the company begins.

In the present case, having regard to the fact that the liquidation began on July 21, 1941, although the company had earned profits from the end of its last financial year, that is to say, from Aug. 31, 1940, the preference shareholders had no right to anything out of the surplus assets in respect of the C preferential dividend which the memorandum confers. The first question on the summons, therefore, must be answered by saying that no payment ought to be made by way of dividend to the holders of the preference shares in respect of any period since Aug. 31, 1940.

It was suggested that as the court ought to do equity, and that, as between Aug. 31, 1940, and July 21, 1941, the company had made a profit out of which a preference dividend might have been declared, the court in a liquidation ought D to make some allowance to the preference shareholders by way of interest upon the amount paid up on their preference shares. The only rights which the preference shareholders have are the rights which the memorandum or articles of association give them. In my view the articles give only a right to preference dividends while the company is a going concern and when declared by the directors with the sanction of the company. I see no ground upon which it would be right to interfere with the rights of the members under the articles of E association.

The second question which has to be decided is as to the division of the surplus assets remaining after there has been repaid to the preference and ordinary shareholders the capital paid up on their shares. The question is whether the liquidator ought to divide and distribute the surplus assets amongst the holders of the ordinary shares alone, or amongst the holders of the preference shares F and the holders of the ordinary shares *pari passu*. I think that the question is governed by the decision in *Re William Metcalfe & Sons, Ltd.* (3). In that case the rights of the shareholders were defined in the memorandum of association in these terms:

> . . . the 1,000 preference shares shall confer the right to a fixed cumulative preferential dividend at the rate of £5 per cent. per annum upon the capital paid up thereon, and shall rank, as to capital as well as dividends, in priority to the other shares then present G and future.

The articles of association provided that:

> The preference shares shall confer the right to a fixed cumulative preferential dividend at the rate of £5 per cent. per annum, and the right in a winding up to repayment of capital in priority to all other shares.

Upon the memorandum and articles of association it was decided by the Court of Appeal: H

> . . . that the memorandum and articles could not be construed as either expressly or impliedly depriving the preference shareholders of their right as contributories to share in the distribution of these surplus assets *pari passu* with the ordinary shareholders.

The memorandum of association in the present case does not contain the same words. It gives the holders of the preference shares a preference in the distribution of assets in a winding up of the company, and art. 7 of the articles of association gives the preference shareholders substantially the same thing—

a preference in the distribution of assets in a winding up of the company. Those words are not as clear as they might be, but, in my judgment, they have the same meaning and effect as the words in the memorandum and articles of association which the Court of Appeal had to construe in *Re William Metcalfe & Sons, Ltd.* (3).

For these reasons, in my judgment, after the preference and ordinary shareholders have each been repaid the capital paid up on the shares held by them respectively, the surplus assets ought to be distributed between the preference shareholders and the ordinary shareholders *pari passu* in accordance with the nominal amount of their shares.

Costs of all parties as between solicitor and client to be paid out of the surplus assets.

Solicitors: *Ridsdale & Son*, agents for *Nicholson & Co.*, Wath-on-Dearne, Yorks. (for all parties).

[*Reported by* IRENE G. R. MOSES, *Barrister-at-Law.*]

R. *v.* WEYMOUTH JUSTICES, *Ex parte* SLEEP.

[KING'S BENCH DIVISION (Humphreys, Wrottesley and Croom-Johnson, JJ.), **February 3 and 17, 1942.**]

Intoxicating Liquors—Licence—Special removal—Discretion of justices—Old on-licence—Premises destroyed by enemy action—Removal refused on grounds of redundancy—"Fit and convenient"—Licensing (Consolidation) Act, 1910 (*c.* 24), *s.* 24 (4).

Premises used as an inn under an old on-licence within the meaning of the Licensing (Consolidation) Act, 1910, were rendered unsuitable for further use by enemy action, and the licensee applied for the special removal of the licence to other premises in the same licensing division where premises are rendered unfit by unavoidable calamity sect. 24 (4) of the Act authorises the granting of a special removal to premises which are, in the opinion of the justices, "fit and convenient for the purpose." The justices refused the application on the ground that the premises were not "fit and convenient," as the needs of the neighbourhood to which it was proposed to remove the licence were already fully served. None of the grounds for refusing the application specified in Sched. II, Part II, of the Act existed. It was contended by the licensee that the words "fit and convenient" related solely to the building, and did not authorise the justices to take into consideration the situation of the premises and their proximity to other licensed houses:—

HELD [WROTTESLEY, J., *dissenting*]: upon the proper construction of the words "fit and convenient for the purpose" in the Licensing (Consolidation) Act, 1910, s. 24 (4), the justices were not entitled to refuse the application on the sole ground that the needs of the neighbourhood were already fully served.

EDITORIAL NOTE. It would be wrong to take the view that the justices were here attempting to get rid of a licence without the licensee receiving compensation. The necessary effect of their decision is only to debar the licensee from removing to the particular premises. Their decision would not have prevented him from applying for a special removal to other premises. However, the point is not the effect of the decision, but the jurisdiction of the licensing justices in such a case. There can be no doubt that, in the case of an old on-licence, the justices had an unfettered discretion to refuse a special removal up to the year 1904. There seems no doubt that their discretion was then limited. The majority of the court have held that the limitation then imposed prevented a refusal on the grounds that the needs of the neighbourhood were already fully served. WROTTESLEY, J., has dissented from this view purely as a matter of construction, but, though he does not say so in his judgment, it can be seen from his concluding remarks that, if the justices are correct in their view that the needs of the neighbourhood are already fully met, the effect of the majority decision is to burden the neighbourhood to which the licence is transferred with a new redundancy, while the neighbourhood from which the transfer is made is apparently left insufficiently provided for.

AS TO SPECIAL REMOVAL, see HALSBURY, Hailsham Edn., Vol. 19, pp. 29, 30, paras. 67-72; and FOR CASES, see DIGEST, Vol. 30. pp. 36, 37, Nos. 291-295.]

(1) *Traynor* v. *Jones*, [1894] 1 Q.B. 83; 30 Digest 33, *252*; 63 L.J.M.C. 31; 69 L.T. 862.
(2) *Simonds* v. *Blackheath JJ.* (1886), 17 Q.B.D. 765; 30 Digest 31, *235*; 55 L.J.M.C. 166.
(3) *Boodle* v. *Birmingham JJ.* (1881), 45 J.P. 635; 30 Digest 33, *251*.
(4) *Sharp* v. *Wakefield*, [1891] A.C. 173; 30 Digest 12, *49*; 60 L.J.M.C. 73; 64 L.T. 180.
(5) *R.* v. *Lancashire JJ., Re Tyson's Appeal* (1870), L.R. 6 Q.B. 97; 30 Digest 29, *194*; 40 L.J.M.C. 17; 23 L.T. 461.
(6) *R.* v. *Liverpool JJ., Ex parte Liverpool Corpn.*, [1934] 2 K.B. 277; Digest Supp.; 103 L.J.K.B. 625; 151 L.T. 327.

Application for an order of *mandamus* directed to the justices of the borough of Weymouth. The facts are fully set out in the judgments.

A. S. Comyns Carr, K.C., and *Derek Curtis Bennett* for the applicant.

R. M. Montgomery, K.C., and *Sydney Lamb* for the respondents.

Humphreys, J.: This is an application for an order of *mandamus* directed to licensing justices for the borough of Weymouth, calling upon them to hear and determine, according to law, an application made to them on Feb. 6, 1941, by William Henry Sleep for the special removal of the licence of the Cornopean Inn, St. Leonards Road, Weymouth, to premises known as 16, Newstead Road, Weymouth. The application in question was made in accordance with the terms of the Licensing (Consolidation) Act, 1910, s. 24 (4), which authorises, in the case of premises rendered unfit for use for the business there carried on under the licence by fire tempest or other unforeseen and unavoidable calamity, the special removal of the licence to any premises within the same licensing district being in the opinion of the licensing justices fit and convenient premises for the purpose. It was admitted that the premises had been rendered unsuitable for use by unforeseen and unavoidable calamity, i.e., by enemy action, so as to entitle the applicant to apply in the terms of the section for a special removal of the licence attached thereto. It was further admitted that the Cornopean Inn was an old on-licence as defined in Part I of Sched. II to the Act.

By the combined operation of sects. 27, 23 (2), and 18 of the Licensing (Consolidation) Act, 1910, the only grounds upon which the justices are entitled to refuse such an application are those to be found in Part II of the Sched. II, i.e., grounds connected with the character of the applicant or the premises, including the fact that the premises are structurally deficient or structurally unsuitable. Any other ground of refusal is to be exercised, not by the justices, but by the compensation authority on a reference from the justices and on payment of compensation. The procedure to be adopted in that case is laid down in sect. 19 of the Act, and in rr. 44 and 45 of the Licensing Rules, 1910. None of the grounds in Part II of Sched. II applied to this case, and the justices did not adopt, or, as far as we know, consider, the above-mentioned procedure of referring the question of the special removal to the compensation authority. It is, of course, essential that the applicant should bring himself within the terms of sect. 24, which alone gives jurisdiction to the justices to make the order asked for.

The application, which was unopposed, was refused by the justices, the ground of refusal stated in writing being "that the needs of the neighbourhood to which it is proposed to remove the licence are fully served." The chairman of the justices has made an affidavit setting out the reasons for the refusal. Para. 7 of that affidavit reads as follows:

> The majority of the justices were of opinion that in the case of an application for an order of special removal the words contained in sect. 24 (4) of the said Act "being in the opinion of the licensing justices fit and convenient premises for the purpose" conferred upon them (in addition to their powers of refusal under the said Schedule) a discretionary power to decide whether in their opinion the premises were fit and convenient for the purpose of an on-licence and that in arriving at such opinion they were entitled to take into consideration not only whether the premises themselves were fit and convenient structurally, but also whether they were fit and convenient for the purpose of an on-licence in relation to the neighbourhood in which they were situated.

Para. 8 is as follows:

> The district in which Newstead Road is situated is well-known to the justices and they also inspected the premises and the neighbourhood before the adjourned hearing of the application. The premises were erected some 40 years ago when an on-licence was applied for and refused on the ground that there were already sufficient licensed facilities in the neighbourhood. There has been very little building development in their

immediate vicinity since their erection and in considering the matter the justices, by a majority, came to the conclusion that the neighbourhood was already adequately served by existing licensed houses and that for this reason the premises could not be deemed fit and convenient for the purpose of an on-licence.

The question for our decision, therefore, appears to be whether the words "fit and convenient" in sect. 24 relate solely to the building, its accommodation and arrangements, or whether they authorise the justices to take into consideration the situation of the premises and their proximity to other licensed houses. There is no special significance to be attached to the presence of those words in sect. 24 (4). They are taken directly from sect. 14 of the Alehouse Act, 1828. That section dealt with various matters now the subject of different sections in the Act of 1910, and, *inter alia*, provided for what is termed a special removal in the last-mentioned Act. The material words of s. 14 of the Alehouse Act, 1828, are in short as follows :

> If any house being kept as an inn shall be by fire tempest or other unforeseen and unavoidable calamity rendered unfit for the reception of travellers and for the other legal purposes of an inn it shall be lawful for the justices to grant to the person whose house shall have become so unfit and who shall open and keep as an inn some other fit and convenient house a licence to sell intoxicating liquor . . .

That section continued in force until repealed, together with the rest of the Alehouse Act, 1828, by the Licensing (Consolidation) Act, 1910. The Act of 1910 did not alter the law. It merely re-enacted, in a slightly different form, the provisions of the Licensing Act, 1904. That Act introduced the novel principle of compensating licensees and owners of existing licences for the loss occasioned by the refusal of a renewal or transfer on any ground other than one of the special grounds above referred to. Sect. 9 of that Act defines transfer as including a transfer under the Alehouse Act, 1828, s. 14. The argument on behalf of the justices therefore appears to involve the proposition that the framers of the Act of 1904, while clearly depriving justices of the power of refusal on such a ground as failure to prove a need for the new grant, omitted to notice that this ground remained open to them by reason of the terms of the Alehouse Act, 1828, s. 14, incorporated in the new statute. That is a contention which I find it impossible to accept.

I agree that the words "fit and convenient" in sect. 24 of the Act of 1910 indicate something more than, and something different from, the mere converse of structurally deficient or structurally unsuitable. I think premises might well be held to be not fit and convenient for the purpose of a licensed house, although they could not be properly described as being structurally deficient or structurally unsuitable so as to bring the case within the grounds of refusal reserved by the schedule. I also think that there is great force in the argument of counsel for the justices that we should not lightly attribute to Parliament the intention of compelling the justices to grant a removal of an old on-licence to a house built on a site which those justices consider quite unsuitable for such a purpose, e.g., a house adjoining a church on one side and a school on the other. It may be that such premises would rightly be regarded as not being convenient for the purpose of a licensed house, using the word "convenient" as being equivalent to "conveniently situated." It is not necessary to decide that matter in the present case, and I prefer to express no opinion upon the point. I cannot, however, think that the words "fit and convenient" can be so construed as to restore to the justices the free and unfettered discretion in granting or refusing an application for a special removal of an "old on-licence" which is expressly taken away from them by the other sections of the Act of 1904. If the justices are free to refuse such an application on the ground that a new licensed house is not required in the neighbourhood to which it is proposed to remove the old on-licence, it appears to me that the provisions of those sections are otiose.

The matters usually taken into account by justices in granting or refusing an application for a new licence (where their discretion is unfettered) may be said to be (i) matters affecting the applicant or the premises, and (ii) the needs of the neighbourhood. In the case of an application for the renewal, transfer or special removal of an old on-licence, they will still properly consider the first of these matters. Are they entitled to base a refusal on the second? If the contention of the justices is to be upheld their discretion remains as wide in such a case as if they were considering an application for a new licence. In my opinion that is not the law. I do not say that the justices were wrong in considering the topic of the needs of the neighbourhood, but, in my opinion, their power of refusal on that ground no longer exists, the right of referring the matter to the compensation authority being substituted for the power of refusal. It was argued that we were bound in this case to assume that the old premises were not redundant, and, therefore, could not properly be the subject of a reference to the compensation authority. I cannot accept that view, there being no evidence on the subject, and redundancy, a word not to be found in the Act, is only one of the matters proper to be considered in the first place by the licensing justices and, in the event of a reference, by the compensation authority. However that may be, I do not think that any such consideration can affect the proper meaning to be given to the words "fit and convenient" in sect. 24.

Counsel for the justices referred us to *Traynor* v. *Jones* (1). In that case the court held that while the holder of a beerhouse licence granted before May 1, 1869, could only be refused a renewal or, following *Simonds* v. *Blackheath JJ.* (2), an ordinary transfer of his licence on one of the four grounds stated in the Wine and Beerhouse Act, 1869, s. 8, yet, upon an application for a grant under the Alehouse Act, 1828, s. 14, the justices had complete discretion in the matter. The law, however, has been altered since the date of that decision, and a special removal is now clearly on the same footing as a renewal or transfer. In my opinion, it has been shown that the justices in this case acted in excess of jurisdiction and have not, therefore, heard and determined the application according to law, and I think that the order of *mandamus* should be granted.

Wrottesley, J. [read by **Humphreys, J.**]: The Cornopean Inn, St. Leonards Road, Weymouth, was rendered unfit for use as licensed premises by an unforeseen and unavoidable calamity, to wit, a German bomb. Accordingly, the licensee became entitled to apply for what is called in the Licensing (Consolidation) Act, 1910, s. 24 (2), a special removal. In the case of an ordinary removal, the justices may authorise it or not at their discretion, and, under sect. 24 (3), a removal may be either inside the licensing district, or to another licensing district in the same county, if authorised by the justices of this other district. In the case of a special removal, it must be to premises inside the licensing district, and the premises must, in the opinion of the justices, be fit and convenient for the purpose. In the case of an ordinary removal the justices have the same power as in the case of an application for a new licence, due regard being had to the interests of the owner and licensee of the old premises. They have unfettered discretion except in the matter of the levy for compensation. In the case of a special removal, however, their discretion is fettered, as in the case of a transfer, that is, the transfer of a licence from the holder to a transferee who thereby becomes the holder. Since this licence is an old on-licence, by sect. 23 (2) (*c*) its transfer is governed by the special provisions affecting its removal—that is to say, the justices may not refuse a transfer except upon one of the grounds set out in Part II of Sched. II to the Act of 1910.

In the main these grounds are (i) failure to carry on the business properly in the past, (ii) the character of the proposed holder, and (iii) the unsuitability of the premises. It is enough to say that none of these grounds apply in this case. The result, therefore, of the statutory provisions governing this case may be stated as follows. The justices may authorise the removal of this licence to any premises within the licensing district, which are, in the opinion of the justices, fit and convenient for the purpose. The discretion of the justices is by no means unfettered. In the absence of things admittedly absent in this case, such as defects in the licensee or the nature of the new premises, the justices must grant the application provided it is for a removal to premises which are, in the opinion of the justices, fit and convenient for the purpose.

The only respect in which the justices find that the premises, to which it was proposed to remove the licence, fell short of this standard is that they lie in a neighbourhood which is already adequately served. The meaning of this is elaborated in the affidavit of the chairman of the justices. The new premises are premises erected some 40 years ago, when an on-licence was applied for and refused on the ground that there were already sufficient licensed facilities in the neighbourhood. They are in a neighbourhood already adequately served by existing licensed houses.

The real, and, as I understand it, the only question to be resolved, is whether the justices may, in entertaining the application to transfer this licence, consider whether the new premises are on an appropriate site. Whether or not they have such a power must, of course, depend on the language of the statute. The language is that, in the opinion of the justices, the premises must be fit and convenient for the purpose. It is admitted that the premises are fit so far as structure and lay-out are concerned. Are they also convenient ? For I take it to be an elementary rule of construction of an Act of Parliament that, in using the word "convenient," the Act means something different from, and in addition to, fitness. As was pointed out by Humphreys, J., in the course of the argument, the words "fit and convenient" are taken directly from the Alehouse Act, 1828, s. 14. Still, I cannot think that the word "convenient" applies merely to the architectural design or lay-out of the premises. The word "convenient" appears to me to be a useful, or shall I say, convenient, word, to deal not merely with the premises, but also with their surroundings. We can all of us think quite readily of surroundings which would make a public house most inconvenient, however admirable the nature of its structure, such as the fact that next door was a church, a school, a row of purely residential buildings.

If the argument put forward on behalf of the applicant is sound, all these matters lie beyond the proper purview of the justices. All that the applicant has to do is to obtain or erect a public house in an area or on a site however incongruous, however overcrowded with licensed premises, and the justices must submit, and forbear even to inquire into the nature of the surroundings. It would be indeed unfortunate if the justices were so limited. As it happens the matter is not concluded by authority, for the two cases cited to us provide no guidance. The report of *Boodle* v. *Birmingham JJ.* (3) does not disclose whether or not the licence under discussion was an old on-licence. In *Traynor* v. *Jones* (1) such a licence and its privileges came under discussion, and it was decided that the privilege attached to the house, and not to the licence-holder, so that, if the house disappeared, the privilege disappeared with it. I think that counsel for the applicant was right in saying that the Act of 1904, and the Consolidating Act of 1910 altered the law in this respect, and allow at any rate one special removal to a new house, provided that none of the grounds in Schedule II apply, and provided that, in the opinion of the justices, the new premises are fit and convenient for the purpose.

Though we have to approach the question without any help from authority, there are things which afford some guidance. We have to answer the question : What is the purpose for which the premises are to be convenient ? The words "for the purpose" appear to be a deliberate addition to the words of the Alehouse Act, 1828. Some light on their meaning is thrown by considering the ground upon which application for a special removal may be made. It is "that the licensed premises have been rendered unfit for use for the business there carried on under the licence." If, therefore, the new premises are to be convenient for the carrying on of the business of the old premises, the justices in this case were not exceeding their powers in refusing to transfer the licence from the neighbourhood, where presumably it filled a public need, to a neighbourhood already fully served by existing licensed houses. It was argued strenuously on behalf of the applicant that the decision of the justices was, in effect, the refusal of a transfer on the ground of redundancy, a ground admittedly not open to them in the case of renewal or transfer from one licensee to another and, therefore, by the provisions of the relative sections not open to them in the case of a special removal. I agree that the justices are not entitled on this ground to refuse an application for a special removal, and that, had the old licensed premises been redundant, the transfer to new premises in the same neighbourhood could not have been refused. That, however, is not this case ; the claim is to remove into a new neighbourhood, already fully stocked with public houses, a licence which was not redundant. Finally, it was suggested that the transfer should have been permitted, and should have been accompanied by a reference of the new licensed premises to the compensation authority. I can find no justification for this in the Act ; and it appears to me to be quite out of keeping with its whole policy. It would burden the compensation fund with a new redundancy, while leaving the old neighbourhood unprovided with licensed premises.

For these reasons, I would refuse the application, leaving the applicants to put forward a more reasonable proposal.

Croom-Johnson, J.: The facts are not in dispute, and are as follows: The Cornopean Inn, St. Leonards Road, Weymouth, holds a full licence for the supply of intoxicating liquor, which licence is an old on-licence within the meaning of the Licensing (Consolidation) Act, 1910, Sched. II, Part I. The premises have been rendered unsuitable for use in the business there carried on under the licence by unforeseen and unavoidable calamity, to wit, by enemy action from the air. An application was made by the licensee to the licensing justices for the Weymouth division at their general annual licensing meeting, and then by adjournment, for the special removal of the licence to fit and convenient premises in existence at 16, Newstead Street, Weymouth, being premises in the same licensing division. The application, which was unopposed, was made in accordance with the provisions of the Licensing (Consolidation) Act, 1910, ss. 24, 27. The application was refused on Mar. 5, 1941, by a majority of the bench. The justices, by an affidavit sworn by their chairman and filed in these proceedings, admit that the licence in respect of the premises is an old on-licence within the meaning of the Licensing (Consolidation) Act, 1910, Sched. II, Part I, and that the premises were rendered unsuitable for use for the business there carried on so as to entitle the licensee to make the application for a special removal. The affidavit continues:

> (6) Under sect. 24 (4) of the said Act a special removal of a licence may be authorised to any premises within the same licensing district as the premises from which it is proposed to remove the licence, " being, in the opinion of the licensing justices, fit and convenient premises for the purpose " and under sect. 27 of the said Act the power of the justices to authorise a special removal is subject to the same provisions and to the same procedure as the power of the justices to authorise the transfer of a justices' licence. Under sect. 23 (2) of the said Act an application for the transfer of a licence may be allowed or refused by the justices in the exercise of their discretion, subject (*inter alia*) to the proviso that the special provisions of the said Act affecting the renewal of an " old on-licence " shall apply to the transfer thereof. Such special provisions are contained in sect. 18 of the said Act and in Schedule II, Part II, which sets out the grounds upon which justices may refuse to renew an " old on-licence " without payment of compensation.
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> (7) The majority of the justices were of opinion that in the case of an application for an order of special removal the words contained in sect. 24 (4) of the said Act " being in the opinion of the licensing justices fit and convenient premises for the purpose " conferred upon them (in addition to their powers of refusal under the said Schedule) a discretionary power to decide whether in their opinion the premises were fit and convenient for the purpose of an on-licence and that in arriving at such opinion they were entitled to take into consideration, not only whether the premises themselves were fit and convenient structurally, but also whether they were fit and convenient for the purpose of an on-licence in relation to the neighbourhood in which they were situated.
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> (8) The district in which Newstead Road is situated is well-known to the justices, and they also inspected the premises and the neighbourhood before the adjourned hearing of the application. The premises were erected some 40 years ago when an on-licence was applied for and refused on the ground that there were already sufficient licensed facilities in the neighbourhood. There has been very little building development in their immediate vicinity since their erection, and, in considering the matter, the justices, by a majority, came to the conclusion that the neighbourhood was already adequately served by existing licensed houses, and that for this reason the premises could not be deemed fit and convenient for the purpose of an on-licence.

The justices, therefore, submitted to this court that in the exercise of their discretionary powers, they had heard and determined the application according to law. The precise ground was stated in writing in a document over the signature of the chairman as follows:

> And the said licensing justices having inspected the said premises 16, Newstead Road, aforesaid and all requisite notices having been proved before them, after hearing the application, ordered that the said application, by a majority decision, be refused, on the ground that the needs of the neighbourhood to which it is proposed to remove the licence are fully served.

At the hearing before us it was not contested that, having regard to the terms of the justices' decision, they must have been of the opinion that the premises which they had inspected were otherwise fit and convenient for the purpose.

In view of the arguments presented to us and the authorities, it is necessary, I think, to consider to some extent, and briefly, the history of the earlier legislation affecting the matter.

The Alehouse Act, 1828, s. 1, gave licensing justices, in the exercise of their discretion, power to grant at the general annual licensing meeting, licenses to persons keeping or about to keep inns to sell exciseable liquors by retail to be drunk or consumed on the premises. Sect. 4 of the same Act gave them power as therein provided in the exercise of their discretion similarly at special transfer sessions to license persons intending to keep inns theretofore kept by other persons about to remove from such inns, that is, for the transfer of a licence from one person to another. Sect. 14 contained a number of provisions for transfer in case of death, change of occupancy or other contingency. The material provision was as follows:

> If any house being kept as an inn by any person duly licensed . . . shall be, by fire, tempest, or other unforeseen and unavoidable calamity, rendered unfit for the reception of travellers, and for the other legal purposes of an inn; it shall be lawful for the justices . . . for the division or place in which the house so kept . . . shall be situate . . . to grant to the person . . . whose house shall . . . have become unfit for the reception of travellers or for other legal purposes of an inn, and who shall open and keep as an inn some other fit and convenient house, a licence to sell exciseable liquors by retail . . . to be drunk or consumed therein . . .

A licence granted in pursuance of this provision was to continue in force until the next annual general licensing meeting. That power enabled the justices to transfer the licence from one house to another. Apparently both types of change, person to person and house to house, were known as transfers. The power of the justices to grant licences and renewals was within their unfettered discretion: see *Sharp* v. *Wakefield* (4). Sect. 14 of the Act of 1828 contained an express reference to discretion, but in *Boodle* v. *Birmingham JJ.* (3), this court held that a refusal of an application under that section on the ground that the locality of the new house was already well supplied with licensed houses could not be interfered with. The reason given was that it had been settled that the discretion of the justices in matters of transfer was the same as in the case of a new licence, and that that discretion was absolute, and reference was made to the decision in *R.* v. *Lancashire JJ.* (5). In *Boodle* v. *Birmingham JJ.* (3), MANISTY, J., appears to have drawn a distinction between a fit and convenient house and the ground upon which the justices in fact exercised their discretion. It was not apparently argued that the words "fit and convenient house" empowered the justices to examine into the sufficiency of the supply of other licensed houses in the district. In *Simonds* v. *Blackheath JJ.* (2), a case of an application for a transfer of the licence of a beerhouse licensed before May 1, 1869, from one person to another, it was held that the discretion of the justices to refuse the application was limited to one or more of the four grounds specified in the Wine and Beerhouse Act, 1869, ss. 8, 9. *Traynor* v. *Jones* (1) was a case of a refusal of an application for a grant of a licence by way of transfer on removal from another pre-1869 beerhouse under the Alehouse Act, 1828, s. 14. It was held, again by this court, that the general discretion conferred on justices was in such a case not within the language of the special exceptions engrafted upon the general rule by sect. 19 of the Act of 1869 and was still absolute. That being the state of the law, it was altered as from Jan. 1, 1905, by the Licensing Act, 1904. The power to refuse the renewal of an existing on-licence on grounds other than certain specified limited grounds thereby became vested in quarter sessions instead of in the justices of the licensing district; on any ground other than the specified ones the justices were empowered to refer the matter to quarter sessions, together with their report, and quarter sessions could then refuse to renew the licence, but, subject to the payment of compensation: Licensing Act, 1904, s. 1 (1). By sect. 9, the provisions of the Act were made to apply to the transfer of an existing on-licence, as they applied to the renewal of an existing on-licence, with the substitution of transfer for renewal, and the expression "transfer" was defined to mean a transfer under the Alehouse Act, 1828, ss. 4, 14. This was a completely new departure, and the absolute or unfettered discretion of the licensing justices to refuse a renewal or transfer, as defined, disappeared. Accordingly, their right to refuse a transfer "to some other fit and convenient house" under sect. 14

of the Act of 1828, which remained in force until repealed by the Licensing (Consolidation) Act, 1910, became limited to the cases set out in sect. 1 (1) of the 1904 Act. The Licensing (Consolidation) Act, 1910, which consolidated and amended the law, came into force on Jan. 1, 1911, and the provisions of sect. 14 of the Act of 1828 were re-enacted, with amendments, in new sections. In the Act of 1910, the transfer of a licence to other premises is called a removal.

The powers of licensing justices to authorise the removal of a justices' licence from the premises in respect of which it was granted to other premises is now A
contained in the Licensing (Consolidation) Act, 1910, s. 24 (1), (2), (4) :

> (1) For the purposes of this Act, the removal of a justices' licence is the removal of a justices' licence from the premises in respect of which it was granted to other premises. (2) A removal of a justices' licence may, subject to the limitations in this Act, be authorised by the licensing authority at their discretion, either on an application for the purpose made on any ground (in this Act referred to as an ordinary removal), or on an application made on the special ground. . . . (*b*) that the premises in respect of B
> which the licence has been granted have been rendered unfit for use for the business there carried on under the licence by fire, tempest, or other unforeseen and unavoidable calamity (in this Act referred to as a special removal) . . . (4) A special removal of a justices' licence may be authorised to any premises within the same licensing district as the premises from which it is desired to remove the licence, being, in the opinion of the licensing justices, fit and convenient premises for the purpose.

Removals are, therefore, " ordinary " and " special." The discretion con- C
ferred as to special removals is, however, subject to the provisions of sect. 27, which says :

> The power of the licensing justices to authorise the special removal of a justices' licence shall be subject to the same provisions and to the same procedure as the power of the justices to authorise the transfer of a justices' licence.

That section is marginally described as : " Procedure on applications for special D
removal," but obviously it extends to the powers of the justices as well as to procedure. The power to authorise the transfer of a justices' licence " to one person in substitution for another " is contained in sect. 23, which in terms in subsect. (2) empowers licensing justices to allow or refuse the application in the exercise of their discretion, subject to the special provisions of the Act affecting the renewal of an old on-licence, which the licence in this case was.

What then are the special provisions of the Licensing (Consolidation) Act, E
1910, affecting the renewal of an old on-licence ? They are to be found in sects. 16 (1), 18 (1) and 19 (1), (2). It is sufficient to say that the ground that the needs of the neighbourhood were already adequately served is not one of the grounds specified in Sched. II, Part II. We were invited to hold that the power to authorise does not include a power to refuse an application for special removal, and that the discretion of the justices when refusing is not bound by the same F
conditions as when authorising. I come to the conclusion that the word " authorise " in sect. 27, reading that section with sect. 23 (2), which refers in terms to allowance or refusal, includes, and must include, a power to refuse an application for an authorisation and subject to the same limitations on the exercise of the discretion.

It is clear, therefore, that the licensing justices have no power to refuse a renewal on the ground of redundancy, as it is sometimes called, and, by parity G
of reasoning, to refuse a special removal on the ground that the old licensed premises are no longer required. Can they consider what the result would be so far as redundancy is concerned if the special removal were authorised ? The Licensing Rules, 1910, rr. 44, 45, appear to recognise the duty of the licensing justices to refer the whole question of special removal to the compensation authority where the grounds are other than those specified—r. 44 refers in terms to sects. 19, 23 (2) and 27. Both rules appear to treat the question of H
redundancy on an application for special removal as one for report by the justices to the compensation authority, and not for the exercise by them of their own discretion in considering whether to authorise the special removal. If, notwithstanding what I have said, the question of existing sufficiency of licensed premises in the neighbourhood is one proper to be entertained by the licensing justices, it can only be by giving a construction to the words " fit and convenient premises for the purpose " in sect. 24 (4) wide enough to embrace it, and, at first sight, one inconsistent with the other sections I have quoted.

Although defined for valuation purposes (see Finance Act, 1911, s. 4), there is no special meaning to be attached to the word "premises" in licensing law. The word is, however, used several times in the Licensing (Consolidation) Act, 1910, s. 24, and, in ordinary language, means, I think, the licensed buildings. They are not to be fit and convenient generally, but fit and convenient for the purpose, having regard, no doubt, to the necessity for supervision and so forth. There is nothing in the precise words used to suggest that some other test of fitness or convenience connected with other licensed premises in the neighbourhood and the needs of the public generally are to be considered—indeed, the words "for the purpose" in their context, to my mind suggest the contrary.

What is "the purpose" in sect. 24 (4) ? I think it means fit and convenient to take the place of the premises already licensed, from which the licence is to be removed, and which, in this case, have been rendered unfit for use for the business there carried on under the licence : sect. 24 (2). If the argument for the respondents were right, then the question of the existence of a ground other than those specified could be examined into and decided by the justices for the purpose of a special removal, although, in effect, they are prohibited from doing so on an application for a renewal, except for the purpose of a reference and report, and notwithstanding that the statute provides, in effect, that the rules on renewal are to apply to a special removal. Furthermore, if the argument were right, the law in a case of special removal would have been put back to what it was before Jan. 1, 1905—a somewhat startling result in view of the reform obviously intended by the Act of 1904. I think that the construction suggested by the respondents of the words "fit and convenient for the purpose" in the context in which they are to be found is an unnatural and forced one, and I can find no justification for it. I express no opinion as to what matters it is within the jurisdiction of the justices to consider in deciding whether proposed new premises in such a case are fit and convenient for the purpose, or whether they can lawfully consider (to any, and, if so, what extent) the convenience or situation of the site since that point does not, in my view, arise for our decision.

We were pressed with the case of *Boodle* v. *Birmingham JJ.* (3) as an authority in favour of the respondents to the present application. It seems to me, however, an authority dealing with an entirely different state of the law. The discretion conferred on justices by the Act of 1828 was, in effect, swept away by the Act of 1904, or at least survived only in a very limited form. Moreover, the Alehouse Act, 1828, s. 14, differs in many material particulars from sect. 24 (2) (*a*) of the Act of 1910 : see *R.* v. *Liverpool JJ.* (6) per LORD HEWART, L.C.J., at p. 283. *Traynor* v. *Jones* (1), was also relied upon by the respondents, but, without dealing in more detail with the decision, it seems to me to involve no more than the proper construction and application of the language of the Wine and Beerhouse Act, 1869, ss. 8, 19, which, it was held, left untouched the general discretion of the justices when dealing with applications for a grant of a licence of a pre-1869 beerhouse by way of removal under sect. 14 of the 1828 Act. It also dealt with an entirely different state of the law. Rightly understood, those cases are of no assistance to the present respondents.

The licensing justices have refrained from referring the licence to the compensation authority ; possibly they would have proceeded under rr. 44 and 45, if they desired to have the question decided by the competent authority. If their order stands, they may, as a result, have deprived the applicant of his chance of obtaining compensation in respect of his licence. In my opinion, they have exceeded the limits of their jurisdiction, they have taken into consideration matters not proper to be taken into account by them in dealing with an application for special removal, and they have failed to hear and determine such application according to law. In my judgment the order now applied for should be made.

Order of mandamus granted.

Solicitors : *Godden, Holme & Ward*, agents for *Pengilly & Ridge* (for the applicants) ; *Monro, Saw & Co.*, agents for *G. A. Lipscombe*, Weymouth (for the respondents).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

GOLD AND OTHERS *v.* ESSEX COUNTY COUNCIL.

[King's Bench Division (Tucker, J.), **January 16, 1942.**]

Medicine—Liability of hospital—Professional duties—Negligence of radiographer—Insufficient screening.

The infant plaintiff was treated by a radiographer in the employ of the defendants at one of their county hospitals. By reason of his failure to provide adequate screening material in giving Grenz-ray treatment, the infant plaintiff suffered injury to her face. It was proved that the radiographer was fully competent to administer the treatment given to the infant plaintiff :—

Held : the radiographer was in the same category as a nurse and the defendants were not liable for his negligence in the execution of professional duties.

[**EDITORIAL NOTE.** This case again raises the question of the correctness of the *dicta* in *Hillyer* v. *Governors of St. Bartholomew's Hospital* (1), and more particularly that of a passage in the judgment of Kennedy, L.J. Unfortunately, the only case which went to the House of Lords did not call for a decided opinion to be given on the accuracy of these *dicta*, and, though judges have repeatedly expressed their dissatisfactio with the position, the courts in England have consistently held themselves bound to decide later cases in accordance with the views of the Court of Appeal in that case. Apart from this, the facts of the present case are interesting as it is concerned with a modern development of hospital work—namely, ray treatment.

As to Liability for the Negligence of a Nurse, see HALSBURY, Hailsham Edn., Vol. 22 pp. 358, 359, para 737 ; and for Cases, see DIGEST, Vol. 34, p. 550, Nos. 86, 87.]

Cases referred to :

(1) *Hillyer* v. *St. Bartholomew's Hospital (Governors)*, [1909] 2 K.B. 820 ; 34 Digest 550, *87* ; 78 L.J.K.B. 958 ; 101 L.T. 368.
(2) *James* v. *Probyn* [1935], The Times, May 29.
(3) *Strangways-Lesmere* v. *Clayton*, [1936] 2 K.B. 11 ; [1936] 1 All E.R. 484 ; Digest Supp. ; 105 L.J.K.B. 385 ; 154 L.T. 463.
(4) *Dryden* v. *Surrey County Council and Stewart*, [1936] 2 All E.R. 535 ; Digest Supp.
(5) *Marshall* v. *Lindsey County Council*, [1935] 1 K.B. 516 ; *on appeal sub nom. Lindsey County Council* v. *Marshall*, [1937] A.C. 97 ; [1936] 2 All E.R. 1076 ; Digest Supp. ; 105 L.J.K.B. 614 ; 155 L.T. 297.
(6) *Wardell* v. *Kent County Council*, [1938] 2 K.B. 768 ; [1938] 3 All E.R. 473 ; Digest Supp. ; 108 L.J.K.B. 350 ; 159 L.T. 337 ; 31 B.W.C.C. 266.
(7) *Evans* v. *Liverpool Corpn.*, [1906] 1 K.B. 160 ; 34 Digest 549, *86* ; 74 L.J.K.B. 742.
(8) *Anderson or Lovelle* v. *Glasgow Royal Infirmary*, [1932] S.C. 245 ; Digest Supp.
(9) *Fleming* v. *Sisters of St. Joseph*, [1937] 2 D.L.R. 121 ; *affd.*, [1938] S.C.R. 172 ; Digest Supp.

Action brought by Ruth Ann Gold, an infant of 5 years of age, suing by her father as next friend, and also by Pearl Gold, her mother, and by her father David Gold, on his own behalf, against the Essex County Council, for damages for injuries resulting from the alleged negligence of the defendants, or of those for whom they were responsible. On July 11, 1940, at the Oldchurch County Hospital, a hospital maintained under their statutory powers by the Essex County Council, the infant plaintiff was receiving treatment to her face for the removal of warts, and that treatment was the application to her face of Grenz rays. The Grenz ray is a ray of slightly shorter wavelength than the ultra violet light ray.

The infant plaintiff had been sent to the hospital by her parents and had been examined in the first instance by Dr. Burrows, who had been for some time consulting dermatologist to the Essex County Council. He passed her on to the radiology department at the hospital, having prescribed the nature of the treatment which she was to receive and the number of units of the ray that were to be applied. He first of all prescribed 1,000 units. She went with her mother to the radiology department of the hospital and she was there treated by Mead. She had several treatments prior to July 11, which was the date on which the matters complained of occurred, and during those treatments Mead applied this ray and screened the little girl's face other than the warts with a rubber material lined with lead, which he had placed over a layer of lint. From the treatment before July 11 no ill effects had resulted, but the warts had not been removed. The child saw Dr. Burrows again, and he recommended an increase in the number of units to 2,000; and on July 11 the infant plaintiff received this further ray treatment of 2,000 units.

On that occasion Mead for some reason did not make use of the rubber lead-lined material as a screen for the face, but he used only lint as a protection. He handed the mother a pair of gloves which were lead-lined, and the mother held the child's head in position with these gloves. There was a considerable area of the child's face which was not covered at all by the gloves which the mother was wearing; and the gloves were clearly intended solely as a protection for the mother's hands and not as any part of the screening of the child's face. Mead thought that the lint would be a sufficient screening for the face. After the treatment on July 11, the child developed ulcers on her face. The face became very inflamed and painful and the result was that the lower part of one side of her face was permanently disfigured. The medical evidence was that the disfigurement would be permanent, and might possibly become rather worse in appearance owing to a tendency of the blood vessels to become dilated.

A. T. Denning, K.C., and *J. Gamble* for the plaintiffs.

Montague Berryman for the defendants.

TUCKER, J.: It is plain from the medical evidence which has been called that Mead, who applied the ray on that day, was guilty of negligence. Dr. Burrows describes it as an error of judgment, but it is clear that it amounted legally to negligence. The negligence was that he did not sufficiently screen the child's face. The layer of lint which he relied upon on July 11 as an adequate screen was not sufficient, and he should have used the rubber screen lined with lead, which is the normal form of screening used for x-ray treatment.

It no doubt may be said by way of extenuation of Mead's action that the reason why he made this mistake was because, as described by Dr. Burrows, 88 per cent. of these rays are stopped by three millimetres of skin, and the remaining 12 per cent. do not do any harm. Therefore, no doubt, Mead thought that the layer of lint which he used would be equivalent to three millimetres of skin; but he was quite clearly mistaken in that matter and he was negligent in not using the proper screening.

It is first said that the defendants are responsible for the negligence of Mead, because they negligently employed an incompetent and unqualified man. I am satisfied that Mead was a qualified radiographer and that he was a man fully competent to administer the treatment ordered by Dr. Burrows.

It is secondly said, that the hospital are responsible because they failed to supply the proper rubber screening material. There was a further allegation that the hospital had failed to supply proper professional assistance to Mead in the performance of this treatment, because the only person present to help him was the girl's mother. That allegation was disposed of by the evidence in the course of the case, because Dr. Burrows said—and I accept his evidence—that it was a very common thing, in the case of a small child, for the mother to hold the child in position and to give the necessary assistance, and that very often a mother was much more successful in a matter of that kind, in dealing with her own child of a very tender age, than would be some stranger. There was nothing in the least calling for any skill in what the mother did, and, in any event, I am satisfied that the evil results did not follow from the manner in which the mother held the girl. The injury was due simply and solely to the failure to use adequate screening material.

With regard to the failure to provide the proper appliances, counsel for the plaintiffs asks me to draw the inference that there was no provision of adequate appliances from the fact that on the previous occasions Mead had used the proper screening material, but on July 11 he did not. With regard to that, the evidence shows that on the previous occasions this screening material was available and was in fact used, and it is not something which perishes in the course of use. If these rubber sheets were there a few days before, there is no reason for me to suppose that they were not still in the hospital. I am quite unable to draw the inference that there was any failure on the part of the hospital authorities to supply adequate materials. I do not think that means that it is the duty of the hospital authorities always to see that materials of this kind are in the actual room where the radiographer happens to be at the moment. It may be that he has to walk down a passage to get it, or to walk into another room to get it; and, although the evidence might suggest that there was not any of this rubber actually in the room where he was at the moment, that, in my view, does not amount to a failure on the part of the hospital authorities to supply adequate material, and I am quite unable to draw the inference that these materials were lacking, in the sense that he could not have obtained them if he had taken a little trouble. I think it was not due to lack of material, but it was due to an error of judgment on his part in thinking that this lint would serve its purpose. Therefore, all the allegations against the hospital based upon negligence on their part as distinct from their responsibility for the negligence of Mead fail.

Counsel for the plaintiffs says that even so he is entitled to succeed on the basis that the defendants are responsible in law for Mead's professional negligence. He says that Mead may be described as a technician, and apparently he was so described on one occasion at any rate, by Dr. Burrows—that is to say he is a man holding a position requiring skill and training, but none the less in a different position from that of an operating surgeon, and coming into the same category as a nurse. Counsel for the plaintiffs says that on the true view of the law, the hospital authorities are responsible for the negligence of a nurse, at any rate outside the actual operating theatre, and that, therefore, they are liable for Mead's professional negligence.

Now that involves a consideration of the authorities. The best known case is *Hillyer* v. *St. Bartholomew's Hospital* (*Governors*) (1). A man received injuries during an operation, and the action was brought against the governors of the hospital on the basis of the negligence of some member of the hospital staff in the operating theatre. FARWELL, L.J., said, at p. 826:

> The three nurses and the two carriers stand on a somewhat different footing, and I will assume that they are the servants of the defendants. But although they are such servants for general purposes, they are not so for the purposes of operations and examinations by the medical officers. If and so long as they are bound to obey the orders of the defendants, it may well be that they are their servants, but as soon as the door of the theatre or operating room has closed on them for the purposes of an operation (in which term I include examination by the surgeon) they cease to be under the orders of the defendants, and are at the disposal and under the sole orders of the operating surgeon until the whole operation has been completely finished; the surgeon is for the time being supreme, and the defendants cannot interfere with or gainsay his orders. This is well understood, and is indeed essential to the success of operations; no surgeon would undertake the responsibility of operations if his orders and directions were subject to the control of or interference by the governing body. The nurses and carriers, therefore, assisting at an operation cease for the time being to be the servants of the defendants, inasmuch as they take their orders during that period from the operating surgeon alone, and not from the hospital authorities.

The matter was put by KENNEDY L.J., in much wider terms. He said, at p. 829:

> In my view, the duty which the law implies in the relation of the hospital authority to a patient and the corresponding liability are limited. The governors of a public hospital, by their admission of the patient to enjoy in the hospital the gratuitous benefit of its care, do I think, undertake that the patient whilst there shall be treated only by experts, whether surgeons, physicians or nurses, of whose professional competence the governors have taken reasonable care to assure themselves; and, further, that those experts shall have at their disposal, for the care and treatment of the patient, fit and proper apparatus and appliances. But I see no ground for holding it to be a right legal inference from the circumstances of the relation of hospital and patient that the hospital authority makes itself liable in damages, if members of its professional staff, of whose competence there is no question, act negligently towards the patient in some matter of professional care or skill, or neglect to use, or use negligently, in his treatment the apparatus or appliances which are at their disposal. It must be understood that I am speaking only of the conduct of the hospital staff in matters of professional skill, in which the governors of the hospital neither do nor could properly interfere either by rule or by supervision. It may well be, and for my part I should, as at present advised, be prepared to hold, that the hospital authority is legally responsible to the patients for the due performance of their servants within the hospital of their purely ministerial or administrative duties.

According to counsel for the plaintiffs, that statement of the law by KENNEDY, L.J., is merely *obiter* and in his view I am not bound by it and should not follow it.

Now the decision in that case has fallen to be considered by various courts on a number of occasions. It was considered by Swift, J., in *James* v. *Probyn* (2); it was considered by Horridge, J., in *Strangways-Lesmere* v. *Clayton* (3); and it was also considered by Finlay, J., in the case of *Dryden* v. *Surrey County Council and Stewart* (4).

In all three cases the judges followed the law as laid down by Kennedy, L.J., and accepted it as representing an accurate statement of the law. In *James* v. *Probyn* (2) Swift, J., referred to the previous decisions, and also to *Marshall* v. *Lindsey County Council* (5) (which at that time had not reached the House of Lords). Swift, J., said:

> Based upon the decisions which have been cited to me and which I have just quoted, the Committee of the Hospital contracts with a patient who is going in there that they will provide a hospital, that is to say, an appropriate building suitable for the purpose of a hospital with a domestic staff for the purpose of running the hospital whom they will control for the purpose of running the hospital. They also contract that they will employ or engage competent doctors and competent nurses, but I do not think that they undertake in any way to be responsible for the way in which the doctors or the nurses perform their duties. The duties of doctors and nurses are the duties of skilled people to be carried out by skilled people, and the actions of doctors and nurses cannot be controlled in my opinion by members of a Committee who do not for one moment pretend that they have the knowledge or the ability to perform these duties themselves. They do not seem to me to be there as the servants of the committee at all in the sense that the Committee can control their method of carrying out their work. That being so, they are not responsible for any negligence of which they may be guilty in the way in which they do carry out their work.

Having cited that, and having referred to *Hillyer's* case (1), Horridge, J., took the same view in *Strangways-Lesmere* v. *Clayton* (3), as also did Finlay, J., in *Dryden* v. *Surrey County Council and Stewart* (4).

Hillyer's case (1) has recently been referred to in the Court of Appeal in a workmen's compensation case dealing with injury to a nurse, *Wardell* v. *Kent County Council* (6), and nothing was then said to throw any doubt on the correctness of the decision in *Hillyer's* case (1). Members of the House of Lords made reference to *Hillyer's* case (1) in *Lindsey County Council* v. *Marshall* (5). The House of Lords held that the case with which they were then dealing was distinguishable from *Hillyer's* case (1), but Viscount Hailsham, L.C., after referring to *Hillyer's* case (1) and the other authorities, said, at p. 108 ([1936] 2 All E.R. at p. 1082):

> In my judgment, those questions are not raised by the facts in this case and nothing that I have said must be taken as throwing any doubt upon the correctness of those decisions. The principle upon which those cases were determined is well stated in *Hillyer* v. *St. Bartholomew's Hospital* (*Governors*) (1) in the judgment of Kennedy, L.J.

The question of the correctness of *Hillyer's* case (1) was reserved by Lord Wright, M.R., and he simply said, at p. 124 ([1936] 2 All E.R. at p. 1094):

> In my judgment the facts in this case are to be distinguished from those in *Hillyer's* case (1). It is not necessary to express here any opinion one way or the other about the correctness of that decision. That can be reserved until it comes, if it ever does, before this House: and the same may be said of *Evans* v. *Liverpool Corpn.* (7), which presents some differences from *Hillyer's* case (1). Nor is it necessary to consider what difficulties may arise in delimiting the respective frontiers of ministerial or administrative duties on the one hand and matters of professional care or skill on the other hand, if it ever becomes necessary to apply the distinction which Kennedy, L.J., draws.

In my view I am bound to follow the law as laid down by Kennedy, L.J., in *Hillyer's* case (1); it was accepted as representing the law by Swift, Horridge and Finlay, JJ.; no doubt about its correctness was raised in the Court of Appeal; and the matter was expressly reserved, without comment one way or another, by the House of Lords. I think I am bound to take *Hillyer's* case (1) as representing the law which it is my duty to apply.

Counsel for the plaintiffs has referred to the Scottish case of *Anderson* v. *Glasgow Royal Infirmary* (8). In that case all the judges in the Court of Session held, on the facts, that there was no negligence established on the part of the nurse. The members of the court, however, expressed their views on the question which had been argued as to the defenders' liability to a patient for injuries suffered in consequence of the negligence of a nurse. Three of the four judges held that the infirmary could not be held responsible, but Lord Alness took a contrary view, and, having dealt with the matter at length, and considered the proper tests to be applied in deciding whether or not a nurse was a servant or agent of the infirmary, he said:

> I cannot with respect, assent to the view of Kennedy, L.J., in *Hillyer* case (1), that the staff of a hospital are in a different position while performing their professional duties, from that in which they are while performing their ministerial and administrative duties . . . I confess that I cannot find any principle or authority which warrants the distinction which the learned Lord Justice sought to draw.

Counsel for the plaintiffs also referred to the Canadian case, *Fleming* v. *Sisters of St. Joseph* (9). The judgment of the Supreme Court of Canada in that case considered exhaustively all the authorities on the point, and the court decided in favour of the view expressed by Lord Alness and did not adopt as correct the statement of the law by Kennedy, L.J. Whatever view I might have been disposed to hold in the absence of English authority on the matter, I think it is quite impossible for me to take that course. It is stated that Swift, J., in giving judgment in *James* v. *Probyn* (2) said (according to the British Medical Journal) that he considered that *Evans*' case (7) and *Hillyer's* case (1) were binding on him, but that he was much attracted by the reasoning of Lord Alness in the *Glasgow Royal Infirmary* case (8), and that if he were deciding the matter for the first time in any court, he might possibly follow that opinion rather than the one expressed in *Hillyer's* case (1). I desire respectfully to say that I also find myself situated as was Swift, J., and I think that, in the light of the judgments of Lord Alness and of the Supreme Court of Canada, I might possibly have come to a different decision in the matter, if I did not consider myself bound to take the same course as Swift, J., himself took—namely, to consider that he was not free to express any views of his own on the matter, but was bound by the decision in *Hillyer's* case (1). The result is that there must be judgment for the defendants.

Judgment for the defendants.

Solicitors: *Sidney Samson* (for the plaintiffs); *Sharpe, Pritchard & Co.*, agents for *John E. Lightburn*, Chelmsford (for the defendants).

[*Reported by* D. K. Belcher, *Barrister-at-Law.*]

HUTCHINSON v. LONDON AND NORTH EASTERN RAILWAY COMPANY.

[Court of Appeal (Lord Greene, M.R., MacKinnon and Goddard, L.JJ.), **February 17, 18, 1942.**]

Railways—Injury to employee on line—Statutory duty of railway to provide lookout—Contributory negligence of workman—Railway Employment (Prevention of Accidents) Act, 1900 (*c.* 27), *Sched., cl.* 12—*Prevention of Accidents Rules,* 1902 (*S.R. & O.,* 1902, *No.* 616), *r.* 9.

Three employees of the defendant railway, one of whom was the ganger, were working on the down main line of the defendant railway, adjusting the level of the rails. The men were stooping down at the work and failed to notice the approach of a down express, which ran into them and killed them. The noise of an up train passing at the time probably prevented them from hearing the approach of the train. No lookout man was there to warn them of danger from approaching trains. The Prevention of Accidents Rules, 1902, r. 9, provides that "in all cases where any danger is likely to arise," a lookout man shall be provided by the railway company. The accident happened at 10.30 a.m. on a clear day at a place where the line could be seen for a mile in one direction and 400 yards in the other. The railway company contended that the obligation to provide a lookout is limited to cases where some exceptional danger is likely to arise, for example, at some particularly blind spot or when weather conditions impede visibility. The railway company also contended that the workman was guilty of contributory negligence:—

Held: (i) the words of the rule "in all cases where any danger is likely to arise" must be given their ordinary and natural meaning, and, in the circumstances of this case, a lookout should have been provided. There had, therefore, been a breach of the statutory rule.

(ii) the workman was not guilty of contributory negligence. The railway company had not discharged the onus on them of proving the workman's negligence.

[**EDITORIAL NOTE.** This is the first time that the court has had to construe the rule here in question. It is true that it was discussed in the House of Lords in *Vincent* v. *Southern Ry. Co.* (6), but their Lordships did not find it necessary to come to a conclusion on the points here raised. The main issue is the meaning to be attributed to the words "where any danger is likely to arise." The Court of Appeal has construed these words very liberally in the present case. On the subject of contributory negligence, the case is both instructive and important. No doubt the principles have been laid down, and completely laid down so far as this case is concerned, in the House of Lords in *Caswell* v. *Powell Duffryn Associated Collieries, Ltd.* (1), but, as has been pointed out before, the difficulty more often lies in the application of principles than in their full and complete statement. Moreover, in the present case, there is the complication that there was no survivor of this disaster and, therefore, a lack of evidence which might confirm or rebut an implication of contributory negligence.

AS TO PREVENTION OF ACCIDENTS ON RAILWAYS, see HALSBURY, Hailsham Edn., Vol. 27, pp. 281-283, paras. 606, 607; and FOR CASES, see DIGEST, Supp. Railways, No. 598a].

Cases referred to:

(1) *Caswell* v. *Powell Duffryn Associated Collieries, Ltd.*, [1940] A.C. 152; [1939] 3 All E.R. 722; Digest Supp.; 108 L.J.K.B. 779; 161 L.T. 374.

(2) *Flower* v. *Ebbw Vale Steel, Iron & Coal Co., Ltd.*, [1934] 2 K.B. 132; 103 L.J.K.B. 465; 151 L.T. 87; *revsd. on other grounds*, [1936] A.C. 206.

(3) *Caswell* v. *Worth* (1856), 5 E. & B. 849; 36 Digest 111, *735*; 25 L.J.Q.B. 121; 26 L.T.O.S. 216.

(4) *Davies* v. *Mann* (1842), 10 M. & W. 546; 36 Digest 113, *751*; 12 L.J.Ex. 10.

(5) *Swadling* v. *Cooper*, [1931] A.C. 1; Digest Supp.; 100 L.J.K.B. 97; 143 L.T. 732.

(6) *Vincent* v. *Southern Ry. Co.* [1927] A.C. 430; Digest Supp.; 96 L.J.K.B. 597; 136 L.T. 513.

(7) *Lewis* v. *Denye*, [1940] A.C. 921; [1940] 3 All E.R. 299; Digest Supp.; 109 L.J.K.B. 817; 163 L.T. 249.

APPEAL by the plaintiff from a decision of CROOM-JOHNSON, J., at Durham Assizes, dated June 18, 1941, dismissing the action.

The plaintiff claimed damages for a breach of statutory duty and claimed both under the Fatal Accidents Acts and the Law Reform (Miscellaneous Provisions) Act, 1934. The defendants pleaded contributory negligence. The facts are fully stated in the judgment of LORD GREENE, M.R.

N. L. C. Macaskie, K.C., and *J. Charlesworth* for the appellant.

C. Paley Scott, K.C., and *F. Denny* for the respondent.

Macaskie, K.C.: The judge decided that, because there was no unusual or special danger, there was no duty upon the respondents to observe the rules, and that the cause of the accident was not the absence of a lookout man, but the men's electing to stay where they were when they knew of the approach of the southbound train. *Vincent* v. *Southern Ry. Co.* (6) shows that a railway company cannot delegate its duty under the statutory rules to a ganger, and absolve themselves from liability if the ganger does not appoint a lookout. The respondents, in the present case, have not discharged the onus of proving that there was contributory negligence on the part of Hutchinson. There is no evidence that Hutchinson knew of the approach of either the up train or of the down train. [Counsel referred to *Lewis and Denye* (7) and *Caswell* v. *Powell Duffryn Associated Collieries, Ltd.* (1).]

Paley Scott, K.C.: The object of r. 9 is to protect men working on or near railway lines in use for traffic. Before that rule compels the appointment of a lookout man, there must be some danger beyond that which ordinarily exists on railway lines. The place at which this accident occurred was not, within the meaning of r. 9, a place in which it was necessary to appoint a lookout man.

LORD GREENE, M.R.: On June 30, 1940, the deceased, Frederick Hutchinson, together with Hawkins, the ganger, and another man, was working on the main line of the London & North Eastern Railway near Newcastle-upon-Tyne. The work on which they were engaged was maintenance work, and the work was actually being carried out on the down main line. It consisted of adjusting the level of the rails, a task which apparently involves jacking up the rails, cleaning the ballast from underneath the sleepers, and putting in new ballast, which is done with shovels. The time was about 10.30 a.m., and the three men were clearly intent upon their work. They were stooping down and were engaged apparently in the work of shovelling the ballast. They were struck by the locomotive of a down express, running from York to Newcastle-upon-Tyne, and all three of them were killed. No lookout man was there to warn them of danger from oncoming trains. Practically simultaneously with the arrival at the scene of the accident of the locomotive of the northbound train a southbound train was passing on the other set of rails. The judge has found as a fact, and the evidence shows that it is a reasonable finding, that at the moment of impact the locomotive of the southbound train and some three of its coaches had actually passed the point where the men were working. The visibility was good, and there were no special weather conditions which could have had any bearing on the accident. The line is on a curve, and there is a very slight gradient rising in a southerly direction, but so slight as to make practically no difference. The length of vision, from the point where the men were working, was about a mile, in a southerly direction, and some 400 yards in a northerly direction. There were distant signals visible at an even greater distance.

In these circumstances the widow of the deceased man, Hutchinson, brought an action claiming damages under the Fatal Accidents Acts, and damages under the Law Reform (Miscellaneous Provisions) Act, 1934, for loss to the estate of the deceased person by reason of the loss of his expectation of life. The claim was grounded, in the first instance, upon the allegation that the defendants had been guilty of a breach of statutory duty and that that breach was the cause of the accident. Alternatively, a case was set up for damages at common law on the ground that the defendants had not provided an adequate system of working, and that that failure had led to the accident. The second ground has not been discussed before us. Accordingly, what I have to say will be confined to the first of the two grounds on which the claim is based.

The statutory duty, breach of which is alleged, is based upon certain rules made under the Railway Employment (Prevention of Accidents) Act, 1900. Under that Act the Board of Trade was empowered to make such rules as they thought fit with respect to any of the subjects mentioned in the schedule to the Act, with the object of reducing or removing the dangers and risks incidental to railway service. Cl. 12 in the schedule is: "Protection to permanent way men when relaying or repairing permanent way." It was not disputed by the railway company that the work on which these men were engaged fell within the language of that cl. 12 in the schedule.

The rules made by the Board of Trade under that Act are the Prevention of Accidents Rules, 1902. The relevant rule is r. 9, which reads as follows:

> With the object of protecting men working singly or in gangs on or near lines of railway in use for traffic for the purpose of relaying or repairing the permanent way of such lines, the railway companies shall, after the coming into operation of these rules, in all cases where any danger is likely to arise, provide persons or apparatus for the purpose of maintaining a good lookout or for giving warning against any train or engine approaching such men so working, and the persons employed for such purpose shall be expressly instructed to act for such purpose, and shall be provided with all appliances necessary to give effect to such look-out.

On this occasion there was no lookout, nor was any apparatus provided. The railway company maintain that, upon the true construction of this rule, the obligation to provide a lookout is limited to cases where some exceptional danger is likely to arise, for example, some particularly blind spot or some climatic conditions which impede visibility, or something of that kind. The judge accepted that construction of the rule, and he held in the present case, where the work was ordinary maintenance work on a main line with normal traffic, and there were no special difficulties in the way of vision or hearing, that the rule did not apply because there was no exceptional danger. In my opinion that construction of the rule is much too narrow. It seems to me that the phrase "in all cases where any danger is likely to arise" means what it says, and I do not see how it can be disputed that danger is likely to arise to any men who are working on a main railway line, quite apart from any special circumstances, and that the rule is directed to making provision to guard against that danger.

It is said by counsel on behalf of the railway company that some limitation must be put upon the words "in all cases where any danger is likely to arise."

He says that, if they are held to cover the ordinary, normal case of work on a line of railway which is in ordinary use, there would be no need for those words at all, because in every case of a line of railway in use for traffic there must be some danger. I do not agree. It is manifest, to my mind, that in many cases where work is being done on a railway in use for traffic, which means a railway that is not closed or abandoned, it may be possible to say that there can be no danger at all to men working on the line. For instance, if there were a branch line with only two or three trains a day, at long intervals, during those intervals it is clear that there would be no danger likely to arise, and, if those words had not been inserted, it would have been obligatory on the railway company to provide a lookout even on such a line during such intervals, which really would, of course, have been absurd.

Further, the obligation arises not merely when men are working on the lines, but also when they are working near the lines. That, of course, is a somewhat vague expression ; but if it had not been for the presence of the words " in all cases where any danger is likely to arise," it would have been necessary for the railway company to provide a lookout for all men working near lines although the actual circumstances of their work were not calculated to lead to any danger at all. It seems to me, therefore, that the search for a context to cut down the plain meaning of those words fails, and that they must be given their ordinary meaning in the English language.

It is not disputed that there was danger in the work that these men were carrying out. All that is said is that the danger was not an exceptional danger and that, therefore, on its true construction, the rule did not apply. I find, therefore, that the company was guilty of a breach of their statutory duty in failing to provide a proper lookout in accordance with the rule. It is quite clear that if a lookout had been provided this accident never would have happened.

The matter does not end there. The railway company alleges that the deceased man, Hutchinson, was guilty of contributory negligence, and the judge, in effect, although not in terms, does so find, upon the hypothesis that, contrary to his own opinion, rule 9 applied to the case. The particular act of contributory negligence which is alleged against the deceased man is that he failed to leave the metals on becoming aware of the approach of the southbound train. It was, I think, established that the reason why the men did not hear, as they obviously did not hear, the whistle given by the oncoming northbound train, was that the noise of the southbound train prevented them. The company, however, has a rule providing for that very case. and aimed at avoiding that very danger. It is r. 234 (*a*), which provides as follows :

> When a train is approaching, men at work on the permanent way must not remain on any running lines, nor between them if the space is less than 8 feet, but must at once move clear of all lines unless they can distinctly see that they are in a position of safety and in no danger from another train approaching them unobserved ; the men must stop in the position they have taken up until the train, including any detached portion thereof which may be following, has cleared a sufficient distance to enable them to see that no train is approaching on the other linss before they re-cross the rails.

Now, it is important to bear in mind one or two matters with regard to a rule of this description. A defendant who is setting up contributory negligence must, of course, establish first of all that the plaintiff was negligent and that the negligence contributed to the accident. Those two matters at least must be established before the defence of contributory negligence can succeed. The force of a rule of this kind is not to be exaggerated. If it is, as this rule obviously is, a rule directed to warning men of the character of a particular danger and directing them how they must behave in order to avoid it, it is clear that non-observance of the rule is evidence of negligence. In fact, the force of the rule is no stronger than evidence would be that every permanent way man who knew his job was perfectly well aware of this particular danger and perfectly well aware of the proper way of avoiding it. The fact that the rule is put into writing and is brought to the man's attention merely fixes him with the knowledge of the existence of a danger and the proper way of escaping it ; and, of course, for that purpose it is extremely cogent. In the last resort, however, the non-observance of the rule, assuming that it is known, as in this case it was known, to the men concerned, is, as a matter of law, evidence of negligence, and nothing more. By negligence I mean, in the case of contributory negligence, negligent disregard by the men of their own safety. There is one more matter which it seems to me the defendant must establish in such a case, and that is that the man had a reasonable opportunity of complying with the rule. It may very well be that a man who knows the rule, and who in fact does not carry it out, nevertheless, when all the circumstances are known, cannot be held guilty of contributory negligence.

I will call attention to one matter which I think is of great importance in dealing with these cases of breach of a statutory rule, which is made as much to protect the men against their own carelessness as it is to protect men who are careful. In *Caswell* v. *Powell Duffryn Associated Collieries, Ltd.* (1), Lord Wright says this at pp. 178, 179 ([1939] 3 All E.R. at p. 739):

> What is all important is to adapt the standard of what is negligence to the facts, and to give due regard to the actual conditions under which men work in a factory or mine, to the long hours and the fatigue, to the slackening of attention which naturally comes from constant repetition of the same operation, to the noise and confusion in which the man works, to his preoccupation in what he is actually doing at the cost perhaps of some inattention to his own safety.

In this case the railway company finds itself in a situation in which a plaintiff very often finds herself, if she is a widow, in cases where the person involved in the accident is dead. It frequently happens in those cases that it becomes impossible for the plaintiff to establish negligence, because the evidence is not available. In the present case, of course, the plaintiff is in no such difficulty with regard to her case, because she points to the breach of the statutory rule. The defendants, on the other hand, are in the position where they have the onus upon them to show contributory negligence on the part of the deceased man, and all those men are dead. The railway company, therefore, are not in a position to extract from a survivor, if it had been possible to do so, admissions, or some precise information as to what the men heard and saw and knew at the time and what their state of mind was, having regard to the very great attention which they were obviously paying to their work. None of those things can be established out of the mouth of any witness who can give evidence with regard to them.

Accordingly, the railway company is really put into this position. It points to the rule, it establishes that the rule was brought to the knowledge of the deceased man, and it establishes that the rule was in fact disregarded to this extent, that the men did not move off the rails when they heard the southbound train or saw it. However, they fail to prove at what particular moment of time these men became aware of the southbound train. Men who are accustomed to working in these conditions, and who at the moment, for some reason which we do not know, were very intent on a particular piece of work, all of them stooping down and directing the whole of their attention to it, may, in those circumstances, not have heard the southbound train until it was practically abreast of them. If that were so, it may very well be that at that moment they had no real opportunity of getting off the line in time to save themselves from being struck by the northbound train. We do not know.

The deceased man was working under the orders of the ganger. We do not know what precise piece of work they were doing at that time or what precise order may have been given at that time by the ganger which would divert the men's attention from the possibility of an on-coming train. We do not know to what extent these men, or possibly the ganger, may have been temporarily misled by the fact that the northbound train was in fact a quarter of an hour late. If this deceased man had not been killed, he might have given evidence to this effect: "We were not paying much attention to the trains because we were doing a rather ticklish piece of work. The ganger had just told us to shovel something in, and we did not in fact notice the southbound train until it was abreast of us. The northbound train was a quarter of an hour late and we had forgotten about it." If that evidence had been given and believed, I do not think any court could have found the man guilty of contributory negligence.

All those things may have been the case. It seems to me that the evidence is equally consistent with their having been the case as with their not having been the case, and I do not think it is right, in cases of this kind, where there is a defence of contributory negligence in an action based on breach of a statutory rule designed, as I have said, to protect men as much from their own carelessness as from anything else, to draw inferences unfavourable to a deceased man and imputing to him all those elements the absence of which would negative any negligence on his part. The matter is even more complicated than I have said, and for this reason. The gang was three in number. It had originally been five, but, owing to certain precautions against possible enemy interference which the railway company were at the moment taking, this and other gangs were depleted by the withdrawal of certain of their members. In the present case, the gang which had previously consisted of five men had been reduced to three. It is quite manifest that, in those circumstances, the work of the remaining three became heavier, and, not unnaturally, men who were keen on their work and wished to get it done, particularly if they had an energetic ganger, would work all the harder and pay the more attention to getting their task performed.

There is another of the company's rules, r. 234 (*d*), which echoes, with some modifications, the language of r. 9 of the Board of Trade Rules. It says:

> When work is about to be undertaken on or near lines in use for traffic, and danger is likely to arise, the ganger or man in charge must, except as shown in cl. (*h*), appoint one or more persons, as may be necessary, expressly to maintain a good lookout, and to give warning of any train approaching.

It was the case for the railway company—and from the business point of view it is a reasonable case—that it is left to gangers, who are responsible and skilled men, to decide whether or not under that rule there is a case for a lookout. That rule, of course, or the company's method of carrying it out, cannot in the least excuse them from non-compliance with the statutory rule. That is a different matter; but that rule, just as much as the other rules, was brought to the knowledge of all the men concerned, including Hutchinson, and in the present case the ganger did not think it necessary to put out a lookout man at all. In fact, it appeared from the evidence that it never was the practice to put out lookout men in those circumstances, when there are only three or four men working.

Now, it seems to me that where the practice of the railway company is of that nature, and where the obligation on the men under r. 234 (*a*) is only to move off the rails unless they can distinctly see that they are in a position of safety, there is a great deal to be said for the view that a reasonable man, interpreting that rule in the circumstances, would be entitled to say to himself: "Well, it is for the ganger, who has not chosen to put out a lookout man, to concern himself with those matters;" and if, as these men obviously were at the moment of the accident, they were doing work under the orders of the ganger, and must be taken to have been where they were and doing what they were on his instructions, it seems to me that to impute contributory negligence to them is imposing much too high a standard on workmen of this kind, doing this class of work, in circumstances of this description.

I have therefore come to the conclusion that the judge erred in dismissing this action. He should, in my opinion, have found that the company was guilty of a breach of statutory duty, and he should have negatived contributory negligence on the part of the deceased man.

I base my decision, as I think has clearly appeared, on the latter part of the case, upon the ground that the railway company has not discharged the onus which is upon it of establishing that, in all the circumstances of this case, whatever they may have been—and we do not know many of the most important circumstances—the disregard of this rule, if indeed it was disregarded, was evidence of negligence on the part of the man.

In those circumstances, the appeal must be allowed, with costs here and below, and judgment will be entered for the plaintiff in accordance with the sum agreed.

MacKinnon, L.J.: I agree, and I do not think I need add anything.

Goddard, L.J.: I agree. With regard to the construction of the Prevention of Accidents Rules, 1902, r. 9, if it were not that the judge took another view, I am bound to say that I should have thought the question was simply unarguable. The rule is unambiguous. It is made in pursuance of a statute which contemplates rules being made for reducing or preventing the dangers and risks incidental to railway service, and one of the purposes for which rules may be made is the protection of permanent way men relaying or repairing the permanent way.

The danger which is an incident of their service is being run down by a train. Therefore, when you find a rule, made in pursuance of a statute, which says that the railway company shall provide a lookout in all cases where any danger is likely to arise, I can see no ground whatever for saying that that rule is to be construed as meaning any unlikely danger. With regard to the words "where any danger is likely to arise," an abnormal or unusual danger is one not likely to arise and is one of those dangers which it is difficult to foresee. It is "any danger which is likely to arise" which has to be guarded against, and I can see no reason whatever for giving any other meaning than the plain, natural meaning to those words, and consequently, in my opinion, there was a clear breach of statutory duty here by the railway company. A

In cases where it is alleged that the defendant, the employer, has been guilty of breach of statutory duty, it has been very common to find a plea of contributory negligence set up, and the sort of direction which I always gave to myself when I was trying a case of that sort was that one should be exceedingly chary of finding contributory negligence where the contributory negligence which is alleged is the very thing which the statutory duty which is cast upon the employer is designed to prevent. The real incentive for the observance of statutory duties which Factory Acts, Railway Acts, Dock Acts, and so forth, place upon employers, is not the fact that they can be fined £50 or £100, as a maximum, for a breach of them, or whatever the sum may be, but that they may have very heavy claims for damages brought against them if they disregard the statute. If they do disregard the statute and are to be able to turn round and say in every case: "It is true I did not provide a lookout, or I did not provide a guard, or I did not provide a fence, but you, the plaintiff, could see it and therefore you ought not to have gone on working"—which in many cases might mean dismissal—"or you ought to have taken some extra precaution, and you did not," there would really be no object in Parliament imposing these statutory duties upon employers. B C D

In *Flower* v. *Ebbw Vale Steel, Iron & Coal Co.* (2), LAWRENCE, J., used words which were described by LORD WRIGHT in *Caswell* v. *Powell Duffryn Associated Collieries, Ltd.* (1) as being a valuable contribution to the law on this subject. He said, at p. 140:

> I think that in considering whether an ordinary prudent workman would have taken more care than the injured man, the tribunal of fact has to take into account all the circumstances of work in a factory and that it is not for every risky thing which a workman in a factory may do in his familiarity with the machinery that a plaintiff ought to be held guilty of contributory negligence. In this case, however, the plaintiff was disobeying orders without, so far as I am able to see, any good reason, and in doing so, was disregarding the fence, which, though, as I hold, not a secure fence within the statute, had been put there for his protection and would have protected him had he obeyed his instructions. E F

In *Flower's* case (2), LORD WRIGHT cited *Caswell* v. *Worth* (3), where LORD CAMPBELL, C.J., said, at p. 855:

> Here there was not only a want of ordinary care, but a knowing and wilful incurring of the risk by the plaintiff.

It is true that in *Caswell* v. *Powell Duffryn Associated Collieries, Ltd.* (1), LORD WRIGHT said, at p. 178 ([1939] 3 All E.R. at p. 739):

> If the matter had been free from authority, I should, I think, have thought it simpler to hold that a workman's claim for injury caused by breach of the employer's statutory duty to fence and like duties, is only barred by blameworthy conduct on the man's part of such gravity and so directly causing the accident as in the judgment of the judge or jury to be properly described as the substantial cause of the accident and to shift the responsibility to him. G

He said, however, that, if contributory negligence was properly defined, he did not think the distinction was other than one of words, and he concluded his speech in this way [pp. 179, 180 ([1939] 3 All E.R. at p. 740)]: H

> The rules of contributory negligence have been mainly developed in connection with road accidents, but at least since *Davies* v. *Mann* (4), the law in discussing contributory negligence in such cases has disregarded as not materially contributing causes some acts of the plaintiff which might be regarded as negligence in a sense, and treated them as of subsidiary moment in ascertaining the causation of the injury and has fixed attention on what was judged to be the proximate or effective cause. Hence the question was stated as it was in *Swadling* v. *Cooper* (5) to be what was the substantial

cause. Contributory negligence involves two elements, negligence and contributing negligence. The policy of the statutory protection would be nullified if a workman were held debarred from recovering because he was guilty of some carelessness or inattention to his own safety, which, though trivial in itself, threw him into the danger consequent on the breach by his employer of the statutory duty. It is the breach of statute, not the act of inadvertence or carelessness, which is then the dominant or effective cause of the injury.

I ask myself how those words apply to this case. The statute throws upon the railway company a duty to provide a lookout to guard against the very accident which happened. Why do these accidents happen ? It is because the men working on the line, through inadvertence, or through, as I think the evidence strongly points to in this case, being absorbed in their work, do not hear the approach of a train. It is true that they have been told that if a train approaches from one direction they are to step off all running lines, unless they can see that there is no danger coming from the other direction. In other words, that when a train is travelling on one line, they are to look down the other to see if it is free. That is a rule, but it is very much more a counsel of perfection. The men may have been absorbed in their work so that they did not realise until the southbound train was on them that a train was approaching from that direction. It may be that they were in a ticklish position at the moment with their work, and they would take a slight risk and not look up, and it is because those things happen that Parliament has authorised the making of a rule which imposes a definite duty upon the employer to provide a lookout.

On the evidence in this case I am quite satisfied that, with these men working on a main line, with trains passing every eight or nine minutes, that is a position in which it is quite clear that danger may arise, and, if there had been a lookout man appointed, it is obvious that the accident would not have happened. I think, therefore, that the only proper conclusion in this case is that the effective and substantial cause of the accident was breach of statutory duty.

Appeal allowed with costs.

Solicitors : *Pattinson & Brewer* (for the appellant) ; *I. Buchanan Pritchard* (for the respondents).

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

Applied
Kruse v Questre
1. All E.R.
1953 p. 954.

HEYMAN AND ANOTHER *v.* DARWINS, LTD.

'Viscount Simon, L.C., Lord Russell of Killowen, Lord 'd Wright and Lord Porter), **October 28, 30, 31, , 11, 1941, February 20, 1942.**]

rvations of LORD WRIGHT, at 50, *applied.* PETER DUMENIL & LTD. *v.* JAMES RUDDIN, LTD. 3] 2 All E.R. 294.

ied. SLADE *v.* METRODENT, LTD.] 2 All E.R. 336.

…ation.—Stay of legal proceedings—Repudiation of contract containing arbitra- pudiation accepted by other party—Arbitration Act, 1889

The respondents contracted with the appellants, an American firm, whereby the latter were to act as their selling agents over a wide area. The agreement contained an arbitration clause in these terms : " If any dispute shall arise between the parties hereto in respect of this agreement or any of the provisions herein contained or anything arising hereout the same shall be referred for arbitration . . . " A dispute arose between the parties, and the appellants, having intimated to the respondents that their letters showed that they had repudiated the agreement, issued a writ against them, claiming a declaration that the respondents had repudiated the agreement and damages under a number of heads. The respondents claimed that the action should be stayed pursuant to the Arbitration Act, 1889, s. 4, in order that the matters in dispute might be referred under the arbitration clause. The appellants contended that, the respondents having repudiated the agreement as a whole and the appellants, by the issue of the writ, having accepted that repudiation, the contract had ceased to exist for all purposes, and the respondents could not afterwards rely on the arbitration clause : —

HELD : the dispute between the parties was a dispute within the arbitration clause and the appellants' action ought to be stayed. Where there has been a total breach of a contract by one party so as to relieve the other of his obligations under it, an arbitration clause, if its terms are wide enough, still remains effective. This is so even where the injured party has accepted the repudiation, and, in such circumstances, either party may rely on the clause.

[**EDITORIAL NOTE.** So far as the particular case here under appeal is concerned, the House of Lords have agreed with the Court of Appeal that the matter is relatively a simple one. The House gave leave to appeal because it was shown that there were *dicta* which expressed conflicting views upon the availability of the arbitration clause included in the contract itself where a contract has been repudiated, and that these conflicting views had been stated in opinions given in the House of Lords or in judgments of the Judicial Committee of the Privy Council. Their Lordships, in dealing with this problem, state that its solution is largely dependent upon two previous questions. The first is the terms of the arbitration clause itself, which, upon its proper construction, may be wide enough to include any dispute in connection with the contract or restricted to particular matters. The other is that the word repudiation has been applied to a number of different matters. Here the repudiation considered is a repudiation by one party accepted as such by the other. Such repudiation ends the liability of the parties to perform the contract, but not the liability to pay the damages for any breach of contract. The contract is, therefore, still in existence for certain purposes, and, provided the terms of the arbitration clause are wide enough, the clause is still effective. Further, a party, who has in this sense repudiated the contract, may still invoke the arbitration clause, without contravening the doctrine of approbation and reprobation. Their Lordships, and especially LORD MACMILLAN, stress the bilateral nature of the arbitration clause and the fact that a refusal to be bound by it does not give rise to a claim for damages, but to a right of specific performance, although, in a proper case, the court has a discretionary power under the Arbitration Act, 1889, s. 4, to refuse to stay an action. The results of their Lordships' consideration are summarised in the concluding part of the opinion of VISCOUNT SIMON, L.C., and all their Lordships have expressed their agreement in that statement of the law.

AS TO STAYING AN ACTION UNDER ARBITRATION ACT, 1889, s. 4, see HALSBURY, Hailsham Edn., Vol. 1, pp. 636, 637, para. 1083; and FOR CASES, see DIGEST, Vol. 2, pp. 365-375, Nos. 337-394.]

Cases referred to:

(1) *Golding* v. *London and Edinburgh Insurance Co., Ltd.* (1932), 43 Lloyd L.R. 487.
(2) *Avery* v. *Bowden* (1856), 6 E. & B. 953, 962; 12 Digest 341, *2846*; 26 L.J.Q.B. 3; 28 L.T.O.S. 145.
(3) *Hirji Mulji* v. *Cheong Yue S.S. Co., Ltd.*, [1926] A.C. 497; 41 Digest 367, *2139*; 95 L.J.P.C. 121; 134 L.T. 737.
(4) *General Billposting Co., Ltd.* v. *Atkinson*, [1909] A.C. 119; 34 Digest 102, *759*; 78 L.J.Ch. 77; 99 L.T. 943.
(5) *Freeth* v. *Burr* (1874), L.R. 9 C.P. 208; 12 Digest 340, *2838*; 43 L.J.C.P. 91; 29 L.T. 773.
(6) *Mersey Steel & Iron Co.* v. *Naylor, Benson & Co.* (1884), 9 App. Cas. 434; 12 Digest 339, *2835*; 53 L.J.Q.B. 497; 51 L.T. 637.
(7) *Sanderson & Son* v. *Armour & Co., Ltd.*, [1922] S.C. (H.L.) 117; 91 L.J.P.C. 167; Digest Supp.; 127 L.T. 597.
(8) *Johannesburg Municipal Council* v. *Stewart*, [1909] S.C. (H.L.) 53; 2 Digest 335 *a*.
(9) *Jureidini* v. *National British & Irish Millers Insurance Co., Ltd.*, [1915] A.C. 499; 2 Digest 333, *146*; 84 L.J.K.B. 640; 112 L.T. 531.
(10) *Leask* v. *Scott* (1877), 2 Q.B.D. 376; 30 Digest 193, *604*; 46 L.J.Q.B. 576; 36 L.T. 784.
(11) *Constantine (Joseph) S.S. Line, Ltd.* v. *Imperial Smelting Corpn., The Kingswood*, [1941] 2 All E.R. 165; Digest Supp.; 110 L.J.K.B. 433; 165 L.T. 27.
(12) *Scott & Sons* v. *Del Sel*, [1923] S.C. (H.L.) 37; Digest Supp.
(13) *F. A. Tamplin S.S. Co., Ltd.* v. *Anglo-Mexican Petroleum Products Co., Ltd.*, [1916] 2 A.C. 397; 12 Digest 390, *3194*; 85 L.J.K.B. 1389; 115 L.T. 315; *affg.*, [1916] 1 K.B. 485; [1915] 3 K.B. 668.
(14) *Metropolitan Water Board* v. *Dick, Kerr & Co.*, [1918] A.C. 119; 12 Digest 399, *3233*; 87 L.J.K.B. 370; 117 L.T. 766; *affg.*, [1917] 2 K.B. 1.
(15) *Scott* v. *Avery* (1856), 1 H. & C. 72; 2 Digest 355, *290*; 31 L.J.Ex. 398; 7 L.T. 127.
(16) *Produce Brokers' Co., Ltd.* v. *Olympia Oil & Cake Co., Ltd.*, [1916] 1 A.C. 314; 2 Digest 475, *1187*; 85 L.J.K.B. 160; 114 L.T. 94.
(17) *Osenton & Co.* v. *Johnston*, [1941] 2 All E.R. 245; Digest Supp.; 110 L.J.K.B. 420; 165 L.T. 235.
(18) *Bristol Corpn.* v. *Aird (John) & Co.*, [1913] A.C. 241; 2 Digest 374, *391*; 82 L.J.K.B. 684; 108 L.T. 434.
(19) *Forslind* v. *Bechely-Crundall*, [1922] S.C. (H.L.) 173.
(20) *Woodall* v. *Pearl Assurance Co.*, [1919] 1 K.B. 593; 29 Digest 403, *0000*; 88 L.J.K.B. 706; 120 L.T. 556.
(21) *Champsey Bhara & Co.* v. *Jivraj Balloo Spinning & Weaving Co.*, [1923] A.C. 480; Digest Supp.; 92 L.J.P.C. 163; 129 L.T. 166.

(22) *Toller* v. *Law Accident Insurance Society, Ltd.*, [1936] 2 All E.R. 959 ; Digest Supp.

(23) *Stebbing* v. *Liverpool & London & Globe Insurance Co., Ltd.*, [1917] 2 K.B. 433 ; 2 Digest 333, *147* ; 86 L.J.K.B. 1155 ; 117 L.T. 247.

(24) *Macaura* v. *Northern Assurance Co.*, [1925] A.C. 619 ; 29 Digest 312, *2572* ; 94 L.J.P.C. 154 ; 133 L.T. 152.

(25) *Stevens* v. *Timber & General Mutual Insurance Assocn.* (1933), 102 L.J.K.B. 337 ; Digest Supp. ; 148 L.T. 515.

(26) *Lissenden* v. *Bosch (C.A.V.), Ltd.*, [1940] A.C. 412 ; [1940] 1 All E.R. 425 ; Digest Supp. ; 109 L.J.K.B. 350 ; 162 L.T. 195.

(27) *Evans* v. *Bartlam*, [1937] A.C. 473 ; [1937] 2 All E.R. 646 ; Digest Supp. ; 106 L.J.K.B. 568 ; 157 L.T. 311.

(28) *Rowe Bros. & Co., Ltd.* v. *Crossley Bros., Ltd.* (1912), 108 L.T. 11 ; 2 Digest 371, *372*.

(29) *Willesford* v. *Watson* (1873), 8 Ch. App. 473 ; 2 Digest 338, *168* ; 42 L.J.Ch. 447 ; 28 L.T. 428.

(30) *Kennedy, Ltd.* v. *Barrow,in-Furness Corpn.* (1909), *Hudson, Building Contracts*, 4th Edn., Vol. II, p. 411 ; 2 Digest 322, *68*.

(31) *Cutter* v. *Powell* (1795), 6 Term Rep. 320 ; 12 Digest 116, *759*.

APPEAL from a decision of the Court of Appeal (SCOTT, MACKINNON and LUXMOORE, L.JJ.), reversing a decision of CASSELS, J. The facts are fully set out in the opinion of VISCOUNT SIMON, L.C.

M. Turner-Samuels and *D. J. Turner-Samuels* for the appellants.

F. A. Sellers, K.C. and *D. A. Scott Cairns* (for *J. P. Ashworth* on war service) for the respondents.

VISCOUNT SIMON, L.C. [read by LORD MACMILLAN]: My Lords, by a written contract dated Feb. 19, 1938, the respondents, who are manufacturers of steel in Sheffield, as principals appointed the appellants, whose business address is in New York, to be sole selling agents of their tool steels in a wide area of territories including the western hemisphere (excluding U.S.A. and Argentine), Australia, New Zealand and India. The appellants were to sell in the name of the respondents, the respondents fixing f.o.b. prices and the appellants charging the purchaser with such excess price over f.o.b. prices as they could obtain. Any excess price over the f.o.b. price was for the credit of the agents, and the principals were to account to the agents in respect of such excess price after the principals had received payment in full from the purchaser. The duration of the agreement was to be for three years from Apr. 1, 1938, as a minimum. The agreement contained an arbitration clause in the following terms:

> If any dispute shall arise between the parties hereto in respect of this agreement or any of the provisions herein contained or anything arising hereout the same shall be referred for arbitration in accordance with the provisions of the Arbitration Act, 1889, or any then subsisting statutory modification thereof.

The question to be decided in this appeal is whether an action started in the King's Bench Division by the appellants against the respondents should, on the application of the latter, be stayed pursuant to the Arbitration Act, 1889, s. 4, in order that the matters in dispute between the parties may be dealt with under the arbitration clause.

The appellants contend that the dispute does not fall within the arbitration clause at all, and, alternatively, that, if it does, the judge in chambers, CASSELS, J., rightly exercised his discretion in refusing to stay the action. The Court of Appeal (SCOTT, MACKINNON and LUXMOORE, L.JJ.), took a contrary view and held that the arbitration clause clearly applied, and that the judge made a wrong use of his discretion in refusing the stay. The Court of Appeal refused leave to appeal further, considering that the case was "a very simple one," but the appeal committee of this House, largely, I think, because of the uncertainty said to result from certain pronouncements in previous cases decided in the House of Lords and the Judicial Committee, gave leave.

The answer to the question whether a dispute falls within an arbitration clause in a contract must depend on (*a*) what is the dispute, and (*b*) what disputes the arbitration clause covers. To take (*b*) first, the language of the arbitration clause in this agreement is as broad as can well be imagined. It embraces any dispute between the parties "in respect of" the agreement or in respect of any provision in the agreement or in respect of anything arising out of it. If the parties are at one on the point that they did enter into a binding agreement in terms which are not in dispute, and the difference that has arisen between them is as to their respective rights under the admitted agreement in the events that have happened—e.g., as to whether the agreement has been broken by either of them; or as to the damage resulting from such breach; or as to whether the breach by one of them goes to the root of the contract and entitles the other party to claim to be discharged from further performance; or as to whether events supervening since the agreement was made have brought the contract to an end so that neither party is required to perform further—in all such cases it seems to me that the difference is within such an arbitration clause as this. In view, however, of phrases to be found in the report of some earlier decisions, the availability of the arbitration clause when "frustration" is alleged to have occurred will require closer consideration.

Turning now to the other question which I have called (*a*), what is the present dispute about? The answer has to be gathered from the affidavits filed in the application to stay, from the correspondence before writ exhibited to these affidavits and from the indorsement on the writ itself. The letters show that the respondents, rightly or wrongly, were complaining that the appellants were selling the respondents' steel for purposes for which the purchasers found it was not suitable, and that in consequence they (the respondents) were faced with the risk of having to meet claims from dissatisfied buyers. Thus, the respondents wrote from Sheffield on July 18, 1939:

> . . . under our contract with you these claims are your responsibility and we therefore cannot make any further remittances to you until we are satisfied that no such claims will be made, or alternatively that any that have been made have been settled.

The appellants, who first heard by cable from their representative in England of this attitude of the respondents, wrote from Australia on July 24 to protest:

> I do not know by what right you pretend to hold any of our money as guarantee against possible claims.

Each party maintained its position, the appellants reporting their success in obtaining further orders in Australasia, and the respondents writing on Aug. 24:

> . . . we can only accept further orders on the strict understanding that from the amounts due to you a certain percentage must be retained to build up a reserve for the reasons already stated.

On Sept. 8 the appellants replied from California that this seemed to them to be a breach of contract on the respondents' part, and they refused to give any such understanding. The anxiety of the appellants to get their profits promptly transferred from London to New York would naturally be intensified by Treasury control established at the outbreak of the war. On Nov. 7, the respondents wrote to express their dissatisfaction at the way in which the agreement was working out, and added:

> . . . in the circumstances we would either suggest cancelling this agreement altogether or entering into negotiations with the view to drawing up another arrangement which would have to be such that satisfaction would be assured for all parties concerned.

The controversy now entered its final stage. The appellants' solicitors wrote on Dec. 21, 1939, referring to the above letters of July 18, Aug. 24, and Nov. 7, and alleging that these letters show that the respondents "have repudiated and/or evinced an intention not to perform" the agreement (an allegation which the respondents deny), and a writ was issued on Jan. 27, asking the court to make a declaration that the defendants "have repudiated and/or evinced an intention not to perform" the agreement, and also claiming damages under various heads.

The first head of claim in the writ appears to be advanced on the view that an agreement is automatically terminated if one party "repudiates" it. That is not so. As Scrutton, L.J., said in *Golding* v. *London & Edinburgh Insurance Co., Ltd.* (1), at p. 488:

> I have never been able to understand what effect repudiation by one party has unless the other accepts it.

If one party so acts or so expresses himself, as to show that he does not mean to accept and discharge the obligations of a contract any further, the other party has an option as to the attitude he may take up. He may, notwithstanding the so-called repudiation, insist on holding his co-contractor to the bargain and continue to tender due performance on his part. In that event, the co-contractor has the opportunity of withdrawing from his false position, and, even if he does not, may escape ultimate liability because of some supervening event not due to his own fault which excuses or puts an end to further performance. (A classic example of this is to be found in *Avery* v. *Bowden* (2)). Alternatively, the other party may rescind the contract, or (as it is sometimes expressed) " accept the repudiation," by so acting as to make plain that, in view of the wrongful action of the party who has repudiated, he claims to treat the contract as at an end, in which case he can sue at once for damages. In the *Hirji Mulji* case (3), LORD SUMNER said, at pp. 509, 510 :

> Recission (except by mutual consent or by a competent court) is the right of one party, arising upon conduct by the other, by which he intimates his intention to abide by the contract no longer. It is a right to treat the contract as at an end if he chooses, and to claim damages for its total breach, but it is a right in his option . . .

However, repudiation by one party standing alone does not terminate the contract. It takes two to end it, by repudiation, on the one side, and acceptance of the repudiation, on the other. Thus, in *General Billposting Co., Ltd.* v. *Atkinson* (4), where the respondent's engagement as manager of the appellant company was subject to 12 months' notice and the latter wrongfully dismissed him without notice, LORD COLLINS (with whose judgment LORD HALSBURY expressly concurred) said, at p. 122 :

> I think the true test applicable to the facts of this case is that which was laid down by LORD COLERIDGE, C.J., in *Freeth* v. *Burr* (5), [at p. 213], and approved in *Mersey Steel Co.* v. *Naylor* (6) in the House of Lords, " that the true question is whether the acts and conduct of the party evince an intention no longer to be bound by the contract." I think the Court of Appeal had ample grounds for drawing this inference from the conduct of the appellants here in dismissing the respondent in deliberate disregard of the terms of the contract, and that the latter was thereupon justified in rescinding the contract and treating himself as absolved from the further performance of it on his part.

In the present case, the proper form in which to seek relief under the first head of the indorsement of the writ would be to ask for a declaration that the agreement had been terminated by the wrongful repudiation by the defendants which had been accepted by the plaintiffs. The issue of the writ may, however, sometimes be regarded as amounting to the exercise of the plaintiffs' claim to rescind and for the purposes of the appeal I am content so to regard it.

Even so, I do not see how this claim, however expressed, together with the other claims in the writ, can be regarded otherwise as than involving a dispute " in respect of the agreement " and in respect of something arising out of it. The fallacy of the other view arises from supposing that, if the respondents have so acted as to refuse further performance of the agreement, this amounts to saying that they deny that the agreement ever existed. If the respondents were denying that the contract had ever bound them at all, such an attitude would disentitle them from relying on the arbitration clause which it contains ; but that is not the position they take up. They admit the contract, and deny that they have repudiated it. Whether they have, or have not, is one of the disputes arising out of the agreement. Even if the arbitrator finds that they have, and that, on the appellants' acceptance of the repudiation, the contract is at an end, that finding does not oust the arbitrator's jurisdiction. As VISCOUNT FINLAY said, in *Sanderson & Son* v. *Armour & Co., Ltd.* (7), at p. 121 :

> The proposition that the mere allegation by one party of repudiation of the contract by the other deprives the latter of the right to take advantage of an arbitration clause is unreasonable in itself, and there is no authority to support it.

Moreover, the damages due from the respondents for this breach of the obligations of the agreement, as well as damages for any other breaches of it, are also disputed matters arising " in respect of " the agreement.

I now turn to certain earlier decisions which, as they stand in the reports, may seem to restrict the application of an arbitration clause where the contract has, for some reason or another, come to an end. The first of these is the appeal to this House from Scotland in *Johannesburg Municipal Council* v. *Stewart* (8). The situation there was unusual—indeed, LORD SHAW, when offering an explanation of it 13 years later in *Sanderson's* case (7), at p. 129, described the circumstances as " very singular and very special " and the case as " extremely complex." The Scottish firm who were respondents had agreed to supply plant to the appellants under a contract which was to be " deemed for all purposes an English contract, enforceable in and subject to the jurisdiction of the English courts," and the contract contained an arbitration clause agreeing, " in case any dispute or difference shall arise between the purchasers and the contractors," to refer it to arbitration under the English Act of 1889. The municipal council brought an action for damages in the Scottish courts, averring (*inter alia*) that the whole contract had been repudiated by the defenders. The Court of Session considered that it was necessary that the parties should ascertain from the English courts, whether the arbitration clause applied. This House reversed this decision, holding that, as English law (unlike the law of Scotland) did not compel reference to arbitration even though the clause applied, the courts in Scotland had jurisdiction to entertain the cause. I regard this as the true ground of the decision, and, in doing so, I am following the view of it expressed by Viscount Finlay in *Sanderson's* case (7), at p. 121. There was a second ground of decision in the *Johannesburg* case (8), which Lord Loreburn, L.C., is reported at p. 54 to have formulated thus:

> If the course of action which is established be that there has been repudiation or a breaking of contract in the sense that the contract has been frustrated by the breach, then it would not be within the arbitration clause . . .

In *Hirji Mulji* v. *Cheong Sue S.S. Co., Ltd.* (3), at p. 511, Lord Sumner indicated that he found this sentence obscure, and I share his difficulty. It is to be noted that it occurs in the report of a judgment which was delivered *ex tempore* and was apparently never revised by the speaker, for the word "course" must surely be "cause." In any case the decision to allow the appeal is sufficiently based on the first ground, which I prefer. In the *Johannesburg* case (8) Lord Shaw made the following observation at p. 56:

> It does not appear to me to be sound law to permit a person to repudiate a contract and thereupon specifically to found upon a term in that contract which he has thus repudiated.

That observation is best understood as referring to the exercise of judicial discretion by refusing a stay, for it seems impossible to construe the language of an arbitration clause as though its range could be reduced by the action of one of the parties. Its range depends on its terms, and, if its terms are wide enough to cover a dispute as to whether one party has repudiated or as to damages due to repudiation, the fact that there has been repudiation may in some cases incline the judge to let the action proceed, but will not alter the interpretation of the clause itself.

The next case calling for special examination is *Jureidini* v. *National British and Irish Millers Insurance Co., Ltd.* (9). Here again the decision was not reserved, and here again the speeches do not all give the same ground for allowing the appeal. Viscount Haldane, L.C., who had, during the argument, referred to the above observation of Lord Shaw in the *Johannesburg* case (8), says, at p. 505:

> Now, my Lords, speaking for myself, when there is a repudiation which goes to the substance of the whole contract I do not see how the person setting up the repudiation can be entitled to insist on a subordinate term of the contract still being enforced.

By the person setting up the repudiation is meant the insurance company, which denied liability under the policy on the ground that the appellants had set fire to their own property, and it is not at all clear to me why, if the policy contained an arbitration clause covering all claims arising under the policy, it should not cover such a dispute. However, the arbitration clause in the policy was not framed so widely. It applied:

> . . . if any difference arises as to the amount of any loss or damage . . .

and provided that:

> . . . it shall be a condition precedent to any right of action or suit upon this policy that the award by such arbitrator, arbitrators, or umpire of the amount of the loss or damage if disputed shall be first obtained.

At p. 507, Lord Dunedin, pointed out that the arbitration clause only applied to differences as to amount of loss, and therefore not to a claim which the respondents rejected altogether, whatever the loss might be. Lord Atkinson, at p. 507, rested his judgment on this last point alone. Lord Parker concurred without distinguishing reasons. Lord Parmoor, at p. 508, says expressly that no difference had arisen as regards matters which could come for decision under the arbitration clause and that consequently the clause had no application. It is on this second ground that I think the majority of the House should be regarded as having decided the appeal.

Last, in this trilogy of difficult decisions, comes the judgment of the Judicial

Committee in *Hirji Mulji* v. *Cheong Yue S.S. Co.* (3). It was the case of a time charterparty, where the ship was requisitioned on behalf of His Majesty's Government before the date at which she was to have entered upon the performance of the charter and remained in government service until more than a year had elapsed after the period of ten months during which her service under the charter was to have been rendered. The judgment of their Lordships, delivered by LORD SUMNER, contains an elaborate and authoritative exposition of the nature of frustration, and a contrast between the operation of frustration, which is automatic, and the consequence of wrongful repudiation, which depends upon the choice of the other party. On this point, the judgment has always been regarded as a pronouncement of the highest authority; but I confess to considerable difficulty in accepting the conclusion that the dispute whether such a requisition had frustrated the performance of the charterparty, or whether, on the other hand, the shipowner was entitled to damages for the charterers' refusal to take delivery of the ship when she was at length released, was not a "dispute arising under this charter." LORD SUMNER held that it was not, on the ground that the execution of the contract had not begun, and that the dispute first arose when "this charter" no longer existed.

A decision of the Judicial Committee is not binding on this House, nor, indeed, on the courts below: *Leask* v. *Scott* (10), at p. 380; and while any opinion delivered by LORD SUMNER must command the respect due to that great master of the law, I think the judgment in the *Hirji Mulji* case (3), so far as the effect of frustration of contract upon an arbitration clause is concerned, must not be taken as having established a general rule. Ordinarily speaking, there seems no reason at all why a widely drawn arbitration clause should not embrace a dispute as to whether a party is discharged from future performance by frustration whether the time for performance has already arrived or not.

My Lords, it is of much practical importance that the law should be quite plain as to the scope of an arbitration clause in a contract where the clause is framed in wide and general terms such as this, and I trust that the decision of the House in this appeal may be useful for this purpose and will remove any misunderstanding which may have grown up out of certain phrases in some of the previous decisions to which I have referred. At the risk of some repetition, I would summarise what I conceive to be the correct view on the matter as follows.

An arbitration clause is a written submission, agreed to by the parties to the contract, and, like other written submissions to arbitration, must be construed according to its language and in the light of the circumstances in which it is made. If the dispute is as to whether the contract which contains the clause has ever been entered into at all, that issue cannot go to arbitration under the clause, for the party who denies that he has ever entered into the contract is thereby denying that he has ever joined in the submission. Similarly, if one party to the alleged contract is contending that it is void *ab initio* (because, for example, the making of such a contract is illegal), the arbitration clause cannot operate, for on this view the clause itself is also void.

If, however, the parties are at one in asserting that they entered into a binding contract, but a difference has arisen between them as to whether there has been a breach by one side or the other, or as to whether circumstances have arisen which have discharged one or both parties from further performance, such differences should be regarded as differences which have arisen "in respect of," or "with regard to," or "under" the contract, and an arbitration clause which uses these, or similar, expressions, should be construed accordingly. By the law of England (though not, as I understand, by the law of Scotland), such an arbitration clause would also confer authority to assess damages for breach, even though it does not confer upon the arbitral body express power to do so.

I do not agree that an arbitration clause expressed in such terms as above ceases to have any possible application merely because the contract has "come to an end," as, for example, by frustration. In such cases it is the performance of the contract that has come to an end. The doctrine of discharge from liability by frustration has often been explained as flowing from the inference of an implied term, and, in giving my opinion on the occasion of the recent decision of this House in *Joseph Constantine S.S. Line, Ltd.* v. *Imperial Smelting Corpn., Ltd.* (11), at p. 171, I expressed the view that the most satisfactory basis upon which the doctrine can be put is that it depends on an implied term in the contract of the parties. If, therefore, when parties have entered into a contract, circumstances arise before the performance of the contract is completed which, in the view of one party, bring the contract to an end by frustration and therefore discharge both parties from further performance, but the other party does not agree, this is a difference about the applicability of the implied term, and is just as much within the arbitration clause as if it were a difference about an express term of the contract. There is a previous decision of this House which establishes this precise proposition. I refer to *Scott & Sons* v. *Del Sel* (12), where sellers of jute contended that a contract to export from Calcutta 2,800 bales to Buenos Ayres was brought to an end, after a portion has been despatched, by a government prohibition of further export, notwithstanding that the contract contained an express term exempting the sellers from liability for late delivery due to unforeseen circumstances. The arbitration clause ran :

> Any dispute that may arise under this contract to be settled by arbitration.

The sellers argued that the dispute as to frustration was not a dispute under the contract, but a dispute as to the existence of the contract. This contention was unanimously rejected. Lord Dunedin reasoned thus, at p. 41 :

> They (the sellers) can only succeed . . . if they bring themselves within one of two categories. Either they must show that there was an express term of the contract which had that effect [i.e., of bringing the contract to an end] or they must show that there was an implied term in the contract which had the same effect. That an implied term in a contract may have that effect is quite clearly shown by what was decided in this House in the case of *Tamplin S.S. Co.* (13) and in the case of the *Metropolitan Water Board* v. *Dick, Kerr & Co.* (14). It seems to me, therefore, that they are in this dilemma, that in either view they have got to have recourse to the contract, and, if they have got to have recourse to the contract, it seems to me that the dispute is a dispute under the contract.

I can see no reason why an arbitration clause framed on the above lines should not equally apply, if the supervening event which is alleged by one side to have effected discharge by frustration occurs after the contract has been entered into, but before the time has come for anything to be done under the contract. The reasoning of Lord Dunedin applies equally to both cases. It is, in my opinion, fallacious to say that, because the contract has " come to an end " before performance begins, the situation, so far as the arbitration clause is concerned, is the same as though the contract had never been made. In such case a binding contract was entered into, with a valid submission to arbitration contained in its arbitration clause, and, unless the language of the arbitration clause is such as to exclude its application until performance has begun, there seems no reason why the arbitrator's jurisdiction should not cover the one case as much as the other.

In this summary it is not necessary to deal with the situation which arises when a contract stipulates that the arbitration must take place before an action can be brought, as in *Scott* v. *Avery* (15), or with the difficult question whether an arbitration clause covers a dispute as to the ambit of the submission : see the observations of Lord Parker in the *Produce Brokers' Co.* case (16).

Two further observations must be made in conclusion. The first is that, notwithstanding the general validity of the above observations, the governing consideration in every case must be the precise terms of the language in which the arbitration clause is framed. Its terms may, of course, be such as will either expressly or by implication reduce what would otherwise be the full ambit of the clause, or again, will extend it yet further. Secondly, what I have endeavoured to formulate in this summary is concerned solely with the question whether or not an arbitration clause applies. It has nothing to do with the further and quite distinct question whether, where an action is started in the English courts about a dispute which is within the scope of an arbitration clause, the action should be stayed at its inception under the Arbitration Act, 1889, s. 4. The principles which should govern the exercise of judicial discretion on this matter have often been laid down and are well understood, and the extent to which appellate authority may interfere was last stated in this House in *Osenton & Co.* v. *Johnston* (17). I think the Court of Appeal was right in reversing the decision of Cassels, J., on this head. Even if the judge were right in regarding the issue as one in which nothing but a question of law is involved, that circumstance would not necessarily, and in all cases, make it right to refuse a stay. The observation of Lord Parker in *Bristol Corpn* v. *Aird* (18), refers to a question of construction. Moreover, in the present case questions of fact may well have to be determined and the dispute as a whole is of a class which is constantly dealt with by an arbitrator. There is no sufficient reason why the matter should not be referred, and therefore, by the express language of the Arbitration Act, 1889, s. 4, there must be a stay.

In my opinion, this appeal fails on all points, and I move that it be dismissed with costs.

Lord Macmillan: My Lords, I am desired by my noble and learned friend Lord Russell of Killowen to say that he has had an opportunity of seeing in print the opinion which I am about to deliver, and that he agrees with it on all points.

I agree with the view which, I believe, is shared by all your Lordships that this appeal should be dismissed. On its own facts the case presents no great difficulty, but as I understand that leave to appeal was granted in this instance on the representation that the case raised general questions affecting the efficacy of arbitration clauses on which some doubt had arisen, and as your Lordships have heard full arguments on these questions, I shall express as briefly as I can the conclusions which I have reached.

The law permits the parties to a contract to include in it as one of its terms an agreement to refer to arbitration disputes which may arise in connection with it, and the courts of England enforce such a reference by staying legal proceedings in respect of any matter agreed to be referred

> . . . if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission . . . [Arbitration Act, 1889, s. 4].

Where proceedings at law are instituted by one of the parties to a contract containing an arbitration clause and the other party, founding on the clause, applies for a stay, the first thing to be ascertained is the precise nature of the dispute which has arisen. The next question is whether the dispute is one which falls within the terms of the arbitration clause. Then sometimes the question is raised whether the arbitration clause is still effective or whether something has happened to render it no longer operative. Finally, the nature of the dispute being ascertained, it having been held to fall within the terms of the arbitration clause and the clause having been found to be still effective, there remains for the court the question whether there is any sufficient reason why the matter in dispute should not be referred to arbitration.

Arbitration clauses in contracts vary widely in their language, for there is no limitation on the liberty of contracting parties to define as they please the matters which they desire to submit to arbitration. Sometimes the reference is confined to practical questions arising in the course of the execution of the contract; sometimes the most ample language is used so as to embrace any question which may arise between the parties in any way relating to the contract. Consequently, many of the reported cases are concerned with the interpretation of the scope of the terms of reference, for an arbitrator has jurisdiction only to determine such matters as, on a sound interpretation of the terms of reference, the parties have agreed to refer to him. In the ordinary case the ascertainment of the nature of the dispute and the interpretation of the terms of reference are matters of no special difficulty.

Of recent years, however, certain views have been advanced and have received considerable judicial encouragement which have tended to introduce an unfortunate element of perplexity as affecting the application and efficacy of arbitration clauses in cases in which the contract is said to have been repudiated. *Dicta* of high authority have caused doubts which subsequent explanations cannot be said to have successfully removed. The arguments at the bar in the present case have illustrated the persistence of this uncertainty.

I may clear the ground by disposing of one or two simple cases. If it appears that the dispute is as to whether there has ever been a binding contract between the parties, such a dispute cannot be covered by an arbitration clause in the challenged contract. If there has never been a contract at all, there has never been as part of it an agreement to arbitrate; the greater includes the less. Further, a claim to set aside a contract on such grounds as fraud, duress, or essential error cannot be the subject matter of a reference under an arbitration clause in the contract sought to be set aside. Again, an admittedly binding contract containing a general arbitration clause may stipulate that in certain events the contract shall come to an end. If a question arises whether the contract has for any such reason come to an end, I can see no reason why the arbitrator should not decide that question. It is clear, too, that the parties to a contract may agree to bring it to an end to all intents and purposes and to treat it as if it had never existed. In such a case, if there be an arbitration clause in the contract, it perishes with the contract. If the parties substitute a new contract for the contract which they have abrogated, the arbitration clause in the abrogated contract cannot be invoked for the determination of questions under the new agreement. All this is more or less elementary.

I now come to the type of case which has given rise to controversy. Such cases arise in this way. One of the parties to a contract evinces by his conduct, or openly declares, his intention not to fulfil his obligations under the contract. He is then commonly said to have "repudiated" the contract, an ambiguous phrase which has, I think, been the source of much misunderstanding. A good illustration of so-called repudiation by conduct is afforded by *Forslind* v. *Bechely-Crundal* (19), and of so-called declared repudiation by *Johannesburg Municipal Council* v. *Stewart* (8). Where there has been such repudiation by one party of his contract obligations the other party may either acquiesce and betake himself to a claim for damages for breach or may contest the repudiation, but if his protests are unavailing, as he cannot in general enforce specific implement, his only remedy in the end is also a claim for damages for breach. If there is a clause in the contract referring to arbitration all disputes under or arising out of or relating to the contract, what is the effect of the repudiation on its efficacy? According to one view, the repudiation excludes the operation of the arbitration clause or at least precludes its enforcement at the instance of the party who has repudiated. Thus, in the *Johannesburg* case (8), Lord Loreburn, L.C., said, at p. 54:

> If the course of action which is established be that there has been repudiation or a breaking of contract in the sense that the contract has been frustrated by the breach, then it would not be within the arbitration clauses in either of these contracts.

Another way of approaching the question appears in the speech of Lord Shaw in the same case, where he says, at p. 56:

> As these averments stand the contract was wholly repudiated. It does not appear to me to be sound law to permit a person to repudiate a contract and thereupon specifically to found upon a term in that contract which he has thus repudiated.

To the same effect Viscount Haldane, L.C., in *Jureidini* v. *National British & Irish Millers Insurance Co., Ltd.* (9), at p. 505, said:

> . . . speaking for myself, when there is a repudiation which goes to the substance of the whole contract I do not see how the person setting up that repudiation can be entitled to insist on a subordinate term of the contract still being enforced.

These *dicta*, in view of their high authority, are entitled to the most careful consideration, but, with all respect, I do not think they constitute pronouncements in law by this House such as to be binding upon your Lordships. To take first the *dictum* of Lord Loreburn, L.C., I confess that I find it obscure, without expressing myself so bluntly as Lord Sumner, who, in a subsequent case, prefaced his comment on the *dictum* with the words: "Whatever exactly this sentence means": *Hirji Mulji* v. *Cheong Yue S.S. Co.* (3) at p. 511. It certainly does not say that repudiation destroys the contract and with it the arbitration clause which it contains. As Lord Dunedin, then Lord President, said in this same *Johannesburg* case (8), in the Court of Session, at p. 878, after pointing out that the defenders there "threw up the whole contract" and the pursuers replied "We see you cannot go on, you have so utterly broken the contract that we hold it at an end and we will claim damages for breach," at once added:

> That does not mean that the contract is gone for ever; on the contrary the contract remains and is only the measure of liability for damages.

The decision of the Court of Session was recalled by this House, but on special grounds not affecting the passage I have quoted from the judgment of Lord Dunedin. Repudiation, then, in the sense of a refusal by one of the parties to a contract to perform his obligations thereunder, does not of itself abrogate the contract. The contract is not rescinded. It obviously cannot be rescinded by the action of one of the parties alone. Even if the so-called repudiation is acquiesced in or accepted by the other party, that does not end the contract. The wronged party has still his right of action for damages under the contract which has been broken, and the contract provides the measure of those damages. It is inaccurate to speak in such cases of repudiation of the contract. The contract stands, but one of the parties has declined to fulfil his part of it. There has been what is called a total breach, or a breach going to the root of the contract, and this relieves the other party of any further obligation to perform what he for his part has undertaken. Now, in this state of matters, why should it be said that the arbitration clause, if the contract contains one, is no longer operative or effective? A partial breach leaves the arbitration clause effective : why should a total breach abrogate it ? The repudiation, not being of the contract, but of obligations undertaken by one of the parties, why should it imply a repudiation of the arbitration clause so that it can no longer be invoked for the settlement of disputes arising in consequence of the repudiation ? I do not think that this is the result of what is termed repudiation. Suppose the injured party prefers to have his claim of damages for the other party's total breach assessed by arbitration, can he not invoke and enforce the arbitration clause for that purpose ? Can he be effectually met by a plea on the part of the wrongdoer that he, the wrongdoer, has repudiated the contract and with it the arbitration clause, which is consequently no longer operative ? I do not think that this result follows even if the injured party acquiesces in the total breach—accepts the repudiation, as it is put—and contents himself with his claim of damages. I think he is entitled to insist on having his damages assessed by arbitration notwithstanding the other party's repudiation.

I venture to think that not enough attention has been directed to the true nature and function of an arbitration clause in a contract. It is quite distinct from the other clauses. The other clauses set out the obligations which the parties undertake towards each other *hinc inde* ; but the arbitration clause does not impose on one of the parties an obligation in favour of the other. It embodies the agreement of both parties that, if any dispute arises with regard to the obligations which the one party has undertaken to the other, such dispute shall be settled by a tribunal of their own constitution. Moreover, there is this very material difference that, whereas in an ordinary contract the obligations of the parties to each other cannot in general be specifically enforced and breach of them results only in damages, the arbitration clause can be specifically enforced by the machinery of the Arbitration Acts. The appropriate remedy for breach of the agreement to arbitrate is not damages but its enforcement. Moreover, there is the further significant difference that the courts in England have a discretionary power of dispensation as regards arbitration clauses which they do not possess as regards the other clauses of contracts.

I am accordingly of opinion that what is commonly called repudiation or total breach of a contract, whether acquiesced in by the other party or not, does not abrogate a contract, though it may relieve the injured party of the duty of further fulfilling the obligations which he has by a contract undertaken to the repudiating party. The contract is not put out of existence, though all further performance of the obligations undertaken by each party in favour of the other may cease. It survives for the purpose of measuring the claims arising out of the breach, and the arbitration clause survives for determining the mode of their settlement. The purposes of the contract have failed, but the arbitration clause is not one of the purposes of the contract.

There still remains the difficulty raised by the *dicta* of LORD SHAW and VISCOUNT HALDANE, which I have quoted above. It is said to be wrong to allow a party to a contract, who has refused to perform his obligations under it, at the same time to insist on the observance of a clause of arbitration embodied in the contract. The doctrine of approbate and reprobate is said to forbid this. I appreciate the apparent dilemma but, with the greatest respect, I venture to think it is based on a misapprehension. The key is to be found in the distinction which I have endeavoured to draw between the arbitration clause in a contract and the executive obligations undertaken by each party to the other. I can see nothing shocking or repugnant to law in one business man saying to another that he regrets he finds himself unable to go on with his deliveries under a contract between them, and at the same time asking the other to join with him in a reference under an arbitration clause in their contract in order to ascertain what compensation is to be paid for his default. The parties have both agreed that all questions between them shall be settled by their own tribunal. The question of the consequences which are to follow from a breach, including a total breach, of the obligations undertaken by one of the parties is just such a question as both parties have agreed should go to arbitration. It is not a case of one party refusing to perform the obligations he has undertaken in favour of the other and at the same time insisting that obligations in favour of himself shall continue to be performed. The arbitration clause, as I have said, is not a stipulation in favour of either party. I am accordingly of opinion that the doctrine of approbate and reprobate does not apply to prevent a party to a contract who has declined to proceed further with the performance of his obligations to the other party from invoking an arbitration clause in the contract for the purpose of settling all questions to which his declinature has given rise. In all this I have assumed that the arbitration clause in its terms is wide enough to cover the dispute. A

It remains to mention the special case of a contract which has been frustrated, in the technical sense which that word has now acquired. In the *Hirji Mulji* case (3), which I have already cited, it was held in the Privy Council that where a contract had been frustrated before performance had begun, in consequence of a government requisition, the contract had terminated as to all matters and disputes which had not already arisen and the arbitration clause had ceased to be operative. I do not propose to express any opinion as to the effect of frustration in the technical sense on arbitration clauses, as the matter has not been fully argued, but I should not like to be taken as accepting without further consideration some at least of the views expressed by LORD SUMNER o.n behalf of the Judicial Committee of the Privy Council in the case just quoted B C

In what I have said, I have purposely not entered upon any detailed examination of the reported cases, preferring to express the result of my study of them in my own words. I am not conscious of having gone counter to any decision of this House, though I have found it necessary respectfully to differ from views incidentally expressed in some of the cases. D

Applying to the present appeal the principles I have endeavoured to formulate, I have no doubt that the dispute between the appellants and the respondents, the nature of which has been fully set out by my noble and learned friend on the woolsack, is one which falls within the arbitration clause in the contract between them and that nothing has occurred to deprive that clause of its binding efficacy. I am also satisfied that, in the circumstances, the Court of Appeal were justified in overruling the discretion exercised by the judge of first instance in declining to grant a stay. E

I have only to add that having had the advantage of reading in print the opinion of my noble and learned friend VISCOUNT SIMON, L.C., I desire to express my agreement with the general conclusions which he has reached.

F

LORD WRIGHT: My Lords, this is an appeal from an interlocutory order of the Court of Appeal by which the action was stayed under the Arbitration Act, 1889, s. 4, on the ground that the dispute fell within the arbitration clause contained in the contract. This was in the following terms :

> If any dispute shall arise between the parties hereto in respect of this agreement or any of the provisions herein contained or anything arising hereout, the same shall be referred to arbitration in accordance with the provisions of the Arbitration Act, 1889, or any then subsisting statutory modification thereof. G

The Court of Appeal reversed the order of CASSELS, J., who, affirming the order of the master, had refused to stay the action.

Under the contract which was dated Feb. 19, 1938, the appellants were to act as the agents of the respondents in the sale for them and in their name of certain tool steels manufactured by the respondents. The agency covered a wide range of territories. The duration of the agreement was for three years from Apr. 1, 1938. I need not here refer in detail to its provisions. The difficulties which arose were (*inter alia*) that the respondents had claimed to keep in hand certain sums of commission due to the appellants under the agreement because, it was said, the appellants had improperly involved the respondents in liabilities under contracts which they had made in the respondents' name in carrying out the agency. There were also claims for commissions alleged to have been lost to the appellants by the respondents' breaches of the agreement. It is unnecessary to go through the correspondence in which the parties set out their H respective complaints and defences. It is enough here to state that on Jan. 27, 1940, the appellants issued a writ against the respondents. By paras. 1 and 2, in their final form, they stated their claims to be for (1) a declaration that the defendants (respondents) repudiated and/or evinced an intention not to perform the agreement, (2) damages for the said repudiation and/or intention not to perform. Para. 3 claimed further, or alternatively, damages for breach of the said agreement. There followed claims for commission due under the agreement and for commission lost by the appellants owing to breaches of the agreement by the respondents and general claims for accounts and payment. The respondents disputed the claim and applied to refer the dispute under the submission.

The contention on behalf of the appellants was that the respondents by their conduct and by their letters had evinced an intention not to perform the agreement any more and had thereby repudiated it, and that the appellants had evinced acceptance of that repudiation by the issue of the writ and that accordingly the principle enunciated in this House by LORD SHAW in *Johannesburg Municipal Council* v. *Stewart* (8) applied. He said, at p. 56 :

> It does not appear to me to be sound law to permit a person to repudiate a contract and thereupon specifically to found upon a term in that contract which he has thus repudiated.

In the same case LORD LOREBURN, L.C., is reported to have said, at p. 54 :

> If the course [*query*, cause] of action which is established be that there has been repudiation or a breaking of the contract in the sense that the contract has been frustrated by the breach, then it would not be within the arbitration clause.

Other general observations to the same effect were quoted from the authorities. If a party repudiates the contract as a whole, he cannot, it is said, rely on some particular stipulation, such as an arbitration clause. So much doubt has been thrown upon these general observations by decisions to which I shall refer later that they cannot now be regarded as authoritative expressions of the law.

It is clear that as the arbitration clause is a matter of agreement, the first thing is to ascertain according to ordinary principles of construction what the parties have actually agreed. Under the Arbitration Act, 1889, s. 4, however, the court is given a discretionary power to stay an action brought in breach of an arbitration clause. Such a clause, therefore, though absolute in terms, is qualified in the sense that it is subject to this overriding discretion of the court. There is a general distinction which may be noted. The contract, either instead of, or along with, a clause submitting differences and disputes to arbitration, may provide that there is to be no right of action save upon the award of an arbitrator. The parties in such a case make arbitration followed by an award a condition to any legal right of recovery on the contract. This is a condition of the contract, to which the court must give effect unless the condition has been "waived," i.e., unless the party seeking to set it up has somehow disentitled himself to do so. The distinction between a mere submission and such a clause is clearly stated by WARRINGTON, L.J., in *Woodall* v. *Pearl Assurance Co.* (20).

A submission may, however, take many different forms. It may be a special agreement to arbitrate upon a particular dispute which has already arisen on some matter, such as contract, tort, trust or family agreement. Thus, to take a single instance, in *Joseph Constantine S.S. Line* v. *Imperial Smelting Corpn., Ltd.* (11), recently decided by this House, there was a specific submission of the difference whether the charterparty in question had been frustrated, the charterers claiming damages because the vessel had not been tendered to load her cargo, the shipowners defending the claim on the ground of frustration. That illustrates clearly one aspect of an arbitration agreement, namely, that it is collateral to the substantial stipulations of the contract ; it is merely procedural and ancillary ; it is a mode of settling disputes, though the agreement to do so is itself subject to the discretion of the court. All this may be said of every agreement to arbitrate, even though not a separate bargain, but one incorporated in the general contract. It may also be noted that the agreement to arbitrate depends on there being a dispute or difference in respect of the substantive stipulations. It appertains to the stage of pleadings or allegations. It is in regard to these that it has to be decided whether the submission applies or should receive effect. It is interlocutory. Again, the illustration I have given shows that there may be an agreement to arbitrate upon a question on a contract which has on one view ceased to exist, at least as to future performance, though whether it has ceased to exist or not is disputed, or, if that is not disputed, the question of damages remains in dispute. It must depend on the construction of the collateral agreement contained in the arbitration clause, whether that agreement survives and can be insisted upon for the settlement of these disputes.

It may also be essential to distinguish between the ordinary submission of disputes and the stipulation that an award is a necessary condition of any right of action. Again, the discretionary power of the court to stay under sect. 4 of the Act, which only arises if the dispute falls within the clause, must be kept distinct from the question of the scope and effect of the clause, which depends on its language.

The word "repudiation" has also led to difficulties because it is an ambiguous word constantly used without precise definition in contract law. I do not attempt an exhaustive list of the senses in which the word has been used, but I may give some instances. Repudiation of a contract is sometimes used as meaning that the defendant denies that there ever was a contract in the sense of an actual *consensus ad idem*. If that is the case, a submission of disputes under the contract never comes into operative existence any more than the contract to which it was to be ancillary. Short of this, one party, though not denying that there was the appearance of assent, might claim that the consent was vitiated by fraud or duress or mistake or illegality, and in that sense it is often said that he repudiates the contract. There, again, it would be a question of construction whether the collateral arbitration clause could be treated as severable and could be invoked for settling such a dispute. There is a form of repudiation, however, where the party who repudiates does not deny that a contract was intended between the parties, but claims that it is not binding because of the failure of some condition or the infringement of some duty fundamental to the enforceability of the contract, it being expressly provided by the contract that the failure of condition or the breach of duty should invalidate the contract. A dispute upon such an issue would generally be within an ordinary submission of disputes under or arising out of the contract or similar words, though the award in a certain event might have the effect of declaring that the contract had ceased to be, or even had never become, binding. Another case to which the word repudiation is applied is when the party, though not disputing the contract, declares unequivocally that he will not perform it, and, admitting the breach, leaves the other party to claim damages. There may then be a dispute under the contract, not indeed as to liability, but as to damages. Such a dispute would normally fall within the ordinary submission, which should receive effect unless the court exercises its discretion to refuse a stay under sect. 4. Except as influencing the exercise of that discretion, I cannot see how defiance or truculence of the party can affect the matter. He is simply breaking his contract. Perhaps the commonest application of the word "repudiation" is to what is often called the anticipatory breach of a contract, where the party by words or conduct evinces an intention no longer to be bound, and the other party accepts the repudiation and rescinds the contract. In such a case, if the repudiation is wrongful and the rescission is rightful, the contract is ended by the rescission; but only as far as concerns future performance. It remains alive for the awarding of damages, either for previous breaches, or for the breach which constitutes the repudiation. That is only a particular form of contract breaking and would generally, under an ordinary arbitration clause, involve a dispute under the contract like any other breach of contract. There is no difference, for instance, for this purpose between a refusal to take further instalments under a contract for the sale of goods by instalments and a refusal to take the entire contract quantity where the tender is to be a single delivery. I need scarcely add that one party to a contract cannot put an end to it. To produce that effect there must be rescission. An anticipatory breach does not necessarily involve an actual intention to break the contract. Intention is to be judged by the party's conduct. The difference between repudiating a contract and repudiating liability under it must not be overlooked.

It is thus necessary in every case in which the word repudiation is used to be clear in what sense it is being used. The next step is to examine the arbitration clause. If the case falls within the arbitration clause, there has still to be considered whether the court should refuse to stay the action under sect. 4.

In the present appeal I think that the Court of Appeal was right in holding that the disputes were disputes within the clause, and that there was sufficient reason to stay the action under sect. 4. This latter is a distinct question which I shall discuss later. I have assumed for the purposes of this case, what I very much doubt, that the allegation in the writ showed a *prima facie* case of anticipatory breach and rescission. This assumption enables the appellants to raise their main contentions, which I take to be that the repudiation and rescission had put an end to the contract and the arbitration clause with it. In my opinion, if I may apply the words of VISCOUNT FINLAY in a similar case, this contention is not only unreasonable, but it is not supported by the authorities.

The case to which I refer is *Sanderson* v. *Armour* (7), where buyers brought an action in the Scots courts for damages under a contract for the sale of goods by instalments, alleging that the first instalment was so bad that they were entitled to refuse to accept other instalments without first being given an opportunity to examine them. When the sellers refused this opportunity, the buyers claimed to rescind and brought an action for damages, whereupon the sellers invoked the arbitration clauses in the contracts under which disputes arising out of or on the contracts were submitted to arbitration. It was held by this House, affirming the courts below, that the dispute was covered by the submission. In answer to objections, based on the observations which I quoted above from *Johannesburg Municipal Council* v. *Stewart* (8), VISCOUNT FINLAY observed that the proposition that the mere allegation by one party of the repudiation of the contract by the other deprived the latter of the right to take advantage of an arbitration clause was unreasonable in itself, and there was no authority to support it. LORD DUNEDIN and LORD SHAW agreed that the submission must receive effect. Their lordships found difficulty in explaining the observations in the *Johannesburg* case (8). That action was brought in the Scots courts. It involved claims on complicated constructional contracts which included arbitration clauses. Some of the contracts were to be construed according to English law, which differs from Scots law in that the English Act gives a discretion to the court whether or not to stay the action, whereas under the Scots Act the submission is mandatory, so that the court has no discretion, but must refer. The appeal was eventually decided by this House by referring back the matter to the Scots court to exercise its discretion under sect. 4 of the English Act. From this point of view the *dicta* which I quoted were not material to the decision. The observation of LORD LOREBURN, L.C., which I have quoted above, is certainly somewhat cryptical and in the *Hirji Mulji* case (3), LORD SUMNER, observing that it did not help the appellants, added, at p. 571, "Whatever exactly this sentence means." The observations of LORD SHAW are explained by LORD DUNEDIN in *Sanderson's* case (7) as to be taken *secundum subjectam materiam.* The distinction was taken that in the *Johannesburg Municipal Council* v. *Stewart* (8) the repudiation was admitted, but this does not appear a sound distinction. On the whole, I think that it is impossible to find any clear guidance as to principle or practice from the *Johannesburg* case (8), except that it affords an instance of the court's discretion under the Arbitration Act. *Sanderson's* case (7) was expressly approved and applied by the Privy Council in *Champsey Bhara & Co.* v. *Jivraj Balloo Spinning & Weaving Co.* (21), at p. 488. Under a contract for the sale of goods, the buyers rejected a tender of the whole contract quantity. It was not a sale by instalments. There was an arbitration under the general submission contained in the contract. In proceeding to set aside the arbitrator's award, it was contended that it was for the court to inquire whether there was a repudiation and consequent termination of the contract; if there was, it was said, the arbitration clause did not apply. LORD DUNEDIN, in delivering the judgment of the Judicial Committee, said that it was for the arbitrator and not for the court to decide what was the effect of the rejection. He said, at p. 489:

> In truth this point is decided in terms by the recent case of *Sanderson* (7). It was a Scotch case, but in no way depended on any peculiarity of the law of Scotland.

Champsey's case (21) was not indeed one of anticipatory breach, but it was a rejection of the whole delivery of goods under the contract, and in that sense might, if wrongful, be treated as an entire repudiation. In the *Hirji Mulji* case (3), at p. 503, LORD SUMNER approves of *Champsey's* case (19) as an authority along with *Sanderson's* case (7) for the proposition that an arbitrator has jurisdiction to adjudicate upon breaches of a contract partly or wholly performed and still in existence for the purpose of awarding damages for such breaches already committed, even though it is determined as regards future performance by repudiation on one side and acceptance by the other. Having regard both to principle and authority, I read this proposition as including damages for anticipatory breach, where rescission follows.

These authorities in my opinion cover specifically the present case. It is true that the breach is only complete and enforceable at the moment of rescission so that breach and termination of the contract are simultaneous. So, indeed, they are in the case of a single entire breach like the rejection in *Champsey's* case (21). The distinction made by LORD SUMNER implied in the words "still in existence," was applied by him in the *Hirji Mulji* case (3), where he refused to hold that a submission of disputes *under* the contract covered a dispute whether there was frustration of the contract, on the ground that when the dispute arose the contract had ceased to exist and so had the arbitration clause along with it. This decision, though the case was one of frustration of contract, was relied on before your Lordships in argument as casting doubt on the general principle which I have been stating. The question in the *Hirji Mulji* case (3) arose on a charterparty of a vessel which had been made subject to a requisition so prolonged (as it was eventually held by the Privy Council) that it defeated the adventure and abrogated the effect of a delay clause. When after two years the vessel was released, the shipowners required the charterers to complete the contract, but the charterers refused. The shipowners claimed damages. The charterers refused to pay. An arbitration was held under the submission, and the arbitrator awarded damages to the shipowner for breach of the contract, holding that there had been no frustration. An action was brought to enforce the award, which succeeded until it came to the Privy Council, where it was held that the action should be dismissed on the ground that the arbitrator had no jurisdiction, because, when the dispute arose in 1919, the charter was already frustrated, so that there could be no dispute under the contract, which had ceased to exist. Frustration operates, said LORD SUMNER in delivering the judgment of the Board, automatically ; it strikes once and strikes no more. The contract then ceases to exist for all purposes, save the enforcement of claims vested before that date, of which there were none in the case before the Board. I confess I feel some difficulty in reconciling this decision with views expressed by this House in *Scott & Sons* v. *Del Sel* (12), where a claim for damages was defended on the ground that performance had been prevented by a government prohibition. This defence was relied upon, either on the basis of an express condition of the contract, or on the ground of delay frustrating the contract. The question was whether the arbitration clause was still operative. LORD DUNEDIN was of opinion that in either event there was a dispute *under* the contract within the submission. Frustration depended, in his opinion, on an implied term of the contract. This is the explanation of the doctrine generally accepted by the English authorities, though for reasons which I have explained elsewhere, I prefer and substantially accept the explanation given by LORD SUMNER in the *Hirji Mulji* case (3). Whichever explanation is accepted, the result ought, in my opinion, to be the same in regard to the present question. However automatic and immediate the frustration, or at whatever time it is operative, its effect must depend on the meaning of the contract and its operation in the events that occurred. LORD BUCKMASTER took the same view as LORD DUNEDIN, but VISCOUNT CAVE and LORD SHAW decided the question simply on the express terms of the contract, and thought that questions of frustration and of implied terms were irrelevant.

As at present advised, I find it difficult to distinguish a dispute where there is a claim for damages and the defence set up is that the contract is frustrated from any other defence, or to understand why such a dispute should be outside a submission of disputes *under* the contract. It is no doubt less difficult to treat these questions as falling within a submission of disputes arising *out of* or *in relation* to a contract, but I do not think such differences in words should be decisive. It is certainly desirable, if possible, to have broad and simple rules in these matters. Frustration, if it occurs, no doubt puts an end to the contract for the future as much as does rescission after repudiation or any other whole breach, though in that case there is a claim for damages for the breach, while in respect of frustration there is no claim for damages. The dispute in all such cases where frustration is alleged is whether there has been frustration at all, and such a dispute would seem logically to arise " under the contract ", and to fall within the submission just as much as if the words had been " arising out of it." However, the question is still open for decision in this House, and does not arise in this case, and I merely refer to it to say that, however answered, it would not help the appellants.

Further, the appellants are not helped by the rule that, generally speaking, a dispute whether the contract ever existed, as contrasted with the question whether it has become ended, is not within the usual form of submission of differences arising out of the contract or the like, because, if there was never a contract, there could never be disputes arising out of it—*ex nihilo nihil fit*. It is all a question of the scope of the submission. Hence, if the question is whether the alleged contract was void for illegality, or, being voidable, was avoided because induced by fraud or misrepresentation, or on the ground of mistake, it depends on the terms of the submission whether the dispute falls within the arbitrator's jurisdiction. This, for example, was applied by the Court of Appeal in *Toller* v. *Law Accident Insurance Co.* (22). The position may be different where the contract contains a clause that in certain events it is not to be enforceable. This distinction is illustrated by *Woodall* v. *Pearl Assurance Co.* (20), an action on a policy which made an award a condition precedent to recovery. The policy contained a provision that any misstatement or suppression in the proposal and declaration on which the policy was based should render it null and void. It was held that a claim by the company that the policy was null and void under that provision was within the submission, and that the company was not repudiating the contract as a whole, but denying liability under it in reliance on its express terms. A similar conclusion was reached in *Stebbing* v. *Liverpool & London & Globe Insurance Co., Ltd.* (23), in which Viscount Reading, L.C.J., said, at pp. 436, 437 :

> In truth the company is relying on upon a term of the policy which prevents the claimant recovering . . . If they succeed in escaping liability that is by reason of one of the clauses in the policy.

These decisions were approved by Lord Sumner in *Macaura* v. *Northern Assurance Co.* (24), where he said, at p. 631 :

> The defendants do not repudiate the policy or dispute its validity as a contract ; on the contrary, they rely on it and say that, according to its terms, express or implied, they are relieved from liability . . .

I may observe the word " implied " as significant. The arbitrator is not limited to the mere words of the contract. On the same principle a submission of disputes arising out of the contract includes disputes as to the existence or non-existence of a custom as being " relevant to the true meaning and effect of the contract " (*per* Lord Parker in *Produce Brokers* case (16), at p. 328). In *Macaura* v. *Northern Assurance Co.* (24) it was contended that the defendant insurance company, by pleading that the plaintiffs had no insurable interest, had done the same thing as if they had pleaded the Gaming Act, and had on that ground claimed that there was no contract for arbitration or anything else. Lord Sumner, at p. 631, pointed out the fallacy of that contention. A gaming contract is illegal and a nullity. Absence of reasonable interest would be a ground for refusing to pay the loss under a contract otherwise valid. Two recent cases in the Court of Appeal illustrate the principle laid down in *Woodall* v. *Pearl Assurance Co.* (20), that a denial of liability based on the express terms of the contract is in general no different in its effect on the ordinary arbitration clause from a denial that there was ever a contract at all. These cases are *Golding* v. *London and Edinburgh Insurance Co.* (1) and *Stevens* v. *Timber and General Mutual Accident Insurance Assocn.* (25).

In the latter case, it was observed by Romer, L.J., that an arbitrator could not arbitrate on the rightfulness of a repudiation because, if he held that the repudiation was not justified, but that the rescission was justified, he would be awarding that the contract was gone and making an award against the existence of his own jurisdiction. I should prefer to put it that the existence of his jurisdiction in this as in other cases is to be determined by the words of the submission. I see no objection to a submission of the question whether there ever was a contract at all, or whether, if there was, it had been avoided or ended. Parties may submit to arbitration any or almost any question. In general, however, the submission is limited to questions arising upon or under or out of a contract which would, *prima facie*, include questions whether it has been ended, and, if so, whether damages are recoverable, and, if recoverable, what is the amount.

I must, however, refer to the curious case of *Jureidini* v. *National British & Irish Millers Insurance Co., Ltd* (9), in which VISCOUNT HALDANE made an observation much relied on by the appellants. That case had two features which require to be noted. One was that there was no submission except of differences as to the amount of loss. The other was that the award of the arbitrator of the amount of the loss or damage, if disputed, was to be a condition precedent to any right of action upon the contract. The contract was a fire policy. The assured claimed a loss by fire under it. The company resisted the claim on the ground that, under the express terms of the policy, all claim was to be forfeited if it was fraudulent, or if the loss was due to the wilful act of the assured, or was with his connivance, and the company relied on both these grounds of forfeiture. The case went to trial before a judge and jury, and judgment was given in favour of the assured for a sum of damages. The judgment was set aside by the Court of Appeal, which held that, under the rule in *Scott* v. *Avery* (15), the courts could not enforce any obligation to pay unless the condition precedent of an arbitrator's award determining the amount had been fulfilled. It is clear that the difficulty in the plaintiff's way in the Court of Appeal arose from the condition precedent. It is also clear that the House of Lords, in reversing the decision of the Court of Appeal and restoring the judgment of the trial court, must have held that the condition precedent was for some reason not binding on the assured. It is unfortunate that the exact grounds on which the House so held are not definitely expressed, but I think that the *ratio decidendi* was that the company, by claiming that all benefit under the policy had been forfeited, had, in the words of LORD DUNEDIN, "necessarily cut out the effect of cl. 17 as creating a condition precedent against all forms of action." LORD ATKINSON and LORD PARMOOR seem also to say that the condition precedent clause had no application, because no difference had arisen (or, apparently, in the circumstances could arise) as to matters that could come within that clause. LORD DUNEDIN suggests that the company might have met the difficulty by having the issue of liability decided by a jury and requiring the amount of damage to be ascertained by an arbitrator. The observation of VISCOUNT HALDANE, L.C., which the appellants relied upon, was his statement [p. 505] that:

> . . . when there is a repudiation which goes to the substance of the whole contract I do not see how the person setting up that repudiation can be entitled to insist on a subordinate term of the contract still being enforced.

It may be observed that this observation was solely that of VISCOUNT HALDANE, and was not concurred in by his colleagues and was not necessary to the *ratio decidendi* adopted by them. It may be simply another way of stating that the company by their conduct had waived the condition and were not entitled to rely upon its non-fulfilment. If it means that the company, by making allegations which, if established, relieved them from liability under the terms of the policy, repudiated the contract, I do not think that it can be regarded as good law, nor is it consistent with the later authorities which I have cited. LORD SUMNER, in *Macaura* v. *Northern Assurance Co.* (24), at p. 631, states the effect of the decision in *Jureidini's* case (9), to be

> that the defendants could not both repudiate the contract *in toto* and require the performance of a part of it, *which only became performable when liability was admitted or established.*

I have italicised these last words because I think they distinguish *Jureidini's* case (9) from cases like *Woodall* v. *Pearl Assurance Co.* (20), which LORD SUMNER approved. In the *Hirji Mulji* case (3) he repeated much the same idea, adding "it is a case of approbation and reprobation."

Perhaps what LORD SUMNER meant was that the company had somehow prevented the possibility of an arbitrator awarding damages if liability were established. It is familiar law that a party who has prevented fulfilment of a condition precedent cannot set up the fact of its non-fulfilment. It is, however, enough here to say that on any view *Jureidini's* case (9) does not, in my opinion, help the defendants.

The authorities, I think, sufficiently dispose of an argument based on the maxim that a party cannot both approbate and reprobate a contract, at least in reference to an ordinary submission, as contrasted with a clause making an award a condition precedent so that it is not merely collateral or procedural, but essential to the obligations of the contract. Like all maxims of the law, that maxim, though it has a proper but very limited application, is too vague and general to be applied without careful limitation ; otherwise it is apt to be misleading, as many cases have shown. Recently, in *Lissenden* v. *Bosch* (26), this House indicated what are the true metes and bounds of the maxim. Its most correct application is in relation to the equitable doctrine of election, but it is also used as meaning that a party cannot take the benefits of a contract without conforming to its onerous conditions. This cannot truly be said of a man who, being sued for repudiation or breach of a contract, disputes the liability and claims the benefit of an arbitration clause to decide whether or not he is liable. He is, in truth, not reprobating the contract, but approbating it. He is using it as a shield against the claim. This, I think, is abundantly clear from what I have already said and need not repeat, and from the authorities which I have cited. The maxim is also sometimes invoked to indicate conduct which disentitles a party to rely on conditions precedent ; but the ordinary arbitration clause is not a condition of the contract.

Where used in reference to arbitration, the maxim has been relied on, not as matter of law, but of discretion. This, I think, is the only correct use in this context. The Arbitration Act, 1889, s. 4, makes the power of the court to stay an action under the arbitration clause a matter of discretion and not *ex debito justitiae*. Though the dispute is clearly within the arbitration clause, the court " may " still refuse to stay if, on the whole, that appears to be the better course. The court must, however, be satisfied on good grounds that it ought not to stay. The onus of thus satisfying the court is on the person opposing the stay, because in a sense he is seeking to get out of his contract to refer, though, in truth, an arbitration clause is not of strict obligation, because it is, under sect. 4, always subject to the discretion of the court. In the present case the judge (agreeing with the master) has exercised his discretion against the application of the arbitration clause. The Court of Appeal reversed the decision of the judge. The judge's discretion is, indeed, primary, but it is subject to appeal. The duty of appellate courts on an appeal against the exercise of a discretion has been examined by this House in *Evans* v. *Bartlam* (27) and in *Osenton* v. *Johnston* (17). It is enough here to say that the appellate court will only set aside the discretionary order if satisfied that it is clearly wrong. It will make every reasonable presumption in favour of upholding the judge. It has been argued here that the order of CASSELS, J., was right, or, at least, was not so clearly wrong as to justify its being reversed. The judge in this case, like the master, has carefully set out his reasons in writing. His view, in effect, is that the broad issue is a question of law, apparently not so much on the construction of the contract as on that of the correspondence, whether in law or in fact or in both there has been a repudiation. In my opinion, these reasons are not sufficient to justify staying the action. The judge seems to rely on the language which he quotes from LORD PARKER in *Bristol Corporation* v. *Aird* (18), to the effect that everybody knows that, with regard to the construction of an agreement, it is absolutely useless to stay the action, because it will only come back to the court on a case stated. Any expression of opinion falling from that great judge must receive the most careful consideration, but it would not be safe to tear it from its context and give it a general application. I need not quote authorities for what has been said so often that, under a general submission, the arbitrator is appointed to decide issues both of fact and law. In the background, indeed, is the court's jurisdiction to set aside an award if it is bad in law on its face, and the opinion of the court on issues of law may be invoked by means of cases stated under the Acts of 1889 and 1934. If the submission is general, however, it will require some substantial reason to induce the court to deny its due effect to the agreement of the parties to submit the whole dispute, whether it includes both fact and law or is limited to either fact or law. In the present case I can find no sufficient reason. The dispute is of the most ordinary character. The correspondence pursues a course similar to that in hosts of other commercial disputes. I think that the judge has acted upon an erroneous conception of the true rule in cases of this nature and that his order should be set aside.

I agree with the general conclusions on the matter summarised by Viscount Simon, L.C., in the closing paragraphs of his opinion, and I concur in the motion proposed.

Lord Porter: My Lords, the substantial reason why your lordships gave leave to appeal in this case was to invite a discussion of the somewhat difficult question whether an arbitration clause in a contract continues to be effective, though the contract itself has been broken in a matter going to its root or has A
otherwise been terminated. The appellant was not, however, confined to an argument on this point and rightly invited your Lordships to consider other aspects of the matter.

The propositions which he put forward were two in number. (i) The judge had the whole matter before him and, in deciding as he did, exercised his discretion in favour of the appellants. In so doing he had followed no wrong principle and his discretion should therefore not be interfered with. B
(ii) The contract had been repudiated in fact by the respondents, owing to their refusal and continued failure to perform it, and also by their claim to accept the action brought by the appellants as a repudiation, and that consequently (*a*) the whole contract was at an end and with it the arbitration clause, or, at any rate, (*b*) the respondents who had repudiated it could not after such repudiation rely upon the clause which formed one of its terms. Both are C
difficult problems, but I have come to the conclusion that the appellants are wrong.

Of the two propositions, the first was the more strongly pressed. The principle upon which your Lordships' House will, and a Court of Appeal should, act in an appeal from the exercise of a judge's discretion is well known and has lately been restated in the case of *Osenton* v. *Johnston* (17), *per* Viscount Simon, L.C., at p. 250: D

> . . . appellate authorities ought not to reverse the order merely because they would themselves have exercised the original discretion, had it attached to them, in a different way. If, however, the appellate tribunal reaches the clear conclusion that there has been a wrongful exercise of discretion, in that no weight, or no sufficient weight, has been given to relevant considerations such as those urged before us by the appellant, then the reversal of the order on appeal may be justified.

In the present case we have the advantage not only of the judge's decision, E
but also of the reasons upon which it is founded. He states them as follows:

> The broad issue here is a question of law; in the circumstances it would be more suitable for the case to start in the law courts than before an arbitrator; whilst the agreement itself offers no difficulty of construction, the correspondence which has passed between the parties may.

This is, I think, a misapprehension. The broad question is not one of law, but one of law and fact combined and of law dependent upon the view of the facts F
taken by the tribunal which is to determine the issue.

Indeed, a little later in his judgment, the judge himself seems to recognise that the issue to be determined is not law alone. He says:

> The court will be able to decide much better than an arbitrator whether in law or in fact or in both there has been a repudiation, whether in law or in fact they were entitled to take up the attitude which they did take up as revealed by the correspondence, whether there has been a breach of agreement by either the plaintiffs or the defendants which G
> would entitle either the plaintiffs or the defendants to damages, and various other matters which, when the pleadings come to be drawn, will undoubtedly be raised.

It is unnecessary to determine whether the judge is right in believing that such matters are better left to the decision of a court than to that of an arbitrator. I can imagine it being contended, rightly or wrongly, that one versed in business disputes would be at least as good a tribunal as a lawyer; but that is not the question. The parties have chosen to refer their differences to H
arbitration, and to arbitration they should go in the ordinary course, unless there is some good reason to the contrary, as, e.g., where there is nothing but law to be decided, as was the case in *Rowe* v. *Crossley* (28).

In these circumstances, it seems to me that there is no sufficient ground in law for refusing to stay the action, and in so deciding your Lordships would not simply be substituting the discretion of the House for that of the judge, but would be following the principles which should guide the action of tribunals in determining whether a case should be referred to arbitration or not. If, then, there is no sufficient reason why the court should have exercised its discretion in staying the action, the appellant is thrown back upon his contention that the contract between the parties has come to an end, and with it the arbitration clause which forms part of the contract.

The argument is of wide application and has given rise to a mass of litigation in which it is not always easy to see the exact grounds upon which a particular decision was based. *Johannesburg* v. *Stewart* (8), *Jureidini* v. *National Insurance* (9) and *Hirji Mulji* v. *Cheong Yue S.S. Co.* (3) on the one side, and *Sanderson* v. *Armour* (7), *Scott* v. *Del Sel* (12) and *Macaura* v. *Northern Assurance Co.* (24), on the other, to quote only some of the cases which have reached your Lordships' House or the Privy Council, have been thought difficult of reconciliation one with another. I propose to consider the principles and results of those cases later. Meanwhile, I think it essential to remember that the question whether a given dispute comes within the provisions of an arbitration clause or not primarily depends upon the terms of the clause itself. If two parties purport to enter into a contract and a dispute arises as to whether they have done so or not, or as to whether the alleged contract is binding upon them, I see no reason why they should not submit that dispute to arbitration. Equally, I see no reason why, if at the time when they purport to make the contract they foresee the possibility of such a dispute arising, they should not provide in the contract itself for the submission to arbitration of a dispute as to whether the contract ever bound them or continues to do so. They might, for instance, stipulate that, if a dispute should arise as to whether there had been such fraud, misrepresentation or concealment in the negotiations between them as to make a purported contract voidable, that dispute should be submitted to arbitration. It may require very clear language to effect this result, and it may be true to say that such a contract is really collateral to the agreement supposed to be have been made, but I do not see why it should not be done. Indeed, the possibility of providing for such an arbitration and the difficulty of giving sufficiently precise expression to bring about the required result are both visualised by LORD SUMNER in *Hirji Mulji* v. *Cheong Yue S.S. Co., Ltd.* (3), when he says, at p. 505:

> The arbitration clause is but part of the contract and, unless it is couched in such terms as will except it out of the results, which follow from frustration, generally, it will come to an end too.

Again, at p. 511:

> . . . it is unnecessary to consider in what terms, if any, a clause might have been framed which would have saved the clause alive in the event of the frustration of the adventure and the charter.

An example of a clause held to be wide enough to include a determination of the ambit of the arbitrator's authority is to be found in *Willesford* v. *Watson* (29), where LORD SELBORNE, L.C., said, at p. 477:

> It struck me throughout that the endeavour of the appellants has been to require this court to do the very thing which the arbitrator ought to do—that is to say, to look into the whole matter, to construe the instrument, and to decide whether the thing complained of is inside or outside the agreement.

On the other hand, in *Jureidini's* case (9), the matter submitted was a narrow one, the *quantum* of damage only. In *Sanderson* v. *Armour* (7), at p. 125, LORD DUNEDIN said that the arbitration clause

> . . . may be of two characters. It may be of a limited character generally known as executory arbitration providing for the adjustment of disputes concerned with the working out of the contract. But it may also be of a universal character, submitting all disputes which may arise either in the carrying out of the contract or in respect of breach of the contract after the actual execution has been finished.

The question of the arbitrator's jurisdiction must therefore ultimately depend on the wording of the arbitration clause. As a rule, however, the arbitrator cannot clothe himself with jurisdiction. As LORD PARKER said in *Produce Brokers' Co.* v. *Olympia Oil and Cake Co., Ltd.* (16), at p. 327:

> The arbitrator cannot make his award binding by holding contrary to the true facts that the question which he affects to determine is within the submission . . . Where, however, the submission is contained in the contract it may be a question of construction whether such expressions as "all disputes arising under this contract" include questions as to the ambit of the submission itself. *Prima facie* I do not think that they would . . . .

The principle is repeated by LORD SUMNER in *Hirji Mulji* v. *Cheong Yue S.S. Co., Ltd.* (3), at p. 502, and need not be further illustrated. This does not mean, however, that in every instance in which it is claimed that the arbitrator has no jurisdiction the court will refuse to stay an action. If this were the case, such a claim would always defeat an agreement to submit disputes to arbitration, at any rate, until the question of jurisdiction had been decided. However, this is not so. The court to which an application to stay is made is put in possession of the facts and arguments and must in such a case make up its mind whether A
the arbitrator has jurisdiction or not as best it can on the evidence before it.

Indeed, the application to stay gives an opportunity for putting these and other considerations before the court, that it may determine whether the action shall be stayed or not. The difficulty does not lie as a rule in deciding what tribunal is to determine the arbitrator's jurisdiction—that must generally be the function of the court—but it lies rather in finding what are the factors to be taken into consideration in deciding whether the arbitral contract remains in B
force or not.

Let me illustrate these difficulties by a reference to three cases. In *Sanderson* v. *Armour* (7) the headnote states, and I think states accurately, the effect of the decision in the words :

> Where a contract for the sale of goods contains a clause referring all disputes arising out of the contract to arbitration, the question whether one or other of the parties has C
> by his actings repudiated the contract is a question for the arbitrator.

In the *Hirji Mulji* case (3), on the other hand, it was held that the question whether a contract had been frustrated was not a dispute " under the contract " —at any rate, provided the dispute did not arise until after the contract had been frustrated, and that an arbitrator, who wrongly decided that it had not been frustrated, had no jurisdiction. It is true that in the former case the dispute was as to repudiation and in the latter as to frustration, but in each the question at D
issue was whether the contract, and with it the arbitration clause, was no longer binding. It is also true that in the earlier case the matter submitted was a dispute " arising out of," and in the latter a dispute " under," the contract. Both distinctions, however, appear to have been treated as of no account in *Scott* v. *Del Sel* (12), in which LORD DUNEDIN, himself a member of the Board which decided *Hirji Mulji* v. *Cheong Yue S.S. Co., Ltd.* (3), was dealing with a case E
where it was claimed that prohibition of export had resulted in frustration, and said, at p. 41 :

> Either they [i.e., those who claimed that the contract had been frustrated] must show that there was an express term of the contract which had that effect [i.e., the effect of frustration] or they must show that there was an implied term in the contract which had the same effect . . . It seems to me that they are in this dilemma, that in either view they have got to have recourse to the contract and if they have got to have recourse F
> to the contract it seems to me that the dispute is a dispute under the contract.

It will be observed that this last case raised a question of frustration and that the word " under," not the phrase " arising out of it," required consideration. The only remaining difference which I can see is that in *Scott* v. *Del Sel* (12), your Lordships' House held that the contract was not frustrated, whereas in the *Hirji Mulji* case (3), the Judicial Committee held that it was. However, the principle by which the arbitrator's jurisdiction is to be determined cannot be G
decided by asking whether he came to a right or a wrong conclusion. Moreover, the ground upon which LORD SUMNER relied in the Privy Council (viz., that, as no dispute arose until after frustration had taken place, the contract with all its terms had come to an end) would, I think, apply to all cases where frustration comes in issue and the question to be decided is whether there has been frustration or not.

The divergence of view which is to be found between the decision in *Scott* v. H
Del Sel (12) and the *Hirji Mulji* case (3) arose where the question at issue was : Who is to decide whether or not there has been frustration, the court or the arbitrator appointed by the contract in respect of which frustration was said to have taken place ? The difficulty is not confined to frustration cases. Whatever the true ground of decision, there are expressions of opinion in *Johannesburg Municipal Council* v. *Stewart* (8) and *Jureidini* v. *National Insurance* (9), which seem to indicate that, if one party to a contract repudiates it and if the other party accepts that repudiation, the contract and all its terms including the

arbitration clause come to an end, and neither party can rely upon its provisions. In *Johannesburg Municipal Council* v. *Stewart* (8) there were two arbitration clauses—one referring "differences arising between the parties"; the other "disputes under the contracts." LORD LOREBURN said, at p. 54 :

> If the course [? cause] of action which is established be that there has been repudiation or a breaking of the contract in the sense that the contract has been frustrated by the breach, then it would not be within the arbitration clause in either of these two contracts. If it be established merely that a particular machine or a particular part of the contract has not been executed as it should be, but that the fault is such in degree and character that it can be compensated in damages without frustrating the contract, then it would normally be a question for arbitration.

In *Jureidini* v. *National Insurance* (9), VISCOUNT HALDANE, L.C., said, at p. 505 :

> . . . there has been in the proceedings throughout a repudiation on the part of the respondents of their liability based upon charges of fraud and arson, the effect of which, if they are right, is that all benefit under the policy is forfeited. But one of the benefits is to go to arbitration under this contract, . . . and accordingly that is one of the things which the appellants have, according to the respondents, forfeited with every other benefit under the contract.
>
> Now, my Lords, speaking for myself, when there is a repudiation which goes to the substance of the whole contract I do not see how the person setting up that repudiation can be entitled to insist on a subordinate terms of the contract being still enforced.

He goes on to point out that the judge who tried the action gave judgment for £3,000 for the breach alleged and continues, at p. 506 :

> . . . I think that was probably right, the arbitration clause having gone with the repudiation.

Before dealing with these observations it is desirable to point out that it was recognised in *Sanderson* v. *Armour* (7) and not, I think, controverted in *Johannesburg Municipal Council* v. *Stewart* (8) or *Jureidini* v. *National Insurance* (9) that repudiation by one party has no effect unless it is accepted by the other. The statement of SCRUTTON, L.J., in *Golding* v. *London and Edinburgh, Ltd.* (1), already quoted by VISCOUNT SIMON, L.C., puts the point succinctly.

What is the effect of the decisions in your Lordships' House and elsewhere in cases in which there has been repudiation and acceptance ? In *Stevens* v. *Timber and General Mutual Accident Assurance* (25), ROMER, L.J., appears to have taken the view that the result would be to put an end to all future performance under the contract, including the right or obligation of going to arbitration. He said, at p. 342 :

> The plaintiffs could upon that assumption [i.e., on the assumption that there had been a repudiation of the contract altogether] have elected to accept the repudiation, and thereupon have sued the defendants upon the contract. Had they done so, the arbitration clause would obviously have no operation.

To the same effect FLETCHER MOULTON, L.J., is reported to have said in *Kennedy, Ltd.* v. *Mayor, etc., of Barrow-in-Furness* (30), at p. 445 :

> If the contract has by the repudiation of the defendants ceased to exist, it is clear that neither party can rely upon the arbitration clause.

Cases of frustration merit, I think, separate consideration. At the moment I confine myself to accepted repudiation. In this type of case the argument that accepted repudiation puts an end to all future obligations under the contract (including the obligation to submit disputes to arbitration), at any rate in the case of the injured party, receives, I think, some support from both earlier and later editions of ANSON'S LAW OF CONTRACTS. In the 9th Edn. (1899), SIR WILLIAM ANSON says, at p. 294 :

> If one or two parties to a contract breaks the obligation which the contract imposes, a new obligation will in every case arise, a right of action conferred upon the party injured by the breach. Besides this there are circumstances under which the breach will discharge the injured party from such performance as may be due from him . . . By discharge we must understand, not merely the right to bring an action upon the contract because the other party has not fulfilled its terms, but the right to consider oneself exonerated from any further performance under the contract—the right to treat the legal consequences of the contract as having come to an end, and given place to a new obligation, a right of action.

A similar view is expressed in the latest—the 18th Edn. of 1937. The three sets of circumstances giving rise to a discharge of contract are tabulated by

Anson as : (i) renunciation by a party of his liabilities under it ; (ii) impossibility created by his own act ; (iii) total or partial failure of performance. In the case of the first two the renunciation may occur or impossibility be created either before or at the time for performance. In the case of the third it can occur only at the time or during the course of performance. Moreover, if the third be partial, the failure must occur in a matter which goes to the root of the contract. All these acts may be compendiously described as repudiation, though that expression is more particularly used of renunciation before the time of performance has arrived.

What, then, is the effect of such repudiation if it be accepted ? In such a case the injured party may sue upon the contract forthwith whether the time for performance is due or not, or, if he has wholly or partially performed his obligation, he may in certain cases neglect the contract and sue upon a *quantum meruit*. In the former case he is still acting under the contract. He requires to refer to its terms at least in order to ascertain the damage, and may require to refer to them also if the repudiation of the contract is in issue. In the latter case he is not proceeding under it, but upon *quasi*-contract. The obligations he incurs and the sum he recovers may differ from those provided in the contract and are not dependent upon its terms.

Indeed, the word repudiation accepted or unaccepted is an ambiguous expression. As Scott, L.J., pointed out in *Toller* v. *Law Accident Insurance Society, Ltd.* (22), at p. 958 :

> It may mean : repudiate the original existence of the contract. It may mean : disclose an intention to disregard it *in toto* and refuse to be bound by its terms altogether. Or it may mean : a mere contention that under the terms of the contract the defendant is completely free from liability by reason of some fact.

Except in the first case the contract is not repudiated ; even in the second all that is repudiated is the defendant's future liability under it. Where the contract itself is repudiated in the sense that its original existence or its binding force is challenged, e.g., where it is said that the parties never were *ad idem*, or where it is said that the contract is voidable *ab initio* (e.g., in cases of fraud, misrepresentation or mistake) and that it has been avoided, the parties are not bound by any contract and escape the obligation to perform any of its terms including the arbitration clause, unless the provisions of the clause are wide enough to include the question of jurisdiction. Where the existence of the contract is acknowledged, but one of its terms is relied upon as disentitling the claimant to recover, the arbitration clause is effective. The distinction is pointed out in *Woodall* v. *Pearl Assurance Co.* (20), approved by Lord Sumner in *Macaura* v. *Northern Assurance Co.* (24), at p. 631. In the latter type of case it is true that the contract may be avoided even from its inception, but, as Viscount Reading, L.C.J., observed in *Stebbing* v. *Liverpool & London & Globe Insurance Co.* (23), at pp. 436, 437:

> . . . the phrase "avoiding the policy" is loosely used . . . In truth the company is relying upon a term of the policy which prevents the claimant recovering . . . If they succeed in escaping liability, that is by reason of one of the clauses in the policy.

Subject to the necessity for a careful scrutiny of the terms of the arbitration clause, the law applicable to these two classes of cases is, I think, clear enough.

There remains the question what result follows where the original existence and efficacy of the contract is not in dispute, but one party has, or it is claimed that he has, refused to be bound by its terms and has disregarded it *in toto* and the other party has accepted his repudiation. In such a case the question of damage has still to be determined, and the question whether there has been repudiation may be still in issue. Are these disputes under the contract ? I use the word "under" advisedly since expressions such as "arising out of" or "concerning" have a wider meaning. I think they are. The contract must be adverted to in order to arrive at their solution. To say that the contract is rescinded or has come to an end or has ceased to exist may in individual cases convey the truth with sufficient accuracy, but the fuller expression that the injured party is thereby absolved from future performance of his obligations under the contract is a more exact description of the position. Strictly speaking, to say that, upon acceptance of the renunciation of a contract, the contract is rescinded is incorrect. In such a case the injured party may accept the renunciation as a breach going to the root of the whole of the consideration. By that acceptance he is discharged from further performance and may bring an action for damages, but the contract itself is not rescinded.

The injured party may therefore rely upon the contract and apply to have the action stayed if he desires to do so. What of the alleged wrongdoer ? Can he say to the injured party : "I have not broken the contract and, as you must go to its terms to find out if I have, our dispute arises under the contract" ; or even : "Admittedly I have broken the contract, but it is still in existence, though you are excused from further performance ; nevertheless damages have still to be ascertained and for this you must go to the contract." In discussing this question I leave aside all reference to the discretion of the court given under the Arbitration Act to stay or not to stay, merely observing that I do not see why in making up its mind the court should not take into consideration the fact that the wrongdoer has repudiated the contract. The argument, however, against allowing, at any rate, an admitted wrongdoer from going to arbitration has not been based solely upon discretion. LORD SHAW said in *Johannesburg Municipal Council* v. *Stewart* (8) :

> It does not appear to me to be sound law to permit a person to repudiate a contract and thereupon specifically to found upon a term in that contract which he has thus repudiated.

Similarly, in *Stevens* v. *Timber & General Mutual Insurance Assocn.* (25), ROMER, L.J., spoke of such an act as an attempt to approbate and reprobate. Whether the phrase approbate and reprobate is rightly used in this connection having regard to your Lordships' view as expressed in *Lissenden* v. *C. A. V. Bosch, Ltd.* (26), I do not stay to consider. At most, the party repudiating is not approbating and reprobating the contract, if that phrase be permitted, but only his future liabilities under it. The contract itself is still in existence and with it the arbitration clause. In these circumstances I do not see why even the wrongdoer should not apply to have the action stayed and succeed in his application, unless the court in its discretion will not let him take advantage of a clause in a contract which he has refused to carry out. In this, I think that the right to insist upon arbitration differs from the claim to require the further performance of the other terms and conditions of the contract. In respect of these latter the injured party may be excused from further performance after essential breach and acceptance of that breach as a renunciation of the contract : see *General Billposting Co.* v. *Atkinson* (4), a case in which a servant wrongfully dismissed was held no longer bound by a clause restricting his right to trade after the determination of his service.

So far, however, as arbitration is concerned

> the injured party must abide by the arbitration clause for it is severable and expressly inserted to deal with breaches including such breaches by repudiation.

I quote from the notes to *Cutter* v. *Powell* (31) in 2 SMITHS LEADING CASES, at p. 37. As my noble and learned friend LORD MACMILLAN has said, the arbitration clause is inserted as a method of settling disputes and is not imposed as a term in favour of one party or the other.

The same observations as apply to accepted repudiation apply, I think, to frustration. The phrase "frustration of the contract" is as inaccurate in expression as is the phrase "rescission of the contract by repudiation." The contract is not frustrated. Its future performance or the adventure is frustrated. The damages are still at large and so is the question whether, having regard to the terms of the contract express or implied, there has been frustration or not. This appears to have been recognised in *Scott & Sons* v. *Del Sel* (12), which though a Scottish case was decided on the same principles as apply in English law, and is binding upon your Lordships' House. So far as the case of *Hirji Mulji* (3), which is not binding, lays down a different principle, I do not think it should be followed, despite the authority which it undoubtedly possesses.

My Lords, the question of the effect of frustration upon the arbitration clause differs in some degree from the effect of repudiation, but in essentials I doubt if there is any distinction. In the one as in the other the question whether future performance is excused is a matter for the arbitrator, dependent, indeed, in one view upon the construction of the contract and the terms to be implied in it. I do not think it is an answer to say that the dispute arises after the contract is frustrated. It may, indeed, it must do so, if frustration is alleged to have taken place and its occurrence is disputed. The dispute may, but the matter in dispute does not, arise after the contract is over—it is synchronous with the moment of its alleged ending, i.e., it arises at the moment at which it is rightly or wrongly contended frustration took place.

So far as concerns the other cases quoted which seem to conflict with this view, I agree with Viscount Simon, L.C., in thinking that the true grounds of the decision in the *Jureidini* case (9) was the narrowness of the field of submission and the fact that no dispute had arisen on the only point submitted to arbitration. *Johannesburg Municipal Council* v. *Stewart* (8) is rightly, I think, to be looked upon as having been referred back to the Court of Session to exercise that discretion which they would not have had if the contract had been governed by Scottish law, but which they in fact had because it was an English contract. Moreover, its provisions were complex, containing no less than three arbitration clauses. The decision is explained on both these grounds in the later case of *Sanderson* v. *Armour* (7).

Apart from the argument based upon discretion, which I have negatived, the only contention raised in the present case is that the contract had come to an end and with it the arbitration clause, or, at any rate, that the respondents have in some way repudiated the contract and, therefore, should not be permitted to rely upon the arbitration clause contained in it. There is, I think, more than one answer to this argument. (i) I can see no ground for asserting that the respondents ever repudiated the contract. Rightly or wrongly, they thought themselves entitled to protection against claims by third parties and accordingly stated in their letter of Aug. 22, 1939, that they could only accept further orders on the strict understanding that from the amounts due a percentage must be retained to build up a reserve. A number of other disputes arose between the parties, but the letter of Aug. 24 contained what the appellants claimed to be a repudiation of the contract. This letter, however, cannot be read alone. Business dealings and negotiations and disputes as to the rights of the parties under the contract continued after it and, so far from showing an intention to repudiate the contract, the respondents as late as Nov. 7 suggest either cancelling the contract altogether or entering into negotiations with a view to drawing up another. This is not repudiation, but suggested variation of a contract recognised to be in existence, even though the respondents may wrongly interpret its terms and their rights under it. (ii) Even if I were wrong in this view, the respondents would still, for the reasons which I have endeavoured to state above, be entitled to take advantage of the arbitration clause. I concur in the motion proposed.

Appeal dismissed.

Solicitors: *Nicholson, Graham & Jones* (for the appellants); *Pennington & Son* (for the respondents).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

INCOME TAX COMMISSIONER, BIHAR AND ORISSA *v.* MAHARAJADHIRAJ SIR RAMESHWAR SINGH OF DARBHANGA.

[Privy Council (Lord Atkin, Lord Thankerton, Lord Romer and Sir George Rankin), **November 13, December 12, 1941.**]

Income Tax—Deductions from profits—Costs of litigation—Unfounded action relating to business transaction.

The respondent's father made a loan of 10 lakhs of rupees to a company in which he was a shareholder, and recovered this loan in an action, the costs of which were allowed as an expense incurred in his moneylending business in the assessment of his income tax. Certain shareholders in the company brought an action against the respondent's father and others for conspiracy, collusion, misrepresentation, and breach of contract. The basis of this action was an alleged transaction, of which the loan was part, whereby the respondent's father agreed to finance and manage the company. The action was dismissed, the version of what took place relied upon by the plaintiffs being found to be completely false. The respondent's father died before the conclusion of the suit, and the respondent who continued his business claimed to deduct the costs in arriving at the assessment of profits. The appellant contended that there was no connection between the loan and the alleged transaction which was the basis of the action against the respondent's father, the action being of a personal character and unrelated to his business as a moneylender :—

HELD : the respondent was entitled to make the deduction claimed. The allegations against the respondent's father were built up upon the transaction in which the loan was made, and the defence of the action was necessary for the protection of his rights as the creditor in the loan.

[**EDITORIAL NOTE.** It is clear that in the conduct of any business the bringing of proceedings to enforce the payment of sums due to the owner of the business must from time to time form part of the transactions necessary to the proper carrying on of the business. The expenses of bringing these actions are recognised as a proper deduction against profits. The present case takes the matter a considerable step further. Here an action, which the court in the exercise of considerable judicial restraint has characterised as unfounded, was brought against the taxpayer. The action in fact was based on matters which the plaintiffs found it quite impossible to prove, and it seems that the plaint itself covered some 80 pages of print, and was said to be quite unintelligible. The defence of such an action, which must be a serious charge upon the profits of the business, is held to be undertaken as part of the transactions of the business and the costs incurred in such defence are held to be a proper deduction against profits. The material provisions of the Indian Act in this connection are the same as those of the English Act, and the decision can be cited in relation to the latter Act to the same extent as any other decision of the Privy Council may—that is, though not absolutely binding, it is to be treated with the greatest respect.

AS TO EXPENSES WHOLLY OR EXCLUSIVELY EXPENDED FOR PURPOSE OF THE TRADE, see HALSBURY, Hailsham Edn., Vol. 17. pp. 152, 153, para. 312 ; and FOR CASES, see DIGEST, Vol. 28, pp. 46, 47, Nos. 233-236.]

Case referred to :

Strong, Co.,, Ltd. v. *Woodifield*, [1906] A.C. 448 ; 28 Digest 57, *290* ; 75 L.J.K.B. 864 ; 95 L.T. 241.

APPEAL by the income tax commissioners from the judgment of the High Court of Judicature at Patna.

The taxpayer claimed to deduct the costs of litigation which he alleged that he had incurred in the course of his business. The taxpayer was a moneylender and had lent a firm Rs.10,00,000, as he contended, as a loan. The firm brought an action against him alleging that he had provided the money not as a loan, but as part of an agreement to finance and manage the firm. The allegations in that action were many and of great length and complexity, but it is sufficient for the purposes of this appeal to say that in the main they charged the taxpayer with misconduct in the management of the business and fraud and conspiracy. The action was a long one and the costs were heavy. The charges against the moneylender failed completely because it was found as a fact that there never was any agreement to manage the company and that the only transaction was a loan. The taxpayer recovered judgment for the amount of his loan and was allowed to deduct the costs relative to that as a deduction in computing his taxable income. The costs of defending the action charging him with fraud and conspiracy and failure to manage the company according to the alleged agreement, were not allowed as a deduction. The reason given for this refusal was that it was an unfounded action brought against the taxpayer as a rich man and fought by him not as a matter relating to his business of moneylender, but to defend his honour and preserve his capital as an individual and not as a business man.

J. Millard Tucker, K.C., and *W. Wallach* for the appellants.

Roland Burrows, K.C., and *C. J. Colombos* for the respondent.

Tucker, K.C. : The claim in the action was not against the respondent as a moneylender. It was in part a claim against him based on a contract to manage the business of the company, and in part an attack upon his honesty in managing the business. These claims are quite foreign to the business of moneylending and ought not to be allowed as deductions from profits : *Strong* v. *Woodifield* (1).

Burrows, K.C., was not called upon for the respondent.

LORD THANKERTON : In connection with the assessment of the profits and gains of his business as a moneylender for the year 1931-1932, the respondent claimed the deduction of Rs. 2,07,018 expended in the year of account as an allowance admissible under the Indian Income-tax Act, 1922, s. 10 (2) (ix). The respondent's claim was rejected by the income-tax officer, the assistant commissioner of income tax, and the commissioner of income tax, the last of whom, at the request of the respondent, made a reference under sect. 66 (2) to the Act of the High Court of Judicature at Patna, which decided the reference in favour of the respondent by a judgment dated Oct. 17, 1939, against which the present appeal has been taken by the appellant.

The relevant provisions of sect. 10 of the Act are these :

> (1) The tax shall be payable by an assessee under head " Business " in respect of the profits or gains of any business carried on by him. (2) Such profits or gains shall be computed after making the following allowances, namely . . . (ix) any expenditure (not being in the nature of capital expenditure) incurred solely for the purpose of earning such profits or gains . . .

The expenditure sought to be deducted consisted of law charges incurred during the accounting year in connection with a suit for damages brought in 1926 by Major Anthony John and others, shareholders in the Agra United Mills, Ltd., against the respondent's father, the late Maharajadhiraj Sir Rameshwar Singh and several other defendants, for conspiracy, collusion, misrepresentation, breach of contract, etc. During the pendency of the suit, the late Maharajadhiraj died on July 3, 1929, and the respondent and his brother were substituted for their father. The suit was dismissed by the Court of the Additional Subordinate Judge of Agra on Feb. 26, 1931.

The only question in the appeal is whether the expenditure in question was " incurred solely for the purpose of earning " the profits or gains of the respondent's moneylending business. The respondent has continued the moneylending business carried on by his father. The question of law which was referred to the High Court was whether or not the costs in question are legally a business deduction. After a scrutiny of the plaintiffs' allegations in the Agra suit of 1926 and of the findings of the Agra court which led to its dismissal, the appellant states in paras. 8 and 9 of the case stated under sect. 66 (2) of the Act :

> 8. The only connection of the late Maharajadhiraj with the Agra United Mills Co., Ltd., was that he was a shareholder, and that he has advanced a loan of Rs. 10,00,000 to the mill. For the latter the late Maharajadhiraj had brought a suit and obtained a decree in 1929. The expenses incurred in this latter suit have been allowed as expense incurred in the assessee's moneylending business. The Agra suit had no connection with any business of the assessee. He was involved in the suit because he happened to be a very rich man and was therefore liable to attack by unscrupulous persons to relieve him of part of his surplus cash.
>
> Opinion of the commissioner.
>
> 9. On the above findings of fact, it is respectfully submitted that the expense for defending the Agra suit was not a business expense, that is, it was not an expense incurred for earning any profits assessed to income tax, and as such the assessee is not entitled to deduct the sum as a " business deduction " against the assessable profits.

On Nov. 23, 1927, the High Court passed an order which required a further statement from the appellant as to whether the moneylending business of the late Maharaja and the assessee is such as would have included transactions of the kind into which he was alleged to have entered with the United Agra Mills, Ltd. In response to a request by the appellant, the respondent furnished him with the details of six other transactions, which the respondent claimed to be comparable to the transaction now in question. Thereafter, on Aug. 22, 1938, the appellant submitted a further case stated relating to these six transactions, in which he sought to distinguish them from the transaction here in question, and answered in the negative the question put to him by the High Court. The appellant's reasons for distinguishing these six transactions will be referred to later. The judges of the High Court held that the conclusion of the appellant could not be supported on the facts stated by him and that the assessee was entitled to the deduction claimed by him. As the appellant had done, they scrutinised the plaint and the judgment in the Agra case, as providing the test for decision of the reference. Agalwara, J., stated :

> The contention that the suit against the late Maharaja was instituted against him, not because he was a moneylender, but because he was a wealthy nobleman, is not, in my opinion, acceptable. It was because the late Maharaja lent money to the company that an opportunity was afforded to the plaintiffs to allege that the advance of 10 lakhs of rupees actually made was only a part performance of a contract the scope of which was very much wider. It was the relationship of moneylender and borrower which provided a foundation on which the allegations against the late Maharaja were

based and the main purpose of the suit was to obtain damages for the breach of an alleged moneylending transaction.

Later, MEREDITH, J., said :

> I agree with the view taken by my learned brother. The late Maharajadhiraj brought a suit for recovery of 10 lakhs of rupees advanced to the mill, a decree was obtained in 1929, and the assessee was allowed to deduct the expenses incurred in this suit as expenses incurred in his moneylending business. If spending money to recover
> A this 10 lakhs is treated as not being in the nature of capital expenditure, and incurred solely for the purpose of earning the profits or gains of the moneylending business, then I cannot see why money spent in defending a false claim arising out of the same transaction is not to be treated upon the same basis. Both suits were based upon the same transaction—namely, the advancing of the 10 lakhs—though no doubt very different versions of that transaction were given by the plaintiffs in each of the suits, the version of the plaintiffs in the suit against the Maharaja being almost completely false. That version might have been an almost completely false version of what took
> B place, but it cannot be denied that it was built up upon the transaction in which the loan of the 10 lakhs was made. If the Maharaja was to show a profit upon this transaction, it was not only necessary for him to sue for recovery, but also to defend any false claims which might have been based on the transaction. Defence of such suits must be regarded, in my view, as a necessary though unpleasant part of the business of moneylending. I am satisfied that the suit was primarily against the Maharaja in his capacity as moneylender, and not merely as a rich nobleman, and it was based
> C primarily too upon breach of contract by the moneylender.

In the opinion of their Lordships, the only right view as to the nature of the Agra suit is that expressed by these judges. It appears that the conclusion arrived at by the appellant was mainly based upon his view that there was no connection between the late Maharaja's loan of 10 lakhs of rupees to the mills and the transactions alleged by the plaintiffs in the Agra suit. This view is
D expressed in para. 8 of the appellant's case stated, and is repeated in his further case stated in commenting on the six other transactions cited by the assessee. In reference to (ii) and (vi), he states :

> In both these cases the assessee found himself compelled to take over the businesses and run them on his own account in order to safeguard the money which he had previously invested in them ; whereas in the case of the Agra United Mills, Ltd., there was no connection between the loan of Rs. 10 lakhs and the transaction into which
> E he was alleged to have entered with the company. It will be seen that the former transaction is expressly dissociated from the latter in para. 39 (*d*) of the plaint in the civil suit.

In the opinion of their Lordships, the appellant has not sufficiently considered the relation of the paragraph to which he refers to the rest of para. 39. The opening sentences make clear that the loan of Rs. 10 lakhs (of which 8½ lakhs had
F already been advanced) was part of the promises made in the alleged agreement of Oct. 21, 1923 (para. 34), under which the Maharaja was to finance the company, and the remainder of para. 39 is concerned with the alleged failures of the Maharaja to implement his promises and with crediting the Maharaja with oblique motives for his failure. The allegations of fraud, conspiracy, etc., were merely the extravagant embroidery which is commonly found in such actions. They do not alter the main character of the action as being directed against the
G late Maharaja as the moneylender, and the latter's defence to the action was just as essential for the full protection of his rights as the creditor in the loan of Rs. 10 lakhs as was his suit for the recovery of the loan. It has to be remembered that money is the stock-in-trade of a moneylender. The appellant might well have come to a different conclusion if he had realised the close connection of this loan with the transactions alleged in the Agra suit. If it really added anything, their Lordships would agree with the High Court that at least three of
H the other transactions referred to in the appellant's further case stated provide evidence that the alleged transaction with the Agra United Mills, Ltd., was not foreign to the moneylending business of the respondent and his father.

Their Lordships are, therefore, of opinion that the facts stated by the commissioner cannot justify the opinion expressed by him, but that the expenditure in question was incurred solely for the purpose of earning the profits or gains of the moneylending business, and that the High Court are right in holding the respondent entitled to the deduction claimed and in answering the question of law asked by the commissioner in favour of the respondent. Accordingly, their

Lordships will humbly advise His Majesty that the appeal should be dismissed and that the judgment of the High Court should be affirmed. The appellant will pay the respondent's costs of the appeal.

Appeal dismissed with costs.

Solicitors : *Solicitor to India Office* (for the appellant) ; *Hy. S. L. Polak & Co.* (for the respondent).

[*Reported by* Hubert B. Figg, Esq., *Barrister-at-Law.*]

WARRILOW *v.* WARD.

[Chancery Division (Farwell, J.), **February 20, 1942.**]

Mortgage—Statutory restrictions—Interest—Interest reserved as amount payable after deduction of tax—Restriction on gross rate payable—Rent and Mortgage Interest Restrictions Act, 1939 (*c.* 71) *s.* 3, *Sched. I.*

A mortgage deed executed in 1929 contained a clause that interest was to be payable at such rate as after deduction of income tax would yield to the mortgagee the clear rate of 7 per cent. per annum. The mortgaged property became controlled by the Rent and Mortgage Interest Restrictions Act, 1939, and, by the operation of that Act, the interest on the mortgage was fixed at the rate payable at the date of the coming into force of the Act and any agreement to increase the rate of interest was invalidated. At that date the standard rate of income tax was 5*s.* 6*d.* in the £, and the mortgagee claimed that, notwithstanding subsequent increases in the rate of income tax, he was still entitled to a clear 7 per cent. He contended that any increase in the gross amount payable was due to the operation of the statute, and not to agreement between the parties. The mortgagor's contention was that the effect of the property becoming controlled was to stabilise the gross amount of interest payable :—

Held : upon the proper construction of the mortgage deed and of the Rent and Mortgage Restriction Acts, the gross rate of interest could not be increased beyond the amount payable when the property became controlled.

[**EDITORIAL NOTE.** In the case of a controlled house, the rate of interest upon a mortgage is not allowed to be increased. Here the net interest payable was fixed, but the gross amount was subject to variation according to the rate of income tax levied by the government. In these circumstances, it was argued that the increase in the gross amount was not the result of agreement between the parties, but the result of the operation of the annual Finance Act. This argument, which was based upon the wording of the Act, has been rejected and the result is that the gross amount of the interest is fixed at the gross amount on Sept. 2, 1939.

As to Restrictions on the Rate of Mortgage Interest, see HALSBURY, Hailsham Edn., Vol. 23, p. 422, para. 623 ; and for Cases, see DIGEST, Vol. 35, pp. 697, 698, Nos. 4402-4410.]

Case referred to :

(1) *Goldsmith* v. *Orr* (1920), 89 L.J.K.B. 901 ; 31 Digest 567, *7136* ; 123 L.T. 614.

Summons to determine the construction of an interest clause in a mortgage. The facts are fully set out in the judgment.

A. Guest Mathews for the plaintiff, the mortgagee.

S. Pascoe Hayward for the defendant, the mortgagor.

Farwell, J. : This is a summons taken out to determine the true construction of the covenant to pay interest in a legal charge dated Sept. 27, 1929, and made between Reginald John Ward of the one part and Alfred Frank Warrilow of the other part.

The summons as originally constituted was entitled " In the matter of the Courts (Emergency Powers) Act, 1939," by which the applicant sought leave to appoint a receiver. In my judgment, that procedure was quite wrong for the purpose of getting this question decided. This is a question of the rights of the parties, depending upon the true construction of a mortgage, and not a question to be decided under the Courts (Emergency Powers) Act at all. Under the Courts (Emergency Powers) Act the only question which the court has to consider is whether sufficient reasons due to the war are shown by the respondent to disentitle the applicant to exercise any remedy which may be available to him. The court on such summonses does not consider the rights of the parties, or determine how far the step which the applicant desires to take is one which he can properly take. It does not, for instance, consider whether the power of sale has arisen, or any similar question, but only whether the respondent has shown cause why the applicant should not exercise any power which he may have. That being so, the original summons, in my judgment, was quite wrongly constituted.

Both the parties, however, are anxious to get this question decided, and the applicant has accordingly amended his summons by entitling it:

> In the matter of a Legal Charge dated Sept. 27, 1929, and in the matter of the Rent A and Mortgage Interest Restrictions Acts, 1920 to 1939.

By that summons he asks for:

> A declaration that upon the true construction of the above-mentioned legal charge of Sept. 27, 1929, and of the Rent and Mortgage Interest Restrictions Acts, 1920 to 1939, the standard rate of interest within the meaning of these Acts payable under the provisions of the said legal charge is such a rate as after deduction therefrom of income tax at the standard rate for the time being yields the clear yearly rate of £7 per centum per annum.

B Then, by cl. 2, the summons proceeds to ask for leave to exercise the power of appointing a receiver. So far as that part of the summons is concerned, I have ordered that it should be struck out, and that the title should be amended by striking out "In the matter of the Courts (Emergency Powers) Act, 1939," and by making the summons *inter partes.* I am, therefore, dealing with this summons simply as a matter of the construction of the legal charge, and in no C way am I dealing with any question under the Courts (Emergency Powers) Act. If any application under the Courts (Emergency Powers) Act is to be made, it must be made by a separate application.

The question which I have to determine is a short legal question. As I have already stated, the legal charge is dated Sept. 27, 1929, and made between Reginald John Ward of the one part and the applicant of the other part. By the charge a sum of £1,000 was advanced by the plaintiff to the defendant, D upon the security of certain property in the neighbourhood of Portsmouth and the defendant covenanted to pay the sum of £1,000 on Dec. 25, 1929, together with interest thereon

> . . . from the date hereof at such rate as after deduction of income tax will yield to the mortgagee the clear rate of £7 per centum per annum and if the said sum shall not be paid on that day then so long as any part thereof shall remain owing will pay to the mortgagee interest thereon at the rate aforesaid on the principal money for the E time being so remaining owing by equal quarterly payments on the quarter days in every year.

The property so charged became subject to the provisions of the Rent and Mortgage Interest Restrictions Acts in 1939. The plaintiff states in para. 3 of his affidavit that "At the date of the coming into force of the above-mentioned Act, the rate of income tax was 5*s.* 6*d.* in the £." Then by para. 4 it appears that the contention of the defendant is:

> F . . . that the effect of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 1, as amended by the Rent and Mortgage Interest Restrictions Act, 1939, Sched. I was to stabilise (as at the date of the coming into operation of the last mentioned Act) the rate of interest payable under the said mortgage at the rate of £9.65 per cent., being the rate equivalent to plain interest at £7 per cent. together with tax at the rate of 5s. 6d. in the £.

The plaintiff contends:

> G . . . that the standard rate of interest within the meaning of the above-mentioned Acts is the rate specified in the said legal charge, namely, such a rate as after deduction of income tax will yield the clear rate of £7 per cent per annum.

It is admitted that the arrears which the plaintiff is claiming are not affected by the Finance Act, 1941, s. 25.

The question for decision arises under the Rent and Mortgage Interest H Restrictions Act, 1939, as to what is the proper amount of interest to be paid. The Act of 1920 did not apply to this property, but the Act of 1939 brought it within the scope of that Act. The relevant section of the 1920 Act is sect. 1 as amended and applied by the subsequent 1939 Act. As amended it reads:

> Subject to the provisions of this Act, where the rent of any dwelling-house to which this Act applies, or the rate of interest on a mortgage to which this Act applies has been, since Sept. 1, 1939, or is hereafter, increased, then, if the increased rent exceeds the standard rent by more than the amount permitted under this Act or, as the case may be, if the increased rate of interest exceeds the standard rate of interest, the amount of such excess shall, notwithstanding any agreement to the contrary, be irrecoverable

> from the tenant or the mortgagor as the case may be: Provided that, where a landlord or mortgagee has increased the rent of any such dwelling-house, or the rate of interest on any such mortgage since the said date, but before Sept. 2, 1939, he may cancel such increase and repay any amount paid by virtue thereof, and in that case the rent or rate shall not be deemed to have been increased since that date.

I confess to som difficulty in appreciating the exact effect of that proviso; but I have read it because it is said that it makes it clear that this section only applies to interest which has been agreed between the parties, and has no application to a case, such as the present, where the rate of interest varies from time to time according to the increase or otherwise of income tax.

As I understand the plaintiff's argument, it is this. He says that the rate of interest payable is the rate specified in the legal charge—namely, such rate as, after the deduction of income tax, will yield a clear 7 per cent. per annum, and that, therefore, the rate of interest is not increased or altered by agreement between the parties but by the legislature, and that to such an increase the Act does not apply. On the other hand, the defendant says that the rate of interest was agreed between the parties at the commencement of the mortgage as 7 per cent., plus the amount payable in respect of income tax, and by virtue of the Act the interest payable is the interest which was payable when that Act came into operation. In my judgment, on the true construction of the Acts and of this mortgage, the defendant's contention is the right one. The parties agreed the rate of interest, and I cannot see that the Act does not apply because the actual amount which has to be paid in each year is regulated by the amount of tax which is payable. It is said it is a rate which is fixed not by the parties themselves, but by the effect of the Finance Act, and, therefore, that it is not a rate which comes within the Rent and Mortgage Interest Restrictions Act at all. In my judgment, the answer to that is that the rate of interest was fixed by the parties and agreed by the parties. No doubt the actual sum payable in each year is or was dependent upon the amount of income tax which was payable, but it was a rate of interest which was agreed between the parties; and, therefore, it seems to me it must come within the Act. The effect of that is that as from Sept. 1, 1939, the rate cannot be increased beyond the amount which was then payable. By the Rent and Mortgage Interest Restrictions Act, 1920, s. 12 (1) (*b*), as amended by Sched. I of the 1939 Act, it is provided:

> The expression "standard rate of interest" means, in the case of a mortgage in force before Sept. 1, 1939, the rate of interest payable at a date, or, in the case of a mortgage created since that date, the original rate of interest . . .

The standard rate of interest in force on Sept. 1, 1939, was the amount of 7 per cent. plus the amount necessary to enable that sum to be paid free of income tax. Income tax at that date was 5*s*. 6*d*. in the £. The effect of the Act is that the rate then payable cannot be increased. Accordingly, whatever the actual rate of interest was in 1939, and it is, I think, agreed to be £9.65 per cent. per annum, that is the rate payable in the future, subject to the provisions of the Finance Act, 1941, s. 25. In my judgment, the defendant's construction is the right one, and I must hold accordingly.

I should refer to the case of *Goldsmith* v. *Orr* (1) which was a case which came before the Court of Appeal under the Increase of Rent and Mortgage Interest (Restrictions) Act, 1919. There the position was different from the present one, because the actual rent payable was not an amount which varied according to the rate of income tax, but an amount which had been agreed between the parties. In that case it was held that the rent which was payable in 1919 was the rent properly payable, and as from that time there could not be any increased sum payable by way of rent. The Court of Appeal was not unanimous. Bankes and Scrutton, L.JJ., were agreed, but Warrington, L.J., took a different view. I do not think it is a decision which is binding upon me in this case, but it is a decision which, in my judgment, strongly supports the view which I have expressed.

Summons dismissed with costs.

Solicitors: *E. B. V. Christian & Co., agents for Maidment & Morgan,* Portsmouth (for the plaintiff); *Lamartine Yates & Morgan* (for the defendant).

[*Reported by* Irene G. R. Moses, *Barrister-at-Law*].

Re CITY HOUSING TRUST, LTD., KOLB *v.* CITY HOUSING TRUST, LTD.

[CHANCERY DIVISION (Bennett, J.), **February 23, 1942.**]

Judgments—Order—Correction—Omission of remuneration of trustees of debenture trust deed—Matter not in mind of court when order made—Fund from which remuneration to be paid still in hand—Correction of date—R.S.C., Ord. 55, *r.* 71.

In a debentureholder's action, the master made an order, dated Oct. 17, 1940, that the costs of the plaintiff, the debentureholder, and those of the defendants, the trustees of the debenture trust deed, should be paid out of a fund in court; and by a certificate filed on July 19, 1940, he found that the defendants were entitled to remuneration as from Jan. 1, 1939. The order did not contain any direction as to the order in which the costs should be paid, and it did not provide for the remuneration of the defendants. It was common ground between the parties that the defendants were entitled to their costs in priority to those of the plaintiff, and that they were entitled to be paid their remuneration in priority to both sets of costs. It was also common ground between the parties that the date in the master's certificate should have been Jan. 1, 1937. The fund in court was insufficient to pay all the taxed costs; and by an order, dated Dec. 18, 1941, the registrar varied the master's certificate, so that the defendants were entitled to remuneration from Jan. 1, 1937, and ordered that their remuneration should be paid in priority to the plaintiff's costs. The plaintiff sought to vary the registrar's order:—

HELD: (i) the correction of the error as to the date in the certificate was a correction which the court was entitled to make under R.S.C., Ord. 55, r. 71.

(ii) since the court had never intended to omit the defendants' remuneration from the order, and the question of that remuneration was never in the mind of the court, and since the fund from which such remuneration had to be paid was still in hand, it would be wrong to deprive the defendants of the remuneration to which they were entitled in priority to the plaintiff's costs, and the registrar was right in varying the master's order by making a provision for such remuneration.

[**EDITORIAL NOTE.** The court has power both under the Rules of the Supreme Court and under its inherent jurisdiction to correct a slip or omission in an order. The main limitations on this power are that the rights of third parties shall not have intervened and that the order as amended must be the order which the court intended to make. Here it was common ground that the amendment asked for followed the intention of the court at the time the original order was made and it was still possible to vary it effectively because the fund was in hand.

AS TO AMENDMENT OF ORDERS, see HALSBURY, Hailsham Edn., Vol. 19, pp. 261-263 para. 561; and FOR CASES, see DIGEST, Practice, pp. 472-477, Nos. 1530-1580. See YEARLY PRACTICE OF THE SUPREME COURT, pp. 449, 450.]

Cases referred to:

(1) *Re Griffith, Jones* v. *Owen*, [1904] 1 Ch. 807; 24 Digest 859, *8957*; 73 L.J.Ch. 464; 90 L.T. 639.

(2) *Preston Banking Co.* v. *Allsup (William) & Sons*, [1895] 1 Ch. 141; Digest, Practice, 815, *3764*; 64 L.J.Ch. 196; 71 L.T. 708.

(3) *McCarthy* v. *Agard*, [1933] 2 K.B. 417; Digest Supp.; 102 L.J.K.B. 753; 149 L.T. 595.

(4) *Scott* v. *Morley* (1887), 20 Q.B.D. 120; 27 Digest 180, *1469*; 57 L.J.Q.B. 43; 57 L.T. 919.

(5) *Re Roper, Taylor* v. *Bland* (1890), 45 Ch.D. 126; 24 Digest 846, *8803*; 63 L.T. 434.

MOTION to vary an order of the registrar dated Dec. 18, 1941, in which he varied an order of the master dated Oct. 17, 1940, and a certificate of the master dated July 19, 1940. The facts are fully set out in the judgment.

E. J. Hecksher for the plaintiff, the debentureholder.

J. Pennycuick for the defendants, the trustees of the debenture trust deed.

BENNETT, J.: The question between the parties is whether the plaintiff in this debentureholder's action should be paid, out of a fund in court, her costs ordered to be taxed under the order of Oct. 17, 1940, in priority to the remuneration to which the trustees of the trust deed for securing the debentures are entitled as such trustees.

The first question relates to the certificate of the master. It finds that the trustees are entitled to remuneration at the minimum rate of £100 per annum from Jan. 1, 1939, during the continuance of the security and until the trusts of the trust deed shall be finally wound up. That provision in the certificate appears to have been inserted in the draft in red ink. Originally Jan. 1, 1939, had been inserted in the draft of the certificate as the date from which the trustees were entitled to remuneration. That was the wrong date. They were entitled to remuneration as from Jan. 1, 1937. If one looks at the draft of the certificate one can see that an attempt has been made to alter the figure 9 into the figure 7, but the alteration has been made in such a way that anybody looking at the figure might be in doubt as to whether it was a 9 or a 7. 9 has found its way into the certificate, and all parties are agreed that the figure ought to be 7. I have no doubt that, in those circumstances, the court is entitled, under the provisions of R.S.C., Ord. 55, r. 71, to amend the mere clerical error. The rule provides as follows :

> The judge may, if the special circumstances of the case require it, upon an application by motion or summons for the purpose, direct a certificate to be discharged or varied at any time after the same has become binding on the parties.

I think that I should be doing less than justice if I were to interfere with the decision of the registrar who, in the order which he made and which the applicant seeks to set aside, has directed that that clerical error shall be put right. I am clear that in that regard the registrar made an order which was perfectly proper and, in my judgment, to that extent, at least, the applicant fails in his motion to vary the registrar's order.

The other respect in which the applicant desires the court to vary the registrar's order is of greater importance. Master HOLLOWAY on Oct. 17, 1940, made an order upon further consideration and upon the application of the plaintiff :

> that (*a*) the costs of the plaintiff of this action down to and including this order and the order of even date herewith be taxed by the Taxing Master as between party and party and as between solicitor and client and (*b*) the like costs of the defendants General Accident Fire and Life Assurance Corpn., Ltd., be taxed by the Taxing Master as between solicitor and client and to include their charges and expenses as trustees of the trust deed dated May 10, 1934, and not already taxed or allowed beyond their costs of this action but not including their costs by the order dated Nov. 28, 1938, directed to be taxed and in taxing the said costs of the plaintiff credit is to be given for the sum of £100 directed to be paid out of court to the plaintiff's solicitor by the said order dated July 24, 1940, and in taxing the costs of the said defendants General Accident Fire and Life Assurance Corpn. Ltd., credit is to be given for any sums received by their solicitors from tenants on account of the costs of tenancy agreements entered into by them. And it is ordered that the funds in court be dealt with as directed in the schedule hereto.

The schedule, which is a payment schedule and states the fund in court to be dealt with as being £2,981 7*s*. 2*d*. money on deposit, provides for payment of the plaintiff's costs as between party and party and the costs of the General Accident Fire and Life Assurance Corpn, as between solicitor and client to be taxed under this order. It is common ground between the parties that the remuneration to which the trustees of the deed supporting the debentures are entitled has priority over the plaintiff's costs of action and the trustees' costs of action out of the proceeds of sale of the property charged by the trust deed and of which the trustees are the trustees. The order makes no provision for payment of the trustees' remuneration. It is also common ground between the parties that, if the proceeds of sale of the trust property are not sufficient to pay the plaintiff's costs of action and the trustees' costs of action in full, the trustees' costs have priority over the plaintiff's costs. No provision was made by Master HOLLOWAY's order as to the order in which the costs directed to be taxed and paid were to be paid out of the funds in court. The sums at which these costs have been taxed are of such amount that they will more than exhaust the money in court, out of which the costs were ordered to be paid. It was in those circumstances that the present application was issued on Nov. 26, 1941, and came before the registrar in Dec. 1941. The application was for an order :

> . . . that notwithstanding the order dated Oct. 17, 1940, the taxed costs of the defendants, the General Accident Fire and Life Assurance Corpn., Ltd., of this action and the costs charges and expenses of the said defendants of the said trust deed (including their remuneration) be paid out of the fund in court in priority to the costs of the plaintiff

and of the other defendants.

Upon that application the registrar made the order of Dec. 17, which the applicant seeks to vary. He, first of all, varied the master's certificate in the way which I have mentioned. Then his order went on to provide :—

> . . . that notwithstanding the said order dated Oct. 17, 1940, the costs of the defendants, General Accident Fire and Life Assurance Corpn., Ltd., of this action including the costs charges and expenses of the said defendant of the trust deed dated May 10, 1934, to be taxed pursuant to the said order dated Oct. 17, 1940, and their remuneration as such trustees from Jan. 1, 1937, to Dec. 31, 1941, be paid out of the fund in court in priority to the costs of the plaintiff directed to be taxed by the said order dated Oct. 17, 1940.

The applicant does not object to that order in so far as it makes provision for the costs of the trustees of the action and for their costs charges and expenses being paid out of the fund in court in priority to their costs. They are not in a position, having regard to the decision of Farwell, J., in *Re Griffith* (1), to raise any objection to that part of the registrar's order. In that case what was decided was :

> An order on the further consideration of an administration action that the costs of all parties are to be paid out of a fund in court does not amount to a direction that they are to be paid equally. If the fund turns out insufficient to pay all the costs, the costs of administrators must be paid in priority to those of other parties.

That case is a decision which prevents the applicant from contending that there ought not to be added, so to say, to the order made by the master, which contains no direction as to the priority in which the costs ordered to be taxed were to be paid, a provision that the costs of the trustees and their costs, charges and expenses are to have priority over the costs of the plaintiff. The applicant does object, however, to the direction which the registrar has given that the trustees are to have priority not only for their costs, but also for their remuneration. It is plain, and it is not contended to the contrary, that, if the matter had been called to the attention of the master in Oct. 1940, when he made his order, he would have made provision for payment out of the fund in court of the trustees' remuneration before and in priority to the payment of the plaintiff's costs. What is said now is that it is too late to give any direction which would interfere with what is, in effect, said to be the vested right of the plaintiff to have her costs paid in priority to the trustees' remuneration, because, if any alteration is made in the order, it is not being made because the court made a slip or a mistake, and, therefore, the matter cannot be put right under the slip order or under the inherent jurisdiction of the court. In support of that argument, counsel for the plaintiff has relied upon two authorities, the first being *Preston Banking Co.* v. *William Allsup & Sons* (2) and the other, also a decision of the Court of Appeal, *McCarthy* v. *Agard* (3). In the first case, *Preston Banking Co.* v. *William Allsup & Sons* (2), the court was dealing with an application in which the order had been made that certain costs should be paid by the applicant. The Vice-Chancellor having made such an order, the person who had been ordered to pay those costs subsequently applied that they should be made costs in the action. The Vice-Chancellor refused to entertain that application. From that refusal of the Vice-Chancellor there was an appeal to the Court of Appeal and the Court of Appeal dismissed the appeal on the ground that the Vice-Chancellor had been asked to re-hear a previous decision. Lord Halsbury said at p. 143 :

> But this is an application to the Vice-Chancellor in effect to rehear an order which he intended to make, but which, it is said, he ought not to have made. Even when an order has been obtained by fraud, it has been held that the court has no jurisdiction to re-hear it.

The Court of Appeal was there dealing with an attempt to re-open before the same judge, a case in which he had already given his decision. That was a wholly different case, I think, from the present one. The second case, *McCarthy* v. *Agard* (3), was a case in which a married woman had been sued as Mrs. A., and she was sued as a married woman. In fact she was not Mrs. A., nor was she a married woman ; she was a Mrs. W. and a widow. The judgment had been settled in *Scott* v. *Morley* (4) form, and, on the real facts being ascertained, the plaintiff applied by summons asking that the judgment should be altered to a personal judgment against the defendant describing her as "Mrs. W., a widow." That application was refused by the Court of Appeal. Again, that is, I think, a different case from the present, where an order has been made which would not have been made, if the court had been apprised of the fact that there was a claim upon the fund out of which the costs were ordered to be paid which had priority over the costs. The costs have not been paid and the matter is one which still can be put right. It seems to me that in principle such a case is governed by the decision of the Court of Appeal in *Re Roper* (5). The headnote reads as follows:

> A testatrix bequeathed a mixed fund of pure personalty and money to arise from realty, directed by her will to be sold, to A. for life, and then to a charity. In a suit to administer the estate, an order on further consideration was made, which directed the costs of suit and certain legacies to be paid out of four sums of cash in court, two of which arose from realty, and two from pure personalty, so far as they would extend, the deficiency to be raised out of a sum of stock in court which represented realty. There was no reservation of subsequent further consideration nor of the question how the costs should ultimately be borne. The dividends on the residue of the fund were ordered to be paid to A. for life with liberty to apply. On A's. death the testatrix's heir-at-law petitioned for the payment of the fund to him as being realty. The Attorney-General, for the charity, objected that the costs of administering the real estate ought to have been paid out of the proceeds of real estate, in which case there would have been left a substantial sum of pure personalty which the charity could take. Kay, J., considered that the order on further consideration settled the question how the costs were to be borne, and ordered payment of the fund to the heir. The Attorney-General appealed:—Held by Cotton and Bowen, L.JJ., that the costs of administering the realty ought to have been paid out of the proceeds of realty and that as the order on further consideration contained no declaration as to the ultimate incidence of the costs and did not indicate any intention to decide that question, the application of the sums of cash in payment of costs and legacies must be treated as directed for convenience without any intention to alter the rights of the parties, and that as the fund was still in hand, the court, although there was no express reservation of the ultimate incidence of the costs, ought now to set the matter right.

At p. 135, Cotton, L.J., said:

> . . . if we see on the true construction of this order that there was no intention whatever to decide the rights of the parties, I do not think that the mere fact that this payment of costs was directed by an order on further consideration ought to prevent the court from setting the matter right where there is a fund in hand enabling it to do so.

Later, he said, at p. 137:

> I think the charity ought not to lose its legacy because the Attorney-General made, as I think he did, a slip in not raising or asking the court to reserve the question when the matter was on for further consideration, out of what fund these costs ought ultimately to be paid.

It is common ground that the court never intended, when the order of Oct. 17, 1940, was made, to decide that the plaintiff's costs had priority over the trustees' remuneration. If, when that order was made, that had been the intention of the court and there had been no appeal against that order, the application would not have been entertained and the order made by the registrar ought not to have been made; but it was never present to the mind of the court at all, and it is not too late now, the fund being in hand, to give effect to the rights of the trustees. In my judgment, it would be wrong to deprive the trustees of the right which they had to be paid their remuneration out of the fund in court in priority to the costs of the plaintiff. In these circumstances, it seems to me that, with a small exception, to which I shall refer in a moment, the registrar was right in making a provision which would give effect to the trustees' rights. The order which the registrar made on Oct. 17, 1940, provides for the payment to the trustees of their remuneration from Jan. 1, 1937, to Dec. 31, 1941. I do not think it could have been right to make that order, at the date when it was made. The trustees' remuneration is payable half-yearly and the provision for their remuneration ought to have been confined to their remuneration down to the half-year ending June 30, 1940. Therefore, that variation must be made in the registrar's order; but apart from that, it seems to me, that the order which the learned registrar made is right.

Order of registrar confirmed subject to one amendment. Costs of the motion costs of the action.

Solicitors: *W. F. Gillham* (for the plaintiff); *Smiles & Co.* (for the defendants).

[*Reported by* Irene G. R. Moses, *Barrister-at-Law.*]

R. *v.* HOME SECRETARY, *Ex parte* BUDD.

[COURT OF APPEAL (Lord Greene, M.R., and MacKinnon and Goddard, L.JJ.), **February 13, 16, 25, 1942.**]

Emergency Legislation—Detention under defence regulation—Member of organisation subject to foreign influence or control—Validity of order—Grounds for belief of Home Secretary—Rearrest of person arrested under invalid order—Habeas Corpus Act, 1816 (*c.* 100), *s.* 3—*Defence* (*General*) *Regulations,* 1939, *reg.* 18B (1A).

The appellant was detained in June, 1940, under an order made in pursuance of the powers given by the Defence (General) Regulations, 1939, reg. 18B (1), but was released by order of the court on the ground that the detention order did not comply with the requirements of the regulation. He was rearrested on June 6, 1941, under an order made under reg. 18B (1A), by reason of his having been a member of the British Union. An order was made in July, 1940, suppressing the British Union.

On an application for a writ of *habeas corpus*, the appellant contended (i) that in view of the suppression of the British Union in July, 1940, there could be no danger of its utilisation for any prejudicial purpose in June, 1941, when the appellant was detained; (ii) that there were sufficient reasons for the court to exercise its power under the Habeas Corpus Act, 1816, of examining into the truth of the facts set forth in the return to the writ; (iii) that having been released from custody on a writ of *habeas corpus*, the appellant could not be again detained for the same cause:—

HELD: (i) whether there was any reason for the detention of the appellant after the suppression of the British Union was really a question whether the Secretary of State had acted in good faith, and there was no evidence that the Secretary of State had not acted in good faith.

(ii) where the Secretary of State has acted in good faith, no inquiry into the facts is permissible.

(iii) the matters, the truth of which the court can inquire into under the Habeas Corpus Act, 1816, s. 3, are facts relevant to the legality of the detention, e.g. the *bona fides* of the Secretary of State, the genuineness of the detention order and the identity of the applicant with the person referred to in the order.

(iv) in the case of the first detention of the appellant, the pre-requisites of a lawful detention had not been complied with. A release from such a detention under a writ of *habeas corpus* was not a bar to a subsequent detention.

Decision of the Divisional Court ([1941] 2 All E.R. 749) *affirmed.*

[**EDITORIAL NOTE.** The importance of this case in the court below lay in the dissenting judgment of STABLE, J., but that matter has now been settled by the decisions in the House of Lords. The only real matter for argument in the present case seems to be the question whether a release under a writ of *habeas corpus*, in effect, operates to give the person released a right of the nature of the right to plead *autrefois acquit*, but the answer of the Court of Appeal to this argument seems conclusive, although, on the whole matter, leave to appeal to the House of Lords was given.

AS TO DETENTION UNDER EMERGENCY REGULATIONS, see HALSBURY, Hailsham Edn., Vol. 6, p. 533, para. 662; and FOR CASES, see DIGEST, Vol. 11, p. 552, Nos. 538-543.]

Cases referred to:

(1) *Liversidge* v. *Anderson*, [1941] 3 All E.R. 338; Digest Supp.; 110 L.J.K.B. 724; 166 L.T. 1.

(2) *Greene* v. *Home Secretary*, [1941] 3 All E.R. 388; Digest Supp.; 111 L.J.K.B. 24; 166 L.T. 24, *affg. S.C. sub nom. R.* v. *Home Secretary, Ex p. Greene* [1941] 3 All E.R. 104.

(3) *Searche's case* (1588), 1 Leon. 70; 16 Digest 269, *788*.

(4) *Cox* v. *Hakes* (1890), 15 App. Cas. 506; 16 Digest 250, *508*; 60 L.J.Q.B. 89; 63 L.T. 392.

(5) *Re Castioni*, [1891] 1 Q.B. 149; 24 Digest 873, *36*; 60 L.J.M.C. 22; 64 L.T. 344.

(6) *R.* v. *Home Secretary, Ex p. Lees*, [1941] 1 K.B. 72; Digest Supp.; 110 L.J.K.B. 42; 164 L.T. 41.

(7) *R.* v. *Brixton Prison (Governor), Ex p. Stallmann*, [1912] 3 K.B. 424; 16 Digest 252, *532*; 82 L.J.K.B. 8; 107 L.T. 553.

(8) *A.-G. for Colony of Hong-Kong* v. *Kwok-A-Sing* (1873), L.R. 5 P.C. 179; 16 Digest 252, *531*; 42 L.J.P.C. 64; 29 L.T. 114.

Appeal by the applicant from an order of the Divisional Court (Viscount Caldecote, L.C.J. and Macnaghten, J., Stable, J., *dissenting*), dated July 2, 1942, and reported [1941] 2 All E.R. 749. The facts are set out in the judgment.

J. Scott Henderson for the appellant.

The Attorney-General (*Rt. Hon. Sir Donald Somervell, K.C.*) and *Valentine Holmes* for the Home Secretary.

Henderson : The applicant is detained because he was a member of an organisation subject to foreign control or whose members have sympathies with the government of a foreign power. The association of which the applicant was a member was dissolved by the government in July, 1940, and there could be no reason for making a detention order on that ground against the applicant in June, 1941. A person cannot be arrested again on the same charge after he has been released under a writ of *habeas corpus* : *Searche's case* (3). The court has full power in this case to inquire into the truth of the matter under the Habeas Corpus Act, 1816, ss. 3, 4. [Counsel also referred to *Cox* v. *Hakes* (4) and *Re Castioni* (5).]

The Attorney-General : Anyone who is or who has been a member of an organisation comes within the terms of the regulation. It does not follow that because an order has been made against an organisation that the organisation has ceased to exist. In the present case, the order is in the same form as in *R.* v. *Home Secretary, Ex p. Lees* (6), and in that case it was decided by the Court of Appeal that the order was in the proper form. In *R.* v. *Governor of Brixton Prison, Ex p. Stallmann* (7), it was said by Lord Alverstone, L.C.J., that the Habeas Corpus Act, 1679, s. 6, applies only where the second arrest is substantially for the same cause as the first so that the return to the second writ of *habeas corpus* raises the same question with reference to the validity of the detention as the first. The grounds which influenced Humphreys, J., in the first application by Budd do not exist on this application. Counsel referred to *A.-G. for Hong Kong* v. *Kwok-A-Sing* (8).]

Lord Greene, M.R. [delivering the judgment of the court] : This is an appeal from the refusal of a Divisional Court to grant the application of the appellant for a writ of *habeas corpus*. At the conclusion of the hearing we stated that the court was unanimously of opinion that the appeal must be dismissed, but that we thought it desirable to give our reasons in writing. This we now proceed to do.

The appellant was arrested and placed in detention on June 6, 1941, under an order made by the present Home Secretary under the Defence (General) Regulations, 1939, reg. 18B (1A). It is not necessary to set out the terms of the order or of the regulation under which it was made. It is admitted that the order is regular on its face, that it was duly signed by the Home Secretary and that the appellant is the person named in it. Before stating and examining the grounds upon which the legality of the detention is disputed, it is desirable to make some general observations as to the law affecting cases of this kind.

The principles applicable are to be found in two recent decisions of the House of Lords : *Liversidge* v. *Anderson* (1) and *Greene* v. *Home Secretary* (2). The former case arose for decision upon the application of the plaintiff for particulars of the defence in an action claiming damages for false imprisonment, the latter upon an application for a writ of *habeas corpus*. In each case the decision was based upon the view of the House as to the substantial issue involved, viz., whether it is open to any court to inquire into the reasonableness of the belief of the Secretary of State in the matters in which the regulation requires him to have reasonable cause to believe, before a detention order can be made.

The regulation in question in those cases was reg. 18B (1), but the principles laid down are equally applicable to cases arising under reg. 18B (1A). The latter regulation is rather more complicated than the former, in that the organisation referred to in it must be an organisation as respects which the Secretary of State is " satisfied " that it complies with one or the other of two descriptions set out in the regulation. It is clear that, if the courts have no power to inquire into the reasonableness of the belief of the Secretary of State in the matters in which he is required to believe, they can have no power to inquire into the grounds of his satisfaction in regard to matters of which he is required to be satisfied.

The opinion of the majority of the House upon the substantial issue appears clearly from the following extracts from the speeches in *Liversidge's* case (1). In that case Viscount Maugham said, at p. 348 :

> The result is that there is no preliminary question of fact which can be submitted to the courts, and that, in effect, there is no appeal from the decision of the Secretary of State in these matters, provided only that he acts in good faith.

At p. 370, Lord Macmillan said :

> . . . I am unable to accept a reading of the regulation which would prescribe that the Secretary of State may not act in accordance with what commends itself to him as a reasonable cause of belief without incurring the risk that a court of law may disagree with him . . .

At p. 378, Lord Wright said :

> On the view which I have formed that there is under reg. 18B no triable issue as to reasonableness for the court, these authorities cease to be of any value. As the administrative plenary discretion is vested in the Home Secretary, it is for him to decide whether he has reasonable grounds and to act accordingly. No outsider's decision is involved, nor is the issue within the competence of any court.

At p. 384, Lord Romer said :

> . . . if at the trial the Home Secretary gives rebutting evidence to the effect that, in his opinion, there were reasonable grounds for his belief, his statement, being merely a statement as to his opinion, must necessarily be accepted unless it can be shown that he was not acting in good faith, and the onus of showing this would lie upon the plaintiff.

It is scarcely necessary to say that language used in earlier decisions which may suggest that the courts may inquire into the reasonableness of the belief of the Secretary of State cannot now be regarded as correct.

Much of the argument presented to us on behalf of the appellant consisted in reality of an attempt to establish that the principles upon which *Liversidge's* case (1) was decided are not applicable in their full force to cases where the application is for a writ of *habeas corpus*. In our opinion, this argument cannot be accepted. Apart from the decision in *Greene's* case (2), to which we will refer in more detail later in this judgment, we think it is clear that the same question arises in both classes of case—namely, on what grounds can the legality of the order be questioned ? It is the legality of the order which has to be considered in each case. If the order is lawful, the detention is lawful, with the result that neither an application for a writ of *habeas corpus* nor an action for damages for false imprisonment can succeed. In neither case is it admissible to go into matters which are irrelevant to the question of legality. Apart from bad faith, that question is decided once for all by the fact that the Secretary of State has what appears to him to be reasonable cause for his belief, and it is not for the courts to inquire into the truth of the matters in which he believes or the reasonableness of his belief in them. *A fortiori* (if that expression is not inappropriate where the principles are clear) in any matter where the Secretary of State has only to be "satisfied," no inquiry by a court is possible.

It is now convenient to consider in detail the three main arguments presented to us on behalf of the appellant. First, it was said that in view of certain facts it must be obvious that, at the date when the detention order was made, there could be no danger of the utilisation of the organisation known as the British Union (of which the appellant had at one time admittedly been a member) for any of the prejudicial purposes mentioned in reg. 18B (1A). The facts relied on were that an order had been made under reg. 18AA, applying that regulation to the British Union, and that the present Home Secretary had stated in the House of Commons that the organisation was effectively suppressed, largely, it would appear, owing to the detention of its most active supporters. Reg. 18AA imposes upon organisations to which it is applied a series of restrictions severe enough, provided that they are obeyed, to restrict their activities to a satisfactory extent. The regulation does not purport to dissolve the organisations. Indeed, to speak of "dissolving" such an organisation is not apposite. It is true that the court is given power to dissolve an organisation, but this is only for the purpose of dealing with its assets and liabilities. With regard to the statement made in the House of Commons (which we allowed to be read to us without ruling that it was admissible), it is enough to say that an organisation may well cease to be dangerous if all its members are interned, but may become dangerous if they, or perhaps any one of them, are or is released. We have dealt with these matters because counsel for the appellant, when pressed, admitted that this branch of his argument (which did not depend on any considerations peculiar to *habeas corpus* proceedings) really amounted to a submission that the Home Secretary cannot have acted in good faith. The argument in our opinion breaks down completely.

The second argument was based on the language of the Habeas Corpus Act, 1816, s. 3. In cases to which that Act applies, it is open to the court, although the return to a writ of *habeas corpus* may be good and sufficient in law, "to examine into the truth of the facts set forth in such return." It was said that there were in the present case sufficient reasons for the court to exercise its power of inquiring into the facts. Those reasons were said to be: (*a*) that the appellant had already been released from an earlier detention by order of a Divisional Court and that no fresh grounds for a second detention were alleged; (*b*) that the Divisional Court in the earlier proceedings had decided that the Home Secretary had not had reasonable grounds for ordering the detention then in question; (*c*) that for the reasons already discussed it was at least not obvious that any danger from the British Union was to be anticipated. On these grounds it was said that the court could enquire into the facts stated in the present detention order and in the affidavit of the Home Secretary. Quite apart from the decision of the House of Lords in *Greene's* case (2), to which reference will presently be made, it is in our opinion clear that the argument is based on a misconception as to the true meaning of the section. The facts into which it was said that we were at liberty to inquire were those matters in respect of which the Home Secretary says that he had reasonable cause for belief and those in respect of which he states that he was satisfied. As we have already pointed out, the court is precluded, as a matter of law, from inquiring into those matters, or into the reasonableness of the belief of the Home Secretary, or into the grounds of his satisfaction. These matters are not relevant to the question of the legality of the detention, and, when the section speaks of an examination into the truth of the facts set forth in the return, it can only be read as referring to facts which are relevant to the issue before the court—namely, the legality of the detention. It is clear that there may be many matters into which the court can and will inquire under the section if occasion arises, e.g., the *bona fides* of the Secretary of State, the genuineness of the detention order itself and the identity of the applicant with the person referred to in the order. Similarly, if, for example, a regulation empowered the Home Secretary to detain any person who was in fact an alien, the court could inquire into the nationality of the applicant, since, if it transpired that he was not in fact an alien, his detention would be *ultra vires*. In all these instances the court would be inquiring into questions relevant to the matter in hand—namely, the legality of the detention.

In our opinion, the question is set at rest by the decision in *Greene's* case (2), when read in the light of the principles laid down in *Liversidge's* case (1). In *Greene's* case (2) the applicant had been detained pursuant to an order made under reg. 18B (1). The validity of the order was assailed on the ground that the Home Secretary never had reasonable or any cause for believing any of the matters in respect of which he stated that he had reasonable cause for belief. It was held that the language of the Habeas Corpus Act, 1816, s. 3, did not justify the court in inquiring into these matters and that no such inquiry should be made. We need only refer to two passages from the opinions delivered. LORD MACMILLAN said, at p. 396:

> The result, in my opinion, is that the production of the Secretary of State's order, the authenticity and good faith of which are in no way impugned, constitute a complete and peremptory answer to the appellant's application. It justifies in law his detention, in the absence of any relevant challenge to its validity, and there is no such challenge.

Similar language was used by LORD WRIGHT, at p. 402, and at p. 403 he said:

> In the present case, there are no facts to inquire into. The only possible inquiry of fact, once the authenticity of the order and its application to the appellant are conceded or established, is as to whether the Home Secretary had in his own mind what appeared to his mind to be reasonable cause.

It was said that there were expressions to be found in the opinions delivered which suggested that the court had power to inquire into the matters which the present appellant was anxious to have examined and that it ought to do so where, as was alleged in the present case, special reasons pointing to the desirability of such an inquiry could be shown. In our opinion, it is quite impossible to spell any such suggestion out of the language used—indeed, to do so would be to negative the whole reasoning on which the decisions in *Liversidge's* case (1) and *Greene's* case (2) itself are based. It is, therefore, unnecessary for us to discuss the allegations relied on as justifying an examination by the court of matters which the court has no power to examine.

There is, however, one of those matters which is relevant in connection with the third and last argument submitted on behalf of the appellant. It concerns the previous detention and release of the appellant, and the facts relating to it must be briefly stated. On June 15, 1940, the appellant was arrested and placed in detention under what purported to be an order signed by the then Home Secretary and dated June 11, 1940. That document on the face of it purported to have been made under reg. 18B (1) since it was based on " hostile associations." One copy of this document was delivered to the police as their authority to effect the arrest and another copy was delivered to the appellant when he was arrested. Now it transpired that no such order had ever been made by the Home Secretary ; the document was false from beginning to end including the statement at the foot that it had been signed by the Home Secretary. This cynical piece of carelessness on the part of departmental officials was severely criticised by the Divisional Court, and we need make no further comment upon it.

It appeared, however, that the Home Secretary had in fact made an order dated June 11, 1940, for the detention of the appellant under reg. 18B (1A), although no copy of that order was given to the constable or the appellant. On the application of the appellant for a writ of *habeas corpus* a Divisional Court, consisting of Humphreys, Singleton and Tucker, JJ., ordered his release. The court did not, as was suggested to us, decide that the Home Secretary did not have reasonable grounds for his belief. Humphreys, J., referred to a number of matters which it is not necessary to mention here and held that the appellant was entitled to be released because no sufficient care and attention was paid to his individual case by the Home Secretary. He added that he was unable to say on the evidence as a whole that the Secretary of State had reasonable cause to believe that it was necessary to exercise control over him, but, in view of the decisions in *Liversidge's* case (1) and *Greene's* case (2), this was not a competent finding. Singleton, J., referred to the same matters as those on which Humphreys, J., had relied, but expressed no concluded opinion on them. He based his decision on para. (4) of reg. 18B, since the document which was delivered to the appellant at the time of his arrest did not state the true grounds for his detention and he was consequently not put in a position to make the representations to the Home Secretary which that paragraph entitles him to make. Tucker, J., based his judgment on the same point.

The argument presented to us was based on the proposition that a person who has been released from custody on a writ of *habeas corpus* cannot be subjected to a second detention for the same cause. This argument is, in our opinion, misconceived. The first detention of the appellant was illegal in that the pre-requisites of a lawful detention had not been complied with. In the case of the present detention, those pre-requisites have been complied with and the detention is lawful. The decision in the first case was not upon the ground that the real order made by the Home Secretary was one which he had no power in law to make—indeed, any such decision would, in view of *Liversidge's* case (1) and *Greene's* case (2), have been wrong in law—but upon the ground that the terms of that order had not been communicated to the appellant in such a way as to enable him to make his representations to the Home Secretary under para. (4). There is nothing in principle or in authority to justify the view that the result of the earlier proceedings can assist the appellant in any way. The appeal must be dismissed.

Goddard, L.J. : My Lords, permit me to take this opportunity of correcting a passage in my judgment in *R.* v. *Home Secretary, Ex p. Greene* (2). I there said that the prisoner's right to controvert the return to a writ of *habeas corpus* was expressly preserved by the Habeas Corpus Act, 1816, s. 4. This was a mistake. The right of controverting the return was first given by the Act, by sect. 3 where the writ was granted by a single judge, and by sect. 4 where it was granted by the full court. A perusal of the opinion of Wilmot, C.J., delivered in the House of Lords in 1758, when a bill for amending the law relating to *habeas corpus* was before the House, makes it clear that no dispute on any matter of fact was allowed on a return to the writ, and that the only question which could be debated was whether the return disclosed on its face a ground for the detention which was sufficient in law. The reason was that in those days it was only a jury that could try a question of fact. Accordingly, if the applicant for the writ desired to dispute any fact alleged in the return, he could do so only by an action, or by preferring an indictment, for a false return. If he obtained a verdict, the court would then take notice that the allegation was false and proceed accordingly. It appears from a note at the end of the report of the judge's opinion that the bill was rejected, and it was by the Act of 1816 that the law in this respect was first altered.

Solicitors: *Oswald Hickson, Collier & Co.* (for the appellant); *Treasury Solicitor* (for the Home Secretary).

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

REGAL (HASTINGS), LTD. *v.* GULLIVER AND OTHERS.

[HOUSE OF LORDS (Viscount Sankey, Lord Russell of Killowen, Lord Macmillan, Lord Wright and Lord Porter), **November 14, 17, 18, 20, 21, 24, 1941, February 20, 1942.**]

Companies—Directors—Sale of shares in subsidiary company—Fiduciary relationship—Right of company to profit on sale.

The appellant company were the owners of a cinema in Hastings. With a view to the sale of the property of the company as a going concern they were anxious to acquire two other cinemas in Hastings. For this purpose they formed a subsidiary company with a capital of £5,000 in £1 shares. They were offered a lease of the two cinemas, but the landlord required a guarantee of the rent by the directors unless the paid-up capital of the subsidiary company was £5,000. The intention of the directors of the appellant company was that the appellant company should hold all the shares in the subsidiary company, and, since the appellant company at that time was unable to provide more than £2,000, it seemed that the directors would be obliged to give the required guarantee. The directors wished to avoid giving this guarantee, and the matter was arranged in this way. The appellant company was to take up 2,000 shares at par; the chairman of the directors promised to find £500; the other directors promised to do the same; and Garton, who was the solicitor to the appellant company, also promised to provide £500. This arrangement was made at a board meeting to which the directors and Garton were called by two notices, one of a board meeting of the appellant company and the other of a board meeting of the subsidiary company. Both meetings were to be held at the same time and place. In fulfilment of the arrangement 2,000 shares were allotted to the appellant company; 500 to each of the directors and Garton, but the shares in respect of the £500 "found" by the chairman of the directors were allotted to and paid for by two companies and one private individual, so that the companies and the individual took as beneficial owners and not as nominees of the chairman. Ultimately the transaction was not carried through by the sale of the property of the company as a going concern, but by the sale of all the shares in the appellant company and in the subsidiary company. The 3,000 shares in the subsidiary company which were allotted to or on behalf of the directors of the appellant company and Garton were sold at a profit of £2 16*s.* 1*d.* per share. It was found as a fact that all the transactions were *bona fide*:—

HELD: (i) in the circumstances, the directors, other than the chairman, were in a fiduciary relationship to the appellant company and liable, therefore, to repay to it the profit they had made on the sale of the shares,

(ii) the chairman of the directors, since he did not take the shares beneficially, was not liable to repay the profit made by those who took the shares from him, as the latter were not in a fiduciary relationship to the company.

(iii) since Garton was not a director of the appellant company he was not in a fiduciary relationship to it, and was not liable to make any repayment. Moreover, he took the shares at the express request of the directors of the appellant company.

[**EDITORIAL NOTE.** The importance of this case lies in the modern practice of carrying on business by means of a number of companies either associated together or some subsidiary to one principal company. It shows that the directors of the company must have regard to the interest of the shareholders in all their dealings with the property of the company. The principle applied in this case was enunciated as early as 1726, long before there were limited liability companies, and was originally restricted to trustees. It has been applied to agents, partners and, lastly, to directors. As the opinions in this case state, the liability of directors is not quite the same as that of trustees, but the general principle remains that any person in a fiduciary capacity is not allowed to make a profit out of property in regard to which the fiduciary relationship exists. This equitable principle or doctrine has been surrounded with many high-sounding phrases and terms, and while it is no doubt one of the great doctrines of equity and a very valuable remedy in the case of improper dealings by persons in fiduciary relationships, it is a principle which can inflict considerable hardship, especially in the administration of small estates. In the case here reported the result is not altogether equitable, for, of the six persons concerned in the transaction impugned, four have by the operation of the doctrine been obliged to give up a profit made with perfect good faith, while the remaining two, by what seems no more than the mere chance of circumstance, have been allowed to retain their share of the profit. As their Lordships point out, no question as to the right to retain this profit could have arisen if the respondents had taken the precaution of obtaining the approval of the appellant company in general meeting, and this would have been a mere matter of form, since they doubtless controlled the voting.

AS TO FIDUCIARY POSITION OF DIRECTOR, see HALSBURY, Hailsham Edn., Vol. 5, pp. 319-325, paras. 533-538; and FOR CASES, see DIGEST, Vol. 9, pp. 491-503, Nos. 3224-3301.]

Cases referred to:

(1) *Keech* v. *Sandford* (1726), Sel. Cas. Ch. 61; 43 Digest 633, *720*.
(2) *Ex p. James* (1803), 8 Ves. 337; 43 Digest 779, *2193*.
(3) *Hamilton* v. *Wright* (1842), 9 Cl. & Fin. 111; 43 Digest 864, *3105*.
(4) *Aberdeen Ry. Co.* v. *Blaikie Brothers* (1854), 1 Macq. 461; 10 Digest 1176, *8339*; 2 Eq. Rep. 1281; 23 L.T.O.S. 315.
(5) *Imperial Hydropathic Hotel Co., Blackpool* v. *Hampson* (1882), 23 Ch.D. 1; 9 Digest 668, *4454*; 49 L.T. 150.
(6) *Re Forest of Dean Coal Mining Co.* (1878), 10 Ch.D. 450; 9 Digest 483, *3173*; 40 L.T. 287.
(7) *Re Faure Electric Accumulator Co.* (1888), 40 Ch.D. 141; 9 Digest 178, *1131*; 58 L.J.Ch. 48; 59 L.T. 918.
(8) *Parker* v. *McKenna* (1874), 10 Ch. App. 96; 9 Digest 493, *3240*; 44 L.J.Ch. 425; 31 L.T. 739.
(9) *Imperial Mercantile Credit Assocn.* (*Liquidators*) v. *Coleman* (1873), L.R. 6 H.L. 189; 9 Digest 491, *3225*; 42 L.J.Ch. 644; 29 L.T. 1; *reversing* 6 Ch. App. 558.
(10) *Huntington Copper Co.* v. *Henderson* (0000) 4 R. (Ct. of Sess.) 294.
(11) *Boston Deep Sea Fishing & Ice Co.* v. *Ansell* (1888), 39 Ch.D. 339; 9 Digest 528, *3490*; 59 L.T. 345.
(12) *Lister & Co.* v. *Stubbs* (1890), 45 Ch.D. 1; 1 Digest 482, *1623*; 59 L.J.Ch. 570; 63 L.T. 75.
(13) *Re North Australian Territory Co., Archer's Case*, [1892] 1 Ch. 332; 9 Digest 488, *3201*; 61 L.J.Ch. 129; 65 L.T. 800.

APPEAL by Regal Hastings, Ltd., from an order of the Court of Appeal, dated Feb. 15, 1941, dismissing an appeal from an order of WROTTESLEY, J., dated Aug. 30, 1940. The appeal was brought by special leave of the Appeal Committee, granted on Apr. 2, 1941. The facts and arguments are fully set out in the opinion of LORD RUSSELL OF KILLOWEN.

A. T. Miller, K.C., and *F. W. Beney* for the appellants.
Cartwright Sharp, K.C., and *C. B. Guthrie* for the respondent Garton.
H. Wynn Parry, K.C., and *P. B. Morle* for the respondents other than Garton.

VISCOUNT SANKEY: My Lords, the appellants were the plaintiffs in the action and are referred to as Regal; the respondents were the defendants. The action was brought by Regal against the first five respondents, who were former directors of Regal, to recover from them sums of money amounting to £7,010 8*s.* 4*d.*, being profits made by them upon the acquisition and sale by them of shares in the subsidiary company formed by Regal and known as Hastings

Amalgamated Cinemas Ltd. This company is referred to as Amalgamated. The action was brought against the defendant, Garton, who was Regal's former solicitor, to recover the sum of £1,402 1*s.* 8*d.*, being profits made by him in similar dealing in the said shares. There were alternative claims for damages and misfeasance and for negligence. The action was based on the allegation that the directors and the solicitor had used their position as such to acquire the shares in Amalgamated for themselves, with a view to enabling them at once to sell them at a very substantial profit, that they had obtained that profit by using their offices as directors and solicitor and were, therefore, accountable for it to Regal, and also that in so acting they had placed themselves in a position in which their private interests were likely to be in conflict with their duty to Regal. The facts were of a complicated and unusual character. I have had the advantage of reading and I agree with the statement as to them prepared by my noble and learned friend, Lord Russell of Killowen. It will be sufficient for my purpose to set them out very briefly.

In the summer of 1935 the directors of Regal, with a view to the future development or sale of their company, were anxious to extend the sphere of its operations by the acquisition of other cinemas. In Hastings and St. Leonards there were two small ones called the Elite and the De Luxe. Negotiations began both for their acquisition or control by lease or otherwise and for the disposal of Regal itself. Part of the machinery for the purpose was the creation by Regal of a subsidiary company, the Amalgamated. It was registered on Sept. 26, 1935, with a capital of £5,000 in £1 shares. The directors were the same as those of Regal with the addition of Garton. It was thought that only £2,000 of the capital was to be issued and that it would be subscribed by Regal, who would control it. Then difficulties began with the Elite and the De Luxe as to a lease, amongst others whether the directors of Amalgamated would guarantee the rent. The directors were not willing to do so. At last all difficulties were surmounted at a crucial meeting of Oct. 2, 1935. It was a peculiar meeting. The directors both of Regal and Amalgamated were summoned to attend at the same place and at the same time. They did so, but, although separate minutes were subsequently attributed to each company, it is not easy to say from the evidence at any particular moment for which company a particular director was appearing. It was resolved that Regal should apply for 2,000 shares in Amalgamated. It was agreed that £2,000 was the total sum which Regal could find. The value of the leases of the two cinemas was taken at £15,000. The draft lease was approved. Each of the Regal directors, except Gulliver, the chairman, agreed to apply for 500 shares, Gulliver saying he would find people to take up 500. The Regal directors requested Garton to take up 500. I will deal later with particular evidence applying to Gulliver and Garton, who delivered separate defences. Thus, the capital of Amalgamated was fully subscribed, Regal taking 2,000 shares, the five respondents taking 500 shares each, and the persons found by Gulliver the remaining 500. The shares were duly paid for and allotted. In the final transaction shortly afterwards these shares were sold at substantial profit, and it is this profit which Regal asks to recover in this action.

The directors gave evidence and were severely cross-examined as to their good faith. The trial judge said:

> All this subsequent history does not help me to decide whether the action of the directors of the plaintiff company and their solicitor on Oct. 2 was *bona fide* in the interests of the company and not *mala fide* and in breach of their duty to the company . . . I must take it that, in the realisation of those facts, it means that I cannot accept what has to be established by the plaintiff, and that is that the defendants here acted in ill faith . . . Finally, I have to remind myself, were it necessary, that the burden of proof, as in a criminal case, is the plaintiffs', who must establish the fraud they allege. On the whole, I do not think the plaintiff company succeeds in doing that and, therefore, there must be judgment for the defendants.

This latter statement was criticised in the Court of Appeal by du Parcq, L.J., who said:

> To anyone who has read the pleadings, but not followed the course of the trial, that would seem a remarkable statement, because it is common ground that there is no allegation of fraud in the pleadings whatever . . . but the course which the case has taken makes the learned judge's statement quite apprehensible, because it does appear to have been put before him as, in the main at any rate, a case of fraud.

It must be taken, therefore, that the respondents acted *bona fide* and without fraud.

In the Court of Appeal, LORD GREENE, M.R., said :

> If the directors in coming to the conclusion that they could not put up more than £2,000 of the company's money had been acting in bad faith, and if that restriction of the company's investment had been done for the dishonest purpose of securing for themselves profit which not only could but which ought to have been procured for their company, I apprehend that not only could they not hold that profit for themselves if the contemplated transaction had been carried out, but they could not have held that profit for themselves even if that transaction was abandoned and another profitable transaction was carried through in which they did in fact realise a profit through the shares . . . but once they have admittedly *bona fide* come to the decision to which they came in this case, it seems to me that their obligation to refrain from acquiring these shares came to an end. In fact, looking at it as a matter of business, if that was the conclusion they came to, a conclusion which, in my judgment, was amply justified by the evidence from a business point of view, then there was only one way left of raising the money, and that was putting it up themselves . . . That being so, the only way in which these directors could secure that benefit for the company was by putting up the money themselves. Once that decision is held to be a *bona fide* one and fraud drops out of the case, it seems to me there is only one conclusion, namely, that the appeal must be dismissed with costs.

It seems therefore that the absence of fraud was the reason of the decision. In the result, the Court of Appeal dismissed the appeal and from their decision the present appeal is brought.

The appellants say they are entitled to succeed : (i) because the respondents secured for themselves the profits upon the acquisition and sale of the shares in Amalgamated by using the knowledge acquired as directors and solicitors respectively of Regal and by using their said respective positions and without the knowledge or consent of Regal ; (ii) because the doctrine laid down with regard to trustees is equally applicable to directors and solicitors. Although both in the court of first instance and the Court of Appeal the question of fraud was the prominent feature, the appellants' counsel in this House at once stated that it was no part of his case and quite irrelevant to his arguments. His contention was that the respondents were in a fiduciary capacity in relation to the appellants and, as such, accountable in the circumstances for the profit which they made on the sale of the shares.

As to the duties and liabilities of those occupying such a fiduciary position, a number of cases were cited to us which were not brought to the attention of the trial judge. In my view, the respondents were in a fiduciary position and their liability to account does not depend upon proof of *mala fides.* The general rule of equity is that no one who has duties of a fiduciary nature to perform is allowed to enter into engagements in which he has or can have a personal interest conflicting with the interests of those whom he is bound to protect. If he holds any property so acquired as trustee, he is bound to account for it to his *cestui que trust.* The earlier cases are concerned with trusts of specific property : *Keech* v. *Sandford* (1), per LORD KING, L.C. The rule, however, applies to agents, as, for example, solicitors and directors, when acting in a fiduciary capacity. The headnote to *Ex p. James* (2), reads as follows :

> Purchase of a bankrupt's estate by the solicitor to the commission set aside. The Lord Chancellor would not permit him to bid upon the resale, discharging himself from the character of solicitor, without the previous consent of the persons interested, freely given, upon full information.

In that case LORD ELDON, L.C., said, at p. 345 :

> The doctrine as to purchase by trustees, assignees, and persons having a confidential character, stands much more upon general principle than upon the circumstances of any individual case. It rests upon this ; that the purchase is not permitted in any case, however honest the circumstances ; the general interests of justice requiring it to be destroyed in every instance ; as no court is equal to the examination and ascertainment of the truth in much the greater number of cases.

In *Hamilton* v. *Wright* (3) the headnote reads :

> A trustee is bound not to do anything which can place him in a position inconsistent with the interests of his trust, or which can have a tendency to interfere with his duty in discharging it. Neither the trustee nor his representative can be allowed to retain an advantage acquired in violation of this rule.

At p. 124, LORD BROUGHAM said :

> The knowledge which he acquires as trustee is of itself sufficient ground of dis-

qualification, and of requiring that such knowledge would not be capable of being used for his own benefit to injure the trust. The ground of disqualification is not merely because such knowledge may enable him actually to obtain an undue advantage over others.

In *Aberdeen Ry. Co.* v. *Blaikie* (4), the headnote reads :

> The director of a railway company is a trustee, and, as such, is precluded from dealing, on behalf of the company, with himself, or with a firm of which he is a partner.

At p. 471, Lord Cranworth, L.C., said :

> A corporate body can only act by agents, and it is of course the duty of those agents so to act as best to promote the interests of the corporation whose affairs they are conducting. Such agents have duties to discharge of a fiduciary nature towards their principal. And it is a rule of universal application that no one having such duties to discharge shall be allowed to enter into engagements in which he has, or can have, a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound to protect.

It is not, however, necessary to discuss all the cases cited, because the respondents admitted the generality of the rule as contended for by the appellants, but were concerned rather to confess and avoid it. Their contention was that, in this case, upon a true perspective of the facts, they were under no equity to account for the profits which they made. I will deal first with the respondents, other than Gulliver and Garton. We were referred to *Imperial Hydropathic Hotel Co., Blackpool* v. *Hampson* (5), where Bowen, L.J., at p. 12, drew attention to the difference between directors and trustees, but the case is not an authority for contending that a director cannot come within the general rule. No doubt there may be exceptions to the general rule, as, for example, where a purchase is entered into after the trustee has divested himself of his trust sufficiently long before the purchase to avoid the possibility of his making use of special information acquired by him as trustee (see the remarks of Lord Eldon, in *Ex p. James* (2) at p. 352) or where he purchases with full knowledge and consent of his *cestui que trust*. *Imperial* v. *Hampson* (5) makes no exception to the general rule that a solicitor or director, if acting in a fiduciary capacity, is liable to account for the profits made by him from knowledge acquired when so acting.

It was then argued that it would have been a breach of trust for the respondents, as directors of Regal, to have invested more than £2,000 of Regal's money in Amalgamated, and that the transaction would never have been carried through if they had not themselves put up the other £3,000. Be it so, but it is impossible to maintain that, because it would have been a breach of trust to advance more than £2,000 from Regal and that the only way to finance the matter was for the directors to advance the balance themselves, a situation arose which brought the respondents outside the general rule and permitted them to retain the profits which accrued to them from the action they took. At all material times they were directors and in a fiduciary position, and they used and acted upon their exclusive knowledge acquired as such directors. They framed resolutions by which they made a profit for themselves. They sought no authority from the company to do so, and, by reason of their position and actions, they made large profits for which, in my view, they are liable to account to the company.

I now pass to the cases of Gulliver and Garton. Their liability depends upon a careful examination of the evidence. Gulliver's case is that he did not take any shares and did not make any profit by selling them. His evidence, which is substantiated by the documents, is as follows. At the board meeting of Oct. 2 he was not anxious to put any money of his own into Amalgamated. He thought he could find subscribers for £500 but was not anxious to do so. He did, however, find subscribers—£200 by South Down Land Company, £100 by a Miss Geering and £200 by Seguliva A.G., a Swiss company. The purchase price was paid by these three, either by cheque or in account, and the shares were duly allotted to them. The shares were held by them on their own account. When the shares were sold, the moneys went to them, and no part of the moneys went into Gulliver's pocket or into his account. In these circumstances, and bearing in mind that Gulliver's evidence was accepted, it is clear that he made no profits for which he is liable to account. The case made against him rightly fails, and the appeal against the decision in his favour should be dismissed.

Garton's case is that in taking the shares he acted with the knowledge and consent of Regal, and that consequently he comes within the exception to the general rule as to the liability of the person acting in a fiduciary position to account for profits. At the meeting of Oct. 2, Gulliver, the chairman of Regal, and his co-directors were present. He was asked in cross-examination about what happened as to the purchase of the shares by the directors. The question was :

> Did you say to Mr. Garton, " Well, Garton, you have been connected with Bentley's for a long time, will you not put up £500 ? "

His answer was :

> I think I can put it higher. I invited Mr. Garton to put the £500 and to make up the £3,000.

This was confirmed by Garton in examination in chief. In these circumstances, and bearing in mind that this evidence was accepted, it is clear that he took the shares with the full knowledge and consent of Regal and that he is not liable to account for profits made on their sale. The appeal against the decision in his favour should be dismissed.

The appeal against the decision in favour of the respondents other than Gulliver and Garton should be allowed, and I agree with the order to be proposed by my noble and learned friend, Lord Russell of Killowen as to amounts and costs. The appeal against the decision in favour of Gulliver and Garton should be dismissed with costs.

Lord Russell of Killowen : My Lords, the very special facts which have led up to this litigation require to be stated in some detail, in order to make plain the point which arises for decision on this appeal.

The appellant is a limited company called Regal (Hastings), Ltd., and may conveniently be referred to as Regal. Regal was incorporated in the year 1933 with an authorised capital of £20,000 divided into 17,500 preference shares of £1 each and 50,000 ordinary shares of one shilling each. Its issued capital consisted of 8,950 preference shares and 50,000 ordinary shares. It owned, and managed very successfully, a freehold cinema theatre at Hastings called the Regal. In July, 1935, its board of directors consisted of one Walter Bentley and the respondents Gulliver, Bobby, Griffiths and Bassett. Its shareholders were twenty in number. The respondent Garton acted as its solicitor.

In or about that month, the board of Regal formed a scheme for acquiring a lease of two other cinemas (viz., the Elite at Hastings, and the Cinema de Luxe at St. Leonards), which were owned and managed by a company called Elite Picture Theatres (Hastings & Bristol), Ltd. The scheme was to be carried out by obtaining the grant of a lease to a subsidiary limited company, which was to be formed by Regal, with a capital of 5,000 £1 shares, of which Regal was to subscribe for 2,000 in cash, the remainder being allotted to Regal or its nominees as fully paid for services rendered. The whole beneficial interest in the lease would, if this scheme were carried out, enure solely to the benefit of Regal and its shareholders, through the shareholding of Regal in the subsidiary company. The respondent Garton, on the instructions of Regal, negotiated for the acquisition of the lease, with the result that an offer to take a lease for 35 or 42 years at a rent of £4,600 for the first year, rising in the second and third years up to £5,000 in the fourth and subsequent years, was accepted on behalf of the owners on Aug. 21, 1935, subject to mutual approval of the form of the lease. Subsequently, the owners of the two cinemas required the rent under the proposed lease to be guaranteed.

On Sept. 11, 1935, Walter Bentley died ; and on Sept. 18, 1935, his son, the respondent Bentley, who was one of his executors, was appointed a director of Regal. It should now be stated that, concurrently with the negotiations for the acquisition of a lease of the two cinemas, Regal was contemplating a sale of its own cinema, together with the leasehold interest in the two cinemas which it was proposing to acquire. On Sept. 18, 1935, at a board meeting of Regal, the respondent Garton was instructed that the directors were prepared to give a joint guarantee of the rent of the two cinemas, until the subscribed capital of the proposed subsidiary company amounted to £5,000. He was further instructed to deal with all offers received for the purchase of Regal's own assets. On Sept. 26, 1935, the proposed subsidiary company was registered under the name Hastings Amalgamated Cinemas, Ltd., which may, for brevity, be referred to as Amalgamated. Its directors were the five directors of Regal, and in addition the respondent Garton.

Harry Bentley, who had been appointed a director of Regal only on Sept. 18, at the end of the board meeting of that date, inquired from Garton the position as regards the new company, Amalgamated. In reply, he received a letter dated Sept. 26, 1935, in which the position, as at that date, is set out by Garton. After stating that the capital of Amalgamated is £5,000, of which £2,000 is being subscribed by Regal, " which sum will form virtually the whole of the present paid up capital " of Amalgamated, and that the rent is to be guaranteed by the directors so long as the issued capital of Amalgamated is under £5,000, he concludes as follows :

> Inasmuch as it is the intention of all the parties that the Regal (Hastings), Ltd. will not only control the Hastings (Amalgamated) Cinemas, Ltd., but will continue to hold virtually the whole of the capital, the position of a shareholder of Regal (Hastings), Ltd., is merely that he has the advantage of a possible asset of the two new cinemas on sale by the Regal (Hastings), Ltd., of its undertaking, so that the price realised to the shareholders of the Regal (Hastings), Ltd., will be the amount that he would normally have received for his interest in such company, plus his proportion of the sale price of such two new cinemas.

On Oct. 2, 1935, an offer was received from would-be purchasers offering a net sum of £92,500 for the Regal cinema and the lease of the two cinemas. Of this sum £77,500 was allotted as the price of Regal's cinema, and £15,000 as the price of the two leasehold cinemas. This splitting of the price seems to have been done by the purchasers at the request of the respondent Garton ; but it must be assumed in favour of the Regal directors that they were satisfied that £77,500 was not too low a price to be paid for their company's cinema, with the result that £15,000 cannot be taken to have been in excess of the value of the lease which Amalgamated was about to acquire. On the afternoon of Oct. 2, the six respondents met at 62, Shaftesbury Avenue, London, the registered offices of Regal. Various matters were mentioned and discussed between them, and they came to certain decisions. Subsequently, minutes were prepared which record the different matters as having been transacted at two separate and distinct board meetings, viz., a meeting of the board of Regal, and a meeting of the board of Amalgamated. The respondent Gulliver stated in his evidence that two separate meetings were held, that of the Amalgamated board being held and concluded before that of the Regal board was begun. On the other hand, the respondent Bentley says :

> It was more or less held in one lump, because we were talking about selling the three properties.

The respondent Garton states that, after it was decided that Regal could only afford to put up £2,000 in Amalgamated, which was purely a matter for the consideration of the Regal board, the next matter discussed was one which figures in the minutes of the Amalgamated board meeting. Moreover, both meetings are recorded in the minutes as having been held at 3 p.m.

Whatever may be the truth as to this, the matters discussed and decided included the following : (i) Regal was to apply for 2,000 shares in Amalgamated ; (ii) the offer of £77,500 for the Regal cinema and £15,000 for the two leasehold cinemas was accepted ; (iii) the solicitor reporting that completion of the lease was expected to take place on Oct. 7, it was resolved that the seal of Amalgamated be affixed to the engrossment when available ; and (iv) the respondent Gulliver having objected to guaranteeing the rent it was resolved

> . . . that the directors be invited to subscribe for 500 shares each and that such shares be allotted accordingly.

On Oct. 7, 1935, a lease of the two cinemas was executed in favour of Amalgamated, for the term of 35 years from Sept. 29, 1935, in accordance with the agreement previously come to. The shares of Amalgamated were all issued, and were allotted as follows : 2,000 to Regal, 500 to each of the respondents Bobby, Griffiths, Bassett, Bentley and Garton, and (by the direction of the respondent Gulliver) 200 to a Swiss company called Seguliva A.G., 200 to a company called South Downs Land Co., Ltd., and 100 to a Miss Geering.

In fact, the proposed sale and purchase of the Regal cinema and the two leasehold cinemas fell through. Another proposition, however, took its place, viz., a proposal for the purchase from the individual shareholders of their shares in Regal and Amalgamated. This proposal came to maturity by agreements dated Oct. 24, 1935, as a result of which the 3,000 shares in Amalgamated held otherwise than by Regal were sold for a sum of £3 16s. 1d. per share, or in other words at a profit of £2 16*s.* 1*d.* per share over the issue price of par.

As a sequel to the sale of the shares in Regal, that company came under the management of a new board of directors, who caused to be issued the writ which initiated the present litigation. By this action Regal seek to recover from its five former directors and its former solicitor a sum of £8,142 10*s.* either as damages or as money had and received to the plaintiffs' use. The action was tried by WROTTESLEY, J., who entered judgment for all the defendants with costs. An appeal by the plaintiffs to the Court of Appeal was dismissed with costs.

My Lords, those are the relevant facts which have led up to the debate in your Lordships' House, and I now proceed to consider whether the appellants are entitled to succeed against any and which of the respondents. The case has, I think, been complicated and obscured by the presentation of it before the trial judge. If a case of wilful misconduct or fraud on the part of the respondents had been made out, liability to make good to Regal any damage which it had thereby suffered could, no doubt, have been established; and efforts were apparently made at the trial, by cross-examination and otherwise, to found such a case. It is, however, due to the respondents to make it clear at the outset that this attempt failed. The case was not so presented to us here. We have to consider the question of the respondents' liability on the footing that, in taking up these shares in Amalgamated, they acted with *bona fides*, intending to act in the interest of Regal.

Nevertheless, they may be liable to account for the profits which they have made, if, while standing in a fiduciary relationship to Regal, they have by reason and in course of that fiduciary relationship made a profit. This aspect of the case was undoubtedly raised before the trial judge, but, in so far as he deals with it in his judgment, he deals with it on a wrong basis. Having stated at the outset quite truly that what he calls " this stroke of fortune " only came the way of the respondents because they were the directors and solicitor of the Regal, he continues thus:

> But in order to succeed the plaintiff company must show that the defendants both ought to have caused and could have caused the plaintiff company to subscribe for these shares, and that the neglect to do so caused a loss to the plaintiff company. Short of this, if the plaintiffs can establish that, though no loss was made by the company, yet a profit was corruptly made by the directors and the solicitor, then the company can claim to have that profit handed over to the company, framing the action in such a case for money had and received by the defendants for the plaintiffs' use.

Other passages in his judgment indicate that, in addition to this " corrupt " action by the directors, or, perhaps, alternatively, the plaintiffs in order to succeed must prove that the defendants acted *mala fide*, and not *bona fide* in the interests of the company, or that there was a plot or arrangement between them to divert from the company to themselves a valuable investment. However relevant such considerations may be in regard to a claim for damages resulting from misconduct, they are irrelevant to a claim against a person occupying a fiduciary relationship towards the plaintiff for an account of the profits made by that person by reason and in course of that relationship.

In the Court of Appeal, upon this claim to profits, the view was taken that in order to succeed the plaintiff had to establish that there was a duty on the Regal directors to obtain the shares for Regal. Two extracts from the judgment of LORD GREENE, M.R., show this. After mentioning the claim for damages, he says:

> The case is put on an alternative ground. It is said that, in the circumstances of the case, the directors must be taken to have been acting in the matter of their office when they took those shares; and that accordingly they are accountable for the profits which they have made . . . There is one matter which is common to both these claims which, unless it is established, appears to me to be fatal. It must be shown that in the circumstances of the case it was the duty of the directors to obtain these shares for their company.

Later in his judgment he uses this language:

> But it is said that the profit realised by the directors on the sale of the shares must be accounted for by them. That proposition involves that on Oct. 2, when it was

decided to acquire these shares, and at the moment when they were acquired by the directors, the directors were taking to themselves something which properly belonged to their company.

Other portions of the judgment appear to indicate that upon this claim to profits, it is a good defence to show *bona fides* or absence of fraud on the part of the directors in the action which they took, or that their action was beneficial to the company, and the judgment ends thus :

> That being so, the only way in which these directors could secure that benefit for their company was by putting up the money themselves. Once that decision is held to be a *bona fide* one, and fraud drops out of the case, it seems to me there is only one conclusion, namely, that the appeal must be dismissed with costs.

My Lords, with all respect I think there is a misapprehension here. The rule of equity which insists on those, who by use of a fiduciary position make a profit, being liable to account for that profit, in no way depends on fraud, or absence of *bona fides* ; or upon such questions or considerations as whether the profit would or should otherwise have gone to the plaintiff, or whether the profiteer was under a duty to obtain the source of the profit for the plaintiff, or whether he took a risk or acted as he did for the benefit of the plaintiff, or whether the plaintiff has in fact been damaged or benefited by his action. The liability arises from the mere fact of a profit having, in the stated circumstances, been made. The profiteer, however honest and well-intentioned, cannot escape the risk of being called upon to account.

The leading case of *Keech* v. *Sandford* (1) is an illustration of the strictness of this rule of equity in this regard, and of how far the rule is independent of these outside considerations. A lease of the profits of a market had been devised to a trustee for the benefit of an infant. A renewal on behalf of the infant was refused. It was absolutely unobtainable. The trustee, finding that it was impossible to get a renewal for the benefit of the infant, took a lease for his own benefit. Though his duty to obtain it for the infant was incapable of performance, nevertheless he was ordered to assign the lease to the infant, upon the bare ground that, if a trustee on the refusal to renew might have a lease for himself, few renewals would be made for the benefit of *cestuis que trust*. Lord King, L.C., said, at p. 62 :

> This may seem hard, that the trustee is the only person of all mankind who might not have the lease : but it is very proper that the rule should be strictly pursued, and not in the least relaxed . . .

One other case in equity may be referred to in this connection, viz., *Ex p. James* (2), decided by Lord Eldon, L.C. That was a case of a purchase of a bankrupt's estate by the solicitor to the commission, and Lord Eldon, L.C., refers to the doctrine thus, at p. 345 :

> This doctrine as to purchases by trustees, assignees, and persons having a confidential character, stands much more upon general principles than upon the circumstances of any individual case. It rests upon this : that the purchase is not permitted in any case however honest the circumstances ; the general interests of justice requiring it to be destroyed in every instance ; as no court is equal to the examination and ascertainment of the truth in much the greater number of cases.

Let me now consider whether the essential matters, which the plaintiff must prove, have been established in the present case. As to the profit being in fact made there can be no doubt. The shares were acquired at par and were sold three weeks later at a profit of £2 16*s.* 1*d.* per share. Did such of the first five respondents as acquired these very profitable shares acquire them by reason and in course of their office of directors of Regal ? In my opinion, when the facts are examined and appreciated, the answer can only be that they did. The actual allotment no doubt had to be made by themselves and Garton (or some of them) in their capacity as directors of Amalgamated ; but this was merely an executive act, necessitated by the alteration of the scheme for the acquisition of the lease of the two cinemas for the sole benefit of Regal and its shareholders through Regal's shareholding in Amalgamated. That scheme could only be altered by or with the consent of the Regal board. Consider what in fact took place on Oct. 2, 1935. The position immediately before that day is stated in Garton's letter of Sept. 26, 1935. The directors were willing to guarantee the rent until the subscribed capital of Amalgamated reached £5,000. Regal was to control Amalgamated and own the whole of its share capital, with the consequence that the Regal shareholders would receive their proportion of the sale price of the two new cinemas. The respondents then meet on Oct. 2, 1935. They have before them an offer to purchase the Regal cinema for £77,500, and the lease of the two cinemas for £15,000. The offer is accepted. The draft lease is approved and a resolution for its sealing is passed in anticipation of completion in five days. Some of those present, however, shy at giving guarantees, and accordingly the scheme is changed by the Regal directors in a vital respect. It is agreed that a guarantee shall be avoided by the six respondents bringing the subscribed capital up to £5,000. I will consider the evidence and the minute in a moment. The result of this change of scheme (which only the Regal directors could bring about) may not have been appreciated by them at the time; but its effect upon their company and its shareholders was striking. In the first place, Regal would no longer control Amalgamated, or own the whole of its share capital. The action of its directors had deprived it (acting through its shareholders in general meeting) of the power to acquire the shares. In the second place, the Regal shareholders would only receive a largely reduced proportion of the sale price of the two cinemas. The Regal directors and Garton would receive the moneys of which the Regal shareholders were thus deprived. This vital alteration was brought about in the following circumstances—I refer to the evidence of the respondent Garton. He was asked what was suggested when the guarantees were refused, and this is his answer:

> Mr. Gulliver said "We must find it somehow. I am willing to find £500. Are you willing," turning to the other four directors of Regal, "to do the same?" They expressed themselves as willing. He said, "That makes £2,500," and he turned to me and said, "Garton, you have been interested in Mr. Bentley's companies; will you come in to take £500?" I agreed to do so.

Although this matter is recorded in the Amalgamated minutes, this was in fact a decision come to by the directors of Regal, and the subsequent allotment by the directors of Amalgamated was a mere carrying into effect of this decision of the Regal board. The resolution recorded in the Amalgamated minute runs thus:

> After discussion it was resolved that the directors be invited to subscribe for 500 shares each, and that such shares be allotted accordingly.

As I read that resolution, and my reading agrees with Garton's evidence, the invitation is to the directors of Regal, and is made for the purpose of effectuating the decision which the five directors of Regal had made, that each should take up 500 shares in the Amalgamated. The directors of Amalgamated were not conveying an "invitation" to themselves. That would be ridiculous. They were merely giving effect to the Regal directors' decision to provide £2,500 cash capital themselves, a decision which had been followed by a successful appeal by Gulliver to Garton to provide the balance.

My Lords, I have no hesitation in coming to the conclusion, upon the facts of this case, that these shares, when acquired by the directors, were acquired by (1) reason, and only by reason of the fact that they were directors of Regal, and in the course of their execution of that office.

It now remains to consider whether in acting as directors of Regal they stood (2) in a fiduciary relationship to that company. Directors of a limited company are the creatures of statute and occupy a position peculiar to themselves. In some respects they resemble trustees, in others they do not. In some respects they resemble agents, in others they do not. In some respects they resemble managing partners, in others they do not. In *Re Forest of Dean Coal Mining Co.* (6), a director was held not liable for omitting to recover promotion money which had been improperly paid on the formation of the company. He knew of the improper payment, but he was not appointed a director until a later date. It was held that, although a trustee of settled property which included a debt would be liable for neglecting to sue for it, a director of a company was not a trustee of debts due to the company and was not liable. I cite two passages from the judgment of SIR GEORGE JESSEL, M.R. At pp. 451, 452, he said:

> Directors have sometimes been called trustees, or commercial trustees, and sometimes they have been called managing partners, it does not matter what you call them so long as you understand what their true position is, which is that they are really commercial men managing a trading concern for the benefit of themselves and all other shareholders in it.

Later, after pointing out that traders have a discretion whether they shall sue for a debt, which discretion is not vested in trustees of a debt under a settlement, he said, at p. 453 :

> Again directors are called trustees. They are no doubt trustees of assets which have come to their hands, or which are under their control, but they are not trustees of a debt due to the company . . . A director is the managing partner of the concern, and although a debt is due to the concern I do not think it right to call him a trustee of that debt which remains unpaid, though his liability in respect of it may in certain cases and in some respects be analogous to the liability of a trustee.

The position of directors was considered by KAY, J., in *Re Faure Electric Accumulator Co.* (7). That was a case where directors had applied the company's money in payment of an improper commission, and a claim was made for the loss thereby occasioned to the company. In referring to the liability of directors, the judge pointed out that directors were not trustees in the sense of trustees of a settlement, that the nearest analogy to their position would be that of a managing agent of a mercantile house with large powers, but that there was no analogy which was absolutely perfect ; and he added, at p. 151 :

> However, it is quite obvious that to apply to directors the strict rules of the Court of Chancery with respect to ordinary trustees might fetter their action to an extent which would be exceedingly disadvantageous to the companies they represent.

In addition a passage from the judgment of BOWEN, L.J., in *Imperial Hydropathic Hotel Co.* v. *Hampson* (5) may be usefully recalled. He said, at p. 152 :

> I should wish . . . to begin by remarking this, that when persons who are directors of a company are from time to time spoken of by judges as agents, trustees, or managing partners of the company, it is essential to recollect that such expressions are not used as exhaustive of the powers and responsibilities of those persons, but only as indicating useful points of view from which they may for the moment and for the particular purpose be considered—points of view at which for the moment they seem to be cutting the circle, or falling within the category of the suggested kind. It is not meant that they belong to the category, but that it is useful for the purpose of the moment to observe that they fall *pro tanto* within the principles which govern that particular class.

These three cases, however, were not concerned with the question of directors making a profit ; but that the equitable principle in this regard applies to directors is beyond doubt. In *Parker* v. *McKenna* (8), a new issue of shares of a joint stock bank was offered to the existing shareholders at a premium. The directors arranged with one Stock to take, at a larger premium, the shares not taken up by the existing shareholders. Stock, being unable to fulfil his contract, requested the directors to relieve him of some. They did so, and made a profit. They were held accountable for the profit so made. LORD CAIRNS, L.C., said, at p. 118 :

> The court will not enquire and is not in a position to ascertain, whether the bank has or has not lost by the acts of the directors. All the court has to do is to examine whether a profit has been made by an agent, without the knowledge of his principal, in the course and execution of his agency, and the court finds, in my opinion, that these agents in the course of their agency have made a profit, and for that profit they must, in my opinion, account to their principal.

In the same case JAMES, L.J., stated his view in the following terms, at pp. 124, 125 :

> . . . it appears to me very important that we should concur in laying down again and again the general principle that in this court no agent in the course of his agency, in the matter of his agency, can be allowed to make any profit without the knowledge of his principal ; that the rule is an inflexible rule, and must be applied inexorably by this court, which is not entitled, in my judgment, to receive evidence, or suggestion, or argument, as to whether the principal did or did not suffer any injury in fact, by reason of the dealing of the agent ; for the safety of mankind requires that no agent shall be able to put his principal to the danger of such an inquiry as that.

In *Imperial Mercantile Credit Assocn.* v. *Coleman* (9), one Coleman, a stockbroker and a director of a financial company, had contracted to place a large amount of railway debentures for a commission of 5 per cent. He proposed that his company should undertake to place them for a commission of 1½ per cent. The 5 per cent commission was in due course paid to the director, who paid over the 1½ per cent. to the company. He was held liable to account for the 3½ per cent., by MALINS, V.-C., who said, at p. 563 :

> It is of the highest importance that it should be distinctly understood that it is the duty of directors of companies to use their best exertions for the benefit of those whose interests are committed to their charge, and that they are bound to disregard their own private interests whenever a regard to them conflicts with the proper discharge of such duty.

His decree was reversed by Lord Hatherley on the ground that the transaction was protected under the company's articles of association. Your Lordships' House, however, thought that in the circumstances of the case the articles of association gave no protection, and restored the decree with unimportant variations. The liability was based on the view, which was not disputed by Lord Hatherley, that the director stood in a fiduciary relationship to the company. That relationship being established, he could not keep the profit which had been earned by the funds of the company being employed in taking up the debentures. The courts in Scotland have treated directors as standing in a fiduciary relationship towards their company and, applying the equitable principle, have made them accountable for profits accruing to them in the course and by reason of their directorships. It will be sufficient to refer to *Huntington Copper Co.* v. *Henderson* (10), in which the Lord President cites with approval the following passage from the judgment of the Lord Ordinary:

> Whenever it can be shown that the trustee has so arranged matters as to obtain an advantage whether in money or money's worth to himself personally through the execution of his trust, he will not be permitted to retain, but be compelled to make it over to his constituent.

In the result, I am of opinion that the directors standing in a fiduciary relationship to Regal in regard to the exercise of their powers as directors, and having obtained these shares by reason and only by reason of the fact that they were directors of Regal and in the course of the execution of that office, are accountable for the profits which they have made out of them. The equitable rule laid down in *Keech* v. *Sandford* (1) and *Ex p. James* (2), and similar authorities applies to them in full force. It was contended that these cases were distinguishable by reason of the fact that it was impossible for Regal to get the shares owing to lack of funds, and that the directors in taking the shares were really acting as members of the public. I cannot accept this argument. It was impossible for the *cestui que trust* in *Keech* v. *Sandford* (1) to obtain the lease, nevertheless the trustee was accountable. The suggestion that the directors were applying simply as members of the public is a travesty of the facts. They could, had they wished, have protected themselves by a resolution (either antecedent or subsequent) of the Regal shareholders in general meeting. In default of such approval, the liability to account must remain. The result is that, in my opinion, each of the respondents Bobby, Griffiths, Bassett and Bentley is liable to account for the profit which he made on the sale of his 500 shares in Amalgamated.

The case of the respondent Gulliver, however, requires some further consideration, for he has raised a separate and distinct answer to the claim. He says: "I never promised to subscribe for shares in Amalgamated. I never did so subscribe. I only promised to find others who would be willing to subscribe. I only found others who did subscribe. The shares were theirs. They were never mine. They received the profit. I received none of it." If these are the true facts, his answer seems complete. The evidence in my opinion establishes his contention. Throughout his evidence Gulliver insisted that he only promised to find £500, not to subscribe it himself. The £500 was paid by two cheques in favour of Amalgamated, one a cheque for £200 signed by Gulliver as director and on behalf of the Swiss company Seguliva, the other a cheque for £300 signed by Gulliver as managing director of South Downs Land Co., Ltd. They were enclosed in a letter of Oct. 3, 1935, from Gulliver to Garton, in which Gulliver asks that the share certificates be issued as follows, 200 shares in the name of himself, Charles Gulliver, 200 shares in the name of South Downs Land Co., Ltd., and 100 shares in the name of Miss S. Geering. The money for Miss Geering's shares was apparently included in South Down Land Co.'s cheque. The certificates were made out accordingly, the 200 shares in Gulliver's name being, he says, the shares subscribed for by the Swiss company.

When the sale and purchase of the Amalgamated shares was arranged, the agreement for the sale and purchase was signed on behalf of the vendor shareholders (other than the respondent Bentley) by Garton & Co.; and in a letter of Oct. 17, 1935, Gulliver sent to Garton (who held the three certificates) three transfers, viz. (1) a transfer of 200 shares executed by South Downs Land Co., Ltd., (2) a transfer of 200 shares executed by himself, and (3) a transfer of 100 shares executed by Miss Geering. When the purchase money was paid cheques were drawn as follows: a cheque for £360 in favour of Miss Geering, a cheque for £720 in favour of South Downs Land Co., Ltd., and a cheque for the same amount in favour of Gulliver. By letter of Oct. 24, 1935, written by Gulliver to the National Provincial Bank, these cheques were paid into the respective accounts of Miss Geering, South Downs Land Co., Ltd., and Seguliva, A.G.

From the evidence of Gulliver it appeared that Miss Geering is a friend who from time to time makes investments on his advice; that the issued capital of South Downs Land Co., Ltd., is £1,000 in £1 shares, held by some 11 or 12 shareholders, of whom Gulliver is one and holds 100 shares; and that in the Swiss company Gulliver holds 85 out of 500 shares.

It is of the first importance on this part of the case to bear in mind that these directors have been acquitted of all suggestion of *mala fides* in regard to the acquisition of these shares. They had no reason to believe that they could be called to account. Why then should Gulliver go to the elaborate pains of having the shares put into the names of South Downs Land Co. and Miss Geering, and of having the proceeds of sale paid into the respective accounts before mentioned, if the shares and proceeds really belonged to him? *Ex hypothesi* he had no reason for concealment; and no question was raised against the transaction until months after the proceeds of sale had been paid into the banking accounts of those whom Gulliver asserts to have been the owners of the shares. I can see no reason for doubting that the shares never belonged to Gulliver, and that he made no profit on the sale thereof.

Counsel for the appellant, however, contended that the trial judge had found as a fact that Gulliver was the owner of the shares; and he relied on certain scattered passages in the judgment, the strongest of which seems to me to be the one in which the judge said:

> I may say this with regard to Mr. Gulliver, that I have not been misled in any way or led to decide in his favour by the fact that he handed over his shares to his nominees but rather the reverse.

I cannot regard that as a finding by the judge that the shares were subscribed for by Gulliver under aliases, and that the shares and the proceeds of sale in fact belonged to him. It is equally susceptible of the meaning that he allowed others to subscribe for the shares which he could have obtained for himself had he so wished. If it be claimed as a finding of fact in the former sense, all I can say is that there is no evidence which in my opinion would justify such a finding.

It was further argued that, even if the shares and the proceeds of sale did not belong to Gulliver, he is nevertheless liable to account to Regal for the profit made by the owners of the shares, and that upon the authority of *Imperial Mercantile Credit Assocn.* (*Liquidators*) v. *Coleman* (9), to which I have already referred. One of the contentions put forward there by Coleman was that his transaction was a transaction for the benefit of a partnership in the profits of which he was only interested to the extent of a half, and that accordingly he could only be made accountable to that extent. That contention was disposed of by Lord Cairns in the following terms, at p. 208:

> My Lords, I think there is no foundation for this argument. The profit on the transaction was obtained by Mr. Coleman, and, in the view that I take, was obtained by him as a director of the association. Whether he desired or whether he determined to reserve it all to himself or to share it with his firm appears to me to be perfectly immaterial. The source from which the profit is derived is Mr. Coleman. It is only through him that his firm can claim. He is liable for the whole of the profits which were obtained; and it is not the course for a Court of Equity to enter into the consideration of what afterwards would have become of those profits.

I am unable to see how this authority helps Regal if it be assumed that neither the shares nor the profit ever belonged to Gulliver.

It was further said that Gulliver must account for whatever profits he may have made indirectly through his shareholding in the two companies, and that an inquiry should be directed for this purpose. As to this, it is sufficient to say that there is no evidence upon which to ground such an inquiry. Indeed, the evidence so far as it goes, shows that neither company has distributed any part of the profit. Finally, it was said that Gulliver must account for the profit on the 200 shares as to which the certificate was in his name. If in fact the shares belonged beneficially to the Swiss company (and that is the assumption for this purpose), the proceeds of sale did not belong to Gulliver, and were rightly paid into the

Swiss company's banking account. Gulliver accordingly made no profit for which he is accountable. As regards Gulliver, this appeal should, in my opinion, be dismissed.

There remains to consider the case of Garton. He stands on a different footing from the other respondents in that he was not a director of Regal. He was Regal's legal adviser ; but, in my opinion, he has a short but effective answer to the plaintiffs' claim. He was requested by the Regal directors to apply for 500 shares. They arranged that they themselves should each be responsible for £500 of the Amalgamated capital, and they appealed, by their chairman, to Garton to subscribe the balance of £500 which was required to make up the £3,000. In law his action, which has resulted in a profit, was taken at the request of Regal, and I know of no principle or authority which would justify a decision that a solicitor must account for profit resulting from a transaction which he has entered into on his own behalf, not merely with the consent, but at the request of his client.

My Lords, in my opinion the right way in which to deal with this appeal is (i) to dismiss the appeal as against the respondents Gulliver and Garton with costs, (ii) to allow it with costs as against the other four respondents, and (iii) to enter judgment as against each of these four respondents for a sum of £1,402 1*s.* 8*d.* with interest at 4 per cent. from Oct. 25, 1935, as to £1,300 part thereof and from Dec. 5, 1935, as to the balance. As regards the liability of these four respondents for costs, I have read the shorthand notes of the evidence at the trial, and it is clear to me that the costs were substantially increased by the suggestions of *mala fides* and fraud with which the cross-examination abounds, and from which they have been exonerated. In my opinion a proper order to make would be to order these four respondents to pay only three-quarters of the appellants' taxed costs of the action. The taxed costs of the appellants in the Court of Appeal and in this House they must pay in full.

One final observation I desire to make. In his judgment LORD GREENE, M.R., stated that a decision adverse to the directors in the present case involved the proposition that, if directors *bona fide* decide not to invest their company's funds in some proposed investment, a director who thereafter embarks his own money therein is accountable for any profits which he may derive therefrom. As to this, I can only say that to my mind the facts of this hypothetical case bear but little resemblance to the story with which we have had to deal.

LORD MACMILLAN : My Lords, the real question for decision in this appeal seems unfortunately to have been somewhat obscured by the course of the arguments before the trial judge and to some extent also in the Court of Appeal. The issue, as it was formulated before your Lordships, was not whether the directors of Regal (Hastings), Ltd., had acted in bad faith. Their *bona fides* was not questioned. Nor was it whether they had acted in breach of their duty. They were not said to have done anything wrong. The sole ground on which it was sought to render them accountable was that, being directors of the plaintiff company and therefore in a fiduciary relation to it, they entered in the course of their management into a transaction in which they utilised the position and knowledge possessed by them in virtue of their office as directors, and that the transaction resulted in a profit to themselves. The point was not whether the directors had a duty to acquire the shares in question for the company and failed in that duty. They had no such duty. We must take it that they entered into the transaction lawfully, in good faith and indeed avowedly in the interests of the company. However, that does not absolve them from accountability for any profit which they made, if it was by reason and in virtue of their fiduciary office as directors that they entered into the transaction.

The equitable doctrine invoked is one of the most deeply rooted in our law. It is amply illustrated in the authoritative decisions which my noble and learned friend LORD RUSSELL OF KILLOWEN has cited. I should like only to add a passage from PRINCIPLES OF EQUITY, by LORD KAMES, which puts the whole matter in a sentence (3rd Edn., 1778, vol. 2, p. 87) : "Equity," he says, "prohibits a trustee from making any profit by his management, directly or indirectly."

The issue thus becomes one of fact. The plaintiff company has to establish two things : (i) that what the directors did was so related to the affairs of the company that it can properly be said to have been done in the course of their management and in utilisation of their opportunities and special knowledge as directors; and (ii) that what they did resulted in a profit to themselves. The first of these propositions is clearly established by the analysis of the whole complicated circumstances for which the House is indebted to my noble and learned friend who has preceded me. The second proposition is admitted, except in the case of Gulliver, in whose case I agree that, on the evidence, he is not proved to have made any profit personally. The conditions are, therefore, A in my opinion, present which preclude the four directors who made a personal profit by the transaction from retaining such profit.

The position of the respondent Garton is quite different. He was the solicitor of the plaintiff company and in no sense a trustee for it. True, he made a profit, as did the four directors, but he subscribed for his shares not only with the knowledge, but at the express request, of his clients, and I know of no principle on which he could be held accountable to them for any resultant profit to himself. B

I should have been content simply to express my concurrence with the views expounded by my noble and learned friend Lord Russell of Killowen, with which I wholly agree, but for the fact that we are differing from the Court of Appeal. For that reason I have thought it proper to state briefly the grounds of my concurrence.

C

Lord Wright: My Lords, of the six respondents, two, Gulliver and Garton, stand on a different footing from the other four. It is in regard to the latter that the important question of principle brought into issue by the decisions of Wrottesley, J., and the Court of Appeal call for determination. That question can be briefly stated to be whether an agent, a director, a trustee or other person in an analogous fiduciary position, when a demand is made upon him by the person to whom he stands in the fiduciary relationship to account for profits D acquired by him by reason of his fiduciary position, and by reason of the opportunity and the knowledge, or either, resulting from it, is entitled to defeat the claim upon any ground save that he made profits with the knowledge and assent of the other person. The most usual and typical case of this nature is that of principal and agent. The rule in such cases is compendiously expressed to be that an agent must account for net profits secretly (that is, without the knowledge of his principal) acquired by him in the course of his agency. The E authorities show how manifold and various are the applications of the rule. It does not depend on fraud or corruption.

The courts below have held that it does not apply in the present case, for the reason that the purchase of the shares by the respondents, though made for their own advantage, and though the knowledge and opportunity which enabled them to take the advantage came to them solely by reason of their being directors F of the appellant company, was a purchase which, in the circumstances, the respondents were under no duty to the appellant to make, and was a purchase which it was beyond the appellant's ability to make, so that, if the respondents had not made it, the appellant would have been no better off by reason of the respondents abstaining from reaping the advantage for themselves. With the question so stated, it was said that any other decision than that of the courts below would involve a dog-in-the-manger policy. What the respondents did, G it was said, caused no damage to the appellant and involved no neglect of the appellant's interests or similar breach of duty. However, I think the answer to this reasoning is that, both in law and equity, it has been held that, if a person in a fiduciary relationship makes a secret profit out of the relationship, the court will not inquire whether the other person is damnified or has lost a profit which otherwise he would have got. The fact is in itself a fundamental breach of the fiduciary relationship. Nor can the court adequately investigate the matter H in most cases. The facts are generally difficult to ascertain or are solely in the knowledge of the person who is being charged. They are matters of surmise; they are hypothetical because the inquiry is as to what would have been the position if that party had not acted as he did, or what he might have done if there had not been the temptation to seek his own advantage, if, in short, interest had not conflicted with duty. Thus, in *Keech* v. *Sandford* (1), a case in which the fiduciary relationship was that of trustee and *cestui que trust*, the trustee was held liable to assign a lease to the infant *cestui que trust*, though the lessor had refused to renew to the infant. LORD KING, L.C., said, at p. 62 :

> This may seem hard, that the trustee is the only person of all mankind who might not have the lease . . .

It did not matter that the infant could not himself have got it and that he was not damaged by the trustee taking it for himself. One reason why the rule is strictly pursued is given by LORD ELDON in *Ex p. James* (2), at p. 345 :

> . . . no court is equal to the examination and ascertainment of the truth in much the greater number of cases.

In *Parker* v. *McKenna* (8), a most instructive case, the rule is so admirably stated by JAMES, L.J., that I cannot resist repeating his language, though my noble and learned friend LORD RUSSELL OF KILLOWEN, in his speech just delivered, which I have had the opportunity of reading in print, and with which I agree completely, has already quoted it to your Lordships. The words of JAMES, L.J., which I emphasise, are [pp. 124, 125] :

> . . . that the rule is an inflexible rule and must be applied inexorably by this court which is not entitled, in my judgment, to receive evidence, or suggestion, or argument as to whether the principal did or did not suffer any injury in fact by reason of the dealing of the agent ; *for the safety of mankind requires that no agent shall be able to put his principal to the danger of such an inquiry as that.*

The italics are mine. I need not multiply citations to the same effect, or illustrations of the different circumstances in which the rule has been applied.

In the present case the four respondents were acting in the matter as agents for the appellant company in their capacity of directors, that is, " as commercial men managing a trading concern for the benefit of themselves and all other shareholders in it," if I may borrow that part of the description applied to directors by SIR GEORGE JESSEL, M.R., in *Re Forest of Dean Coal Mining Co.* (6), at p. 452. In the numerous actions, or most of them, which have been brought against directors of companies for profits secretly (that is, without the assent of the shareholders) secured in the course of their dealings as directors, the claims have been against them in their capacity as agents. Thus, to take a familiar instance, in *Boston Deep Sea Fishing & Ice Co.* v. *Ansell* (11), the defendant was held liable to account to the plaintiff company of which he was director for secret bribes or bonuses which he had received from persons making contracts with the company. The defendant's liability flowed from the fiduciary relationship in which he stood to the company as its agent. BOWEN, L.J., said, at pp. 367, 368 :

> . . . the law implies a use, that is to say, there is an implied contract, if you put it as a legal proposition—there is an equitable right, if you treat it as a matter of equity—as between the principal and agent that the agent should pay it over, which renders the agent liable to be sued for money had and received, and there is an equitable right in the master to receive it, and to take it out of the hands of the agent, which gives the principal a right to relief in equity.

As it was held in *Lister & Co.* v. *Stubbs* (12), the relationship in such a case is that of debtor and creditor, not trustee and *cestui que trust.* Many instances can be quoted from the books of the stringency with which the courts have enforced the rule that a director must account to his company for any benefit which he obtains in the course of and owing to his directorship, even though the benefit comes from a third person and involves no loss to the company. I cite as one example *Re North Australian Territory Co., Archer's Case* (13), where a director was held liable to account to the company for the sum paid to him by the promoter of the company by way of indemnity against the money which the director had to pay for his qualification shares.

The analysis of the facts in the present case which has been made by LORD RUSSELL OF KILLOWEN shows clearly enough that the opportunity and the knowledge which enabled the four respondents to purchase the shares came to them simply in their position as directors of the appellant company. WROTTESLEY, J., clearly so held. He said at the outset of his judgment :

> There is no doubt they (the respondents) did take up in their own names shares which only after a few days and certainly only after a week or two they were able to sell at a very large profit indeed. There is no doubt that it was only because they were directors and solicitor respectively of the plaintiff company that this stroke of fortune came in their way.

He decided against the appellant company because he fixed his attention on his view that the appellant suffered no loss by the respondents' conduct, instead of fixing attention on the crucial fact that the respondents made a secret profit out of their agency. I do not think that any different view was taken on this aspect of the case by the Court of Appeal, or that it was questioned by that court that the opportunity of making the profits came to the four respondents by reason of their fiduciary position as directors. The Court of Appeal held that, in the absence of any dishonest intention, or negligence, or breach of a specific A duty to acquire the shares for the appellant company, the respondents as directors were entitled to buy the shares themselves. Once, it was said, they came to a *bona fide* decision that the appellant company could not provide the money to take up the shares, their obligation to refrain from acquiring those shares for themselves came to an end. With the greatest respect, I feel bound to regard such a conclusion as dead in the teeth of the wise and salutary rule so stringently enforced in the authorities. It is suggested that it would have been mere B quixotic folly for the four respondents to let such an occasion pass when the appellant company could not avail itself of it; but LORD KING, L.C., faced that very position when he accepted that the person in the fiduciary position might be the only person in the world who could not avail himself of the opportunity. It is, however, not true that such a person is absolutely barred, because he could by obtaining the assent of the shareholders have secured his freedom to make the profit for himself. Failing that, the only course open is to C let the opportunity pass. To admit of any other alternative would be to expose the principal to the dangers against which JAMES, L.J., in the passage I have quoted uttered his solemn warning. The rule is stringent and absolute, because "the safety of mankind" requires it to be absolutely observed in the fiduciary relationship. In my opinion, the appeal should be allowed in the case of the four respondents. D

In the case of the other two respondents, I agree with LORD RUSSELL OF KILLOWEN that the appeal should be dismissed for the several reasons which he has given in regard to each of them. These appeals turn on issues of evidence and fact, and I do not desire to add to what has fallen from my noble and learned friend.

LORD PORTER: My Lords, I have had an opportunity of reading the speech which has been delivered by my noble and learned friend, LORD RUSSELL OF E KILLOWEN, and had we not been differing from the view of the Court of Appeal I should not desire to add to what he has said. As we are reversing the judgment of both the court of first instance and the Court of Appeal I desire, out of respect for the opinions expressed in them, to state in the briefest possible compass the grounds for the view which I hold.

My Lords, I am conscious of certain possibilities which are involved in the F conclusion which all your Lordships have reached. The action is brought by the Regal company. Technically, of course, the fact that an unlooked for advantage may be gained by the shareholders of that company is immaterial to the question at issue. The company and its shareholders are separate entities. One cannot help remembering, however, that in fact the shares have been purchased by a financial group who were willing to acquire those of the Regal and the Amalgamated at a certain price. As a result of your Lordships' decision G that group will, I think, receive in one hand part of the sum which has been paid by the other. For the shares in Amalgamated they paid £3 16*s*. 1*d*. per share, yet part of that sum may be returned to the group, though not necessarily to the individual shareholders by reason of the enhancement in value of the shares in Regal—an enhancement brought about as a result of the receipt by the company of the profit made by some of its former directors on the sale of Amalgamated shares. This, it seems, may be an unexpected windfall, but whether it H be so or not, the principle that a person occupying a fiduciary relationship shall not make a profit by reason thereof is of such vital importance that the possible consequence in the present case is in fact as it is in law an immaterial consideration.

The plaintiff, the Regal company, by its pleadings, claimed (i) damages for negligence, (ii) alternatively, the profit obtained on the sale of the shares in Amalgamated as money had and received by the defendants to the plaintiffs' use, and (iii) in the further alternative damages for misfeasance. No claim for fraud was suggested, and the trial judge expressly exonerated the defendants from any liability for negligence or misfeasance. Before your Lordships' House the claim for money had and received was alone persisted in. The alternative claim for misfeasance, however, seems also to have been presented to the Court of Appeal, but to have been rejected by them, and in common with the rest of your Lordships I unreservedly accept the findings of both courts.

It remains, therefore, to consider the claim that (in the words of LORD GREENE, M.R.):

> . . . in the circumstances of the case the directors must be taken to have been acting in the matter of their office when they took those shares and that, accordingly, they are accountable for the profits, which they have made.

That the shares were obtained by the defendants by reason of their position as directors of Regal is, I think, plain. The original proposition, when the formation of the subsidiary company was suggested, was that the whole of the shares should be issued to the Regal company, partly for cash and partly for services rendered, and this proposition was discussed and accepted at board meetings of that company. It was only afterwards, when the necessity for finding £5,000 cash arose, that the issue to any one other than the company was considered, and then the directors turned to themselves. "There is no doubt it was only because they were directors and solicitor respectively of the plaintiff company that this stroke of fortune came their way," says WROTTESLEY, J., and I agree with his observation.

In these circumstances, it is to my mind immaterial that the directors saw no way of raising the money save from amongst themselves and from the solicitor to the company, or, indeed, that the money could in fact have been raised in no other way. The legal proposition may, I think, be broadly stated by saying that one occupying a position of trust must not make a profit which he can acquire only by use of his fiduciary position, or, if he does, he must account for the profit so made. For this proposition the cases of *Keech* v. *Sandford* (1) and *Ex p. James* (2) are sufficient authority. WROTTESLEY, J., and the members of the Court of Appeal appear to have adopted a narrower outlook with which, with all respect, I find myself unable to agree. WROTTESLEY, J., said:

> In order to succeed the plaintiff company must show that the defendants both ought to have caused and could have caused the plaintiff company to subscribe for these shares and that the neglect to do so caused a loss to the plaintiff company.

In the Court of Appeal, LORD GREENE, M.R., said:

> It must be shown that in the circumstances of the case it was the duty of the directors to obtain these shares for their company . . . The position of the Regal company would have been very much strengthened by having all these shares in the two companies in the same hands with the possibility of one control. That being so, the only way in which these directors could secure that benefit for their company was by putting up the money themselves. Once that decision is held to be a *bona fide* one, and fraud drops out of the case, it seems to me there is only one conclusion, namely, that the appeal must be dismissed with costs.

To treat the problem in this way is, in my view, to look at it as involving a claim for negligence or misfeasance and to neglect the wider aspect. Directors, no doubt, are not trustees, but they occupy a fiduciary position towards the company whose board they form. Their liability in this respect does not depend upon breach of duty but upon the proposition that a director must not make a profit out of property acquired by reason of his relationship to the company of which he is director. It matters not that he could not have acquired the property for the company itself—the profit which he makes is the company's, even though the property by means of which he made it was not and could not have been acquired on its behalf. Adopting the words of LORD ELDON, L.C., in *Ex p. James* (2), at p. 345:

> . . . the general interests of justice require it to be destroyed in every instance; as no court is equal to the examination and ascertainment of the truth in much the greater number of cases.

My Lords, these observations apply generally to the action, but the cases of Gulliver and Garton stand on a somewhat different footing. As to them, there are additional and special considerations to be kept in mind. I need not set them out or refer to them further than by saying that I find myself in agreement with the reasoning and conclusion of my noble and learned friend, LORD RUSSELL of Killowen, and would submit with him that the appeal should be allowed so far as concerns the defendants Bobby, Griffiths, Bassett and Bentley, and should be dismissed in the case of Gulliver and Garton. I also concur in the order as to costs which he suggests.

Appeal dismissed as against the respondents Gulliver and Garton. Appeal allowed as against the other respondents.

Solicitors: *H. S. Wright & Webb* (for the appellants); *Boyce Evans & Sheppard* (for the respondents Bobby, Griffiths & Bassett); *Tackley, Fall & Read* (for the respondent Bentley); *Hugh V. Harraway & Son* (for the respondent Gulliver); *Underwood & Co.* (for the respondent Garton).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

BANK POLSKI *v.* K. J. MULDER & CO.

[Court of Appeal (Lord Greene, M.R., and MacKinnon, L.JJ.), **February 27, 1942.**]

Bills of Exchange—Acceptance—Bills expressed to be payable in Dutch currency at named bank in Amsterdam—Bills accepted in London—Whether local acceptance—Absence of statement that bills were not payable elsewhere than at named place—Bills of Exchange Act, 1882 (*c.* 61), *s.* 19 (2) (*c*).

The Bank Polski were holders for value of bills of exchange drawn in Poland and expressed to be payable at a named bank in Amsterdam in Dutch currency. The bills were accepted in London by M. & Co. In an action upon the bills, M. & Co. contended that the acceptance was a local acceptance within the Bills of Exchange Act, 1882, s. 19 (2) (*c*), and that therefore the Bank Polski was not entitled to sue them as acceptors in default of presentation for payment:—

Held: since there was no express statement that the bills were payable only at the place specified, and not elsewhere, the acceptance was not a local acceptance within the meaning of the subsection.

Decision of Tucker, J. ([1942] 2 All E.R. 647) *affirmed.*

[**EDITORIAL NOTE.** It was stated in the course of this appeal that there was a wide difference of opinion whether the omission of the words "only" and "and not elsewhere" was a material difference and that it was desired to obtain a decision of the court on the point. The Act clearly states that an acceptance to pay at a particular place is a general acceptance, unless it is expressly stated that the bill is to be paid there only and not elsewhere. The Court of Appeal have found no difficulty in holding that this subsection must be strictly complied with if an acceptance is to be treated as a local acceptance.

As to Qualified Acceptance of Bills of Exchange, see HALSBURY, Hailsham Edn., Vol. 2, pp. 635-637, paras. 875-877; and for Cases, see DIGEST, Vol. 6, pp. 63-65, Nos. 510-527.]

Case referred to:

(1) *Ex p. Hayward* (1887), 3 T.L.R. 687; 6 Digest 237, *1498.*

Appeal by the defendants from a judgment of Tucker, J., dated June 24, 1941, reported [1941] 2 All E.R. 647, where the facts are fully set out. The point taken on appeal was not argued before Tucker, J.

H. J. Wallington, K.C. and *Valentine Holmes* for the appellants.

H. G. Robertson for the respondents.

Wallington, K.C.: The appellants, the acceptors of the bills, desire to have a decision of the court that the acceptance was intended to be a qualified acceptance although the word "only" or the words "and not elsewhere" were not written upon the bills. Looking at the bills there is an express statement to pay at that place, and it should be regarded as a statement to pay there and not elsewhere. The acceptors accepted the bills as they were directed by the drawers to accept them. On the face of these bills there is a contract between drawers and acceptors. It is one thing for an acceptor to write on a bill that he will pay at a certain place and not elsewhere, but it is quite a different thing for a drawer to specify the place of payment.

[MacKinnon, L.J. referred to *Ex p. Hayward* (1).]

Wallington, K.C.: In that case the place of payment was written on the bills by the acceptor as well as by the drawer. The present case differs from any case I have been able to find, because in the present case the drawers wrote the place of payment upon the bills and the acceptors merely acquiesced.

Robertson : The Bills of Exchange Act, 1882, s. 52, says that, if an acceptance is general, presentment for payment is not necessary in order to charge the acceptor. The words of sect. 19 are perfectly plain that acceptance is general unless it is qualified. It is for the acceptor to qualify the generality of the acceptance if he wishes to do so. It is impossible to construe the acceptance of the bills in the present case as an acceptance to pay at a particular place and not elsewhere.

Wallington, K.C., in reply.

LORD GREENE, M.R. : This is an appeal from a judgment of TUCKER, J., in an action upon certain bills of exchange. These bills were all in the same form. They were drawn in Poland and were accepted in London by the present appellants, and they were expressed to be payable in Amsterdam, at a named bank there, in Dutch currency. The bills were not presented for payment, and the only point that is taken by way of defence is that the bills ought to have been presented for payment, and that, in default of such presentation, the present plaintiffs, who are holders for value, are not entitled to sue the acceptors.

Before TUCKER, J., the point argued for the appellants was based on the Bills of Exchange Act, 1882, s. 72. That point is expressly abandoned in this court, and, accordingly, I say no more about it. Before us the argument was a short and simple one. By the Bills of Exchange Act, 1882, s. 19 (1) :

> An acceptance is either (*a*) general or (*b*) qualified (2) . . . In particular an acceptance is qualified which is . . . (*c*) local, that is to say, an acceptance to pay only at a particular specified place. An acceptance to pay at a particular place is a general acceptance, unless it expressly states that the bill is to be paid there only and not elsewhere . . .

It being conceded that the contract is to be governed entirely by English law and that no reference to Dutch law is relevant, the sole question which we have to decide is whether or not the acceptance given in connection with these bills was a local acceptance within the meaning of that provision of the Act. On the face of it, it clearly is not. It is an acceptance payable at a specified place ; but there is no express statement that the bill is to be paid there only and not elsewhere. Accordingly, on the face of the bill, this argument cannot stand.

The place of payment specified in the bill is in Holland. The address of the acceptors stated on the face of the bill is in London, the drawers being in Poland. It is said that the fact that the currency in which the bill is payable is Dutch currency, coupled with the place of payment specified on the face of the bill, indicate that the parties intended that payment should be made at the specified place and there only. A further reinforcement of that argument was based on the proposition that, where the place is specified by the drawer himself, as apparently it was in this case, the drawer having typed it on the face of the bill before it was accepted, that makes some difference. It seems to me that there is nothing whatever in this last point. The acceptor accepts the bill in the form in which it is presented to him, and the fact that the place of payment is already there makes it none the less his contract of acceptance with that term as to payment in it.

With regard to the other two matters, the difference in country and the difference in currency, it seems to me quite hopeless to suggest that those facts can amount to the express statement which the section requires in order to make the acceptance a qualified and not a general one. When the section says : " unless it expressly states that the bill is to be paid there only, and not elsewhere," I apprehend that it means what it says. It seems to me quite impossible to spell out of the matters upon which reliance is placed any such express statement at all. The point is a perfectly short one and, in my opinion, it is perfectly clear.

There is one minor point raised by the appellants, which relates to interest. By the judgment, interest was awarded as from Nov. 1, 1939, which was the due date. In fact, the bills were only presented to the acceptors in Feb., 1940, and it is said that the judgment is wrong in that it ought to have allowed interest only from Feb., 1940, and not from Nov. 1, 1939. No such point was taken before the judge, and, in my opinion, there is no substance in it at all. The appellants have had the use of the money since Nov. 1, and it appears to me that the judge was perfectly right in awarding interest as from that date. The appeal, accordingly, must be dismissed with costs.

MACKINNON, L.J.: I agree. This is a very clear case, and its clarity is made possible by reason of the existence of the Bills of Exchange Act, 1882, which I have always regarded as the best drafted Act of Parliament which was ever passed. It was admitted, because it could not be disputed, that this was a general acceptance within sect. 19 of the Act. By writing their acceptance on the bill when presented to them, the defendants made a contract, and they made that contract in London where they signed their name. Sect. 72 (2) reads as follows: A

> Subject to the provisions of this Act, the interpretation of the . . . acceptance . . . of a bill is determined by the law of the place where such contract is made.

That is, by the law of London, where the contract was made by the acceptance. In CHALMERS, BILLS OF EXCHANGE, 10th Edn., p. 283, the meaning of the term interpretation in this subsection is explained as follows; B

> The term "interpretation" in this subsection clearly includes the obligations of the parties as deduced from such interpretation.

Therefore the obligation of the acceptors who have made their contract in London depends upon English law.

There are only two remaining relevant sections which show the obligation of the acceptor under English law. One is sect. 52 (1), which provides: C

> When a bill is accepted generally presentment for payment is not necessary in order to render the acceptor liable.

The other is sect. 54 (1), which provides:

> The acceptor of a bill, by accepting it—(1) engages that he will pay it according to the tenor of his acceptance.

As a result, it is perfectly clear that the defendants were liable to pay the sum claimed. D

This case is almost anticipated in precise terms by *Ex p. Hayward* (1). In that case bills of exchange were drawn abroad, addressed to the proposed defendants and stated to be payable in Ceylon. They were accepted in London by the proposed defendant as "payable at the Chartered Mercantile Bank, Kandy," but without the added limitation "but not elsewhere" or the word "only." It was held that that was a general acceptance and that the acceptors could be sued in London. The only conceivable difference between that case and the present one is that in fact the bills had been presented at the bank, which was named in the acceptance. The distinction is immaterial, and, if authority were necessary, *Ex p. Hayward* (1), would provide it to show that the decision of TUCKER, J., was correct. E

I agree with LORD GREENE, M.R., that there is nothing in the point with regard to the interest. F

GODDARD, L.J.: I agree.

Solicitors: *Herbert Smith* (for the appellant); *Slaughter & May* (for the respondents).

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

G

DRUMMOND *v.* HAMER.

[KING'S BENCH DIVISION (Atkinson, J.), **January 20, 1942.**]

Arbitration—Appointment of arbitrator—Failure of one side to appoint—Notice requiring appointment within 7 days—Necessity for appointment of sole arbitrator after default—Arbitration Act, 1889 (c. 49), *s.* 6 (*b*). H

A lease provided that in the event of the demised premises being rendered uninhabitable the rent should be proportionately reduced. The premises, having been rendered uninhabitable by fire, the question of the appropriate reduction of rent was referred to arbitration. The applicant alleged that the respondent had failed to appoint an arbitrator on his behalf and served upon the respondent a notice requiring him within 7 days from the service of the notice to name an arbitrator to act on his behalf in the matters submitted, failing which the matters would stand referred to the arbitrator appointed by the applicant as sole arbitrator. After the lapse of 7 days from the date of this notice, the applicant's arbitrator proceeded to act alone in the reference :—

HELD : The Arbitration Act, 1889, s. 6 (*b*) requires that, after service of a notice in the above form and after default by the other side to appoint an arbitrator within the 7 days, the party giving the notice shall expressly appoint his arbitrator to act as sole arbitrator in the submission.

[**EDITORIAL NOTE.** The question to be decided in this case is a short one, though it is rather complicated by the peculiar facts of the case. Where one side fails to appoint an arbitrator, the Arbitration Act, 1889 s. 6 (*b*) requires the other side to serve him with a notice requesting that the necessary appointment be made within seven days. If that notice is not complied with within the time mentioned, the power given by the Act is not for the arbitrator who has been appointed to proceed alone, but for the party who has appointed him to make a new appointment of him as sole arbitrator. The terms of the Act necessitate a notice and a subsequent appointment, and, as the Act is one ousting the jurisdiction of the court, they must be strictly complied with.

AS TO APPOINTMENT OF SOLE ARBITRATOR, see HALSBURY, Hailsham Edn., Vol. 1, p. 646, para. 1095 ; and FOR CASES see DIGEST, Vol. 2, pp. 402, 403, Nos. 588-592.]

Case referred to :

(1) *Re Franklin and Swathling's Arbitration*, [1929] 1 Ch. 238 ; Digest Supp. ; 98 L.J.Ch. 101 ; 140 L.T. 403.

MOTION to set aside an award in an arbitration. The facts and arguments are fully set out in the judgment.

Gerald Gardiner for the applicant.

N. L. C. Macaskie, K.C., and *B. L. O'Malley* for the respondent.

ATKINSON, J. : On Mar. 17, 1937, Major Drummond granted to Col. Hamer a lease of Cadland House, a furnished house, with the grounds and various lodges, a gardener's cottage and woodland, described as formerly a polo ground, and coloured pink on a plan annexed. No acreage was mentioned and there were no measurements or scale upon the plans. The term was 21 years and the rent was £300 per annum. Col. Hamer covenanted in the following terms :

> . . . not to use or employ the demised premises or any part thereof or permit or suffer the same to be used or employed for any purpose other than that of a residential or country club or residential hotel.

There was a proviso in the lease to the following effect :

> Provided always that in the event of the demised premises or any part thereof being rendered uninhabitable by reason of damage by fire the rent or an appropriate portion thereof shall cease until such damage has been made good.

There was also a clause as follows :

> If any dispute or difference shall arise between the landlord and tenant touching any clause matter or thing whatsoever herein contained . . . the dispute shall be determined by arbitration in the usual way subject to the provisions of the Arbitration Act, 1889, or any statutory modification thereof.

On May 5, 1937, the house was rendered uninhabitable by fire, and, therefore, it is clear that the apportionment clause came into operation. Nothing could be agreed about the rent, and an arbitration became necessary. From the beginning Col. Hamer said that a neighbour of his was entering on part of the land purported to be demised to him and was using some of his sheds under a claim that these lands and premises had been included in an earlier lease to that neighbour. In the settlement of this dispute Col. Hamer had to give up certain cow sheds and stock yards and certain strips of land and the neighbour had to give up his claim to the polo ground. The terms provided for an acreage allowance in respect of the land given up by Col. Hamer, and Major Drummond had to fix the proper boundaries of the polo ground and erect a fence. The acreage allowance was to date from Mar. 25, 1938, and the amount was to be agreed between the solicitors, and in default of agreement, to be determined by an independent surveyor to be paid by the parties concerned jointly. Neither that term nor a further provision that the lease should be rectified has ever in fact been carried out. Col. Hamer gave up the land in question, and it is quite clear from two letters that, as an item in an attempt to come to some complete arrangement, Col. Hamer did agree the acreage which was to be given up and that an allowance off the rent of 10*s*. an acre per annum had to be made. The point about that is that he was only agreeing to these two matters as part of the general arrangement and an agreement upon those two items would not in such a case make a concluded bargain. The award finds that, on the day of that settlement and as part of the settlement, there was a definite agreement as to the acreage and the rent, when it is quite clear there was not.

A That, at any rate, was the position when the prospect of an arbitration to assess the rent payable began to appear. On July 12, 1938, Messrs. Boodle, Hatfield & Co., acting for Major Drummond, wrote:

> If you do not agree the assessment of £100 per annum as a fair rent as from the date of the fire, the matter must go to arbitration under the terms of the lease. If this is to be done, our client's arbitrator will be Mr. R. G. Woolley, of Messrs. Rawlence & Squarey, 20, Portland Terrace. Southampton. If you do not agree the computation of the rent, please let us know the name of your arbitrator. B

A few letters passed, and Col. Hamer was taking the point that before they could arbitrate about the assessment of the rent or the apportionment of the rent, the acreage of this land ought to be definitely ascertained. Messrs. Boodle, Hatfield & Co. did not take that view, and on Aug. 19, 1938, gave notice calling upon Col. Hamer to appoint an arbitrator in these terms:

> C We informed you that our client's arbitrator will be Mr. R. G. Woolley, of Messrs. Rawlence & Squarey, of Southampton, and we asked you in default of your agreeing to the computation to nominate your arbitrator. This you have not done, and we now on behalf of our client beg to give you formal notice that, if within seven days from this date you do not nominate an arbitrator, we shall under the terms of the lease and in accordance with the Arbitration Act, 1889, s. 6 (*b*) appoint our client's arbitrator to act as sole arbitrator in the reference.

D That is a notice which they could only give if they had appointed their own arbitrator, which they had done. I say that because later on I shall have to refer to an argument of counsel for the respondent that Woolley never had been appointed arbitrator and was not appointed arbitrator until Dec. 28, 1938. It is quite clear that they are putting him forward at this early stage as their arbitrator and gave this notice calling upon Col. Hamer to name an arbitrator on his behalf. The reply to this letter was written by Col. Hamer's wife in these terms: E

> Col. Hamer has asked me to inform you that he has appointed Mr. F. Ward, F.S.I., as his surveyor and valuer for the arbitration. He also wishes me to forward the enclosed cheque for £5 as an acknowledgment of the tenancy of Cadland Garden, cottages and lodges from June, 1937, to June, 1938, at £1 per quarter without prejudice and subject to any claim he may make for non-use of Cadland House. As I informed you yesterday Col. Hamer is ill and cannot at the moment deal with letters.

F That this was recognised as a good appointment of an arbitrator by Col. Hamer is quite clear from a number of letters. On Sept. 12, 1938, Col. Hamer writes as follows:

> I am quite willing to arbitrate and have named my arbitrator. . . . It is obviously necessary and reasonable, not only for my arbitrator but yours also, to know exactly what we are arbitrating about.

G On Sept. 15, 1938, there is a letter in evidence which makes it quite clear that Ward has been appointed and has been approached by Woolley, because he wrote, addressing it to Woolley:

> With reference to your telephone message, up to the moment I have received no definite instructions from Col. Hamer on this matter; I spoke to him this morning, and he informs me that nothing can be done until the boundaries of the property that he has leased have been definitely settled. On hearing from Col. Hamer that this is in order I will write you again, and give you dates for a meeting. H

There is one more letter to which I ought to refer, written on the next day by Messrs. Boodle, Hatfield & Co., in which they say what the issue is:

> The one question in dispute here is the amount of the rent . . . We informed you on July 12, 1938, that if you were not prepared to agree the assessment of £100 per annum Mr. Woolley of the firm of Messrs. Rawlence & Squarey, of Southampton, would be our client's arbitrator and enquired the name of the person who would act for you in this capacity if you were not prepared to agree the figure. We had to write to you again on the 19th ultimo to the effect that unless you replied to our letter we should have to

> proceed under the Arbitration Act, 1889, s. 6 (*b*), and it was only then that you informed us in your letter of the 27th of that month that Mr. F. Ward, F.S.I., would act for you. . . . You still do not give us Mr. F. Ward's address.

It is perfectly obvious that Woolley had the address, because he had telephoned to him. So far as I can see, it is quite beyond question that these two gentlemen had been appointed arbitrators.

The duty of the arbitrators is thus stated in the Arbitration Act, 1889, Sched. I, para. (*b*), as amended by the Arbitration Act, 1934 :

> If the reference is to two arbitrators, the two arbitrators shall appoint an umpire immediately after they are themselves appointed.

Woolley, or the solicitors acting for Major Drummond, did not know or had forgotten that. At any rate, no approach was made to Ward to join in the nomination of an umpire. There is a further matter to which I must call attention. If an arbitrator, having been appointed, fails to act with reasonable despatch in any matter which he is called upon to do, the other side can move to have his appointment set aside. One is familiar with the difficulties which used to arise before the Act of 1934, when an arbitrator was able to delay matters very considerably. Sect. 6 of the 1934 Act provided as follows :

> (1) The court may, on the application of any party to a reference, remove an arbitrator or umpire who fails to use all reasonable despatch in entering on and proceeding with the reference and making an award . . . (4) For the purposes of this section the expression "proceeding with a reference" includes, in a case where two arbitrators are unable to agree, giving notice of that fact to the parties and to the umpire.

If the attitude taken up by Ward was that the acreage ought to be ascertained before they entered upon this arbitration, and that was thought by Major Drummond's advisers to be wrong or to delay proceedings, they had only to call upon him to proceed, and, if he did not, they could apply to have him removed. They did not take that step. Instead, they wrote to Col. Hamer :

> If you still persist in raising the irrelevant question of the county court settlement, and on this ground decline to instruct your arbitrator to proceed, our client will be compelled to instruct his arbitrator to proceed alone as sole arbitrator under the terms of the Arbitration Act, 1889. Kindly accept this letter as formal notice to that effect.

That was completely wrong ; their remedy, on the assumption that the arbitrator had been appointed, was to get him removed from his position. They repeated that on Nov. 25. On Dec. 5, Messrs. Boodle, Hatfield & Co. wrote to Col. Hamer :

> Our client can no longer permit the arbitration for the assessment of rent to be delayed, as it was at your request, in order that the agreement embodying the terms should be completed. We therefore write to inform you that we are instructing the arbitrator appointed by our client under cl. 4 (3) of the lease to determine the question in dispute as to the proportion of the rent payable by you as lessee in consequence of the fire . . . and to proceed with the arbitration. Perhaps you would therefore be good enough to instruct your arbitrator to proceed, and in default of your so doing, as we have already informed you, under the terms of the Arbitration Act, 1889, our client's arbitrator will proceed alone and his decision will be binding on you.

That letter seems to me to be full of misconception. It recognises again that Col. Hamer has appointed an arbitrator, and goes on to say that, if Col. Hamer does not instruct him to proceed, Woolley will proceed alone. As I have pointed out, if the other party's arbitrator does not go on, steps must be taken to remove him. An arbitrator cannot go on alone in circumstances of that kind. Then Messrs. Boodle, Hatfield & Co. write to Woolley on Dec. 28 :

> Upon consideration, we agree it is desirable that this matter should proceed with the utmost formality, and we accordingly enclose a formal appointment by our client of you as his arbitrator under the terms of the lease. A notice of your appointment signed by our client has to-day been forwarded to Col. Hamer.

Both sides agree that formal appointments are unnecessary, and that an appointment can be oral. It is necessary that the intended arbitrator should have notice of the appointment, and no arbitration can proceed until notice has been given to the other side, but, because Messrs. Boodle, Hatfield & Co., on Dec. 28, thought that they would like to have Woolley formally appointed, it does not mean that Woolley was not in law already a properly appointed arbitrator ; and certainly, because they chose to appoint Woolley in a formal way, that could not impose upon Col. Hamer the duty of nominating an arbitrator or appointing his arbitrator in a formal way, if the previous appointment was good. It is agreed that an informal appointment may be good, and nothing they could do could make Col. Hamer's appointment an improper and insufficient one. I see no reason whatever for suggesting that, when they chose to make this formal appointment, there were not already in existence two perfectly good arbitrators. They had failed in their duty to nominate an umpire, and, if those on Major Drummond's side thought that Ward or Col. Hamer was causing unnecessary delay, they had only to call upon Ward to proceed and take any necessary steps to get his appointment set aside if he did not. At any rate they did not take that step. They made this formal appointment.

A notice of this formal appointment was sent to Col. Hamer in these terms :

> I hereby give you notice that I have this day appointed Reginald George Woolley, of 20, Portland Terrace, Southampton, to be the arbitrator on my behalf to settle by arbitration in pursuance of the proviso in that behalf contained in a deed dated Mar. 17, 1937, the disputes and differences that are now depending between us . . . and I hereby require you within 7 days from the service of this notice on you to name an arbitrator to act on your behalf in the matter of the said disputes and differences failing which the said disputes and differences will stand referred to the said Reginald George Woolley alone as sole arbitrator.

The first comment made by Col. Hamer, was that there were many disputes pending and that the appointment did not define the disputes which were to be the subject of the submission. I am told two actions had been started, there was another arbitration on the way, and there were several other disputes which were going on between them. It is quite obvious that he could not be called upon to nominate an arbitrator in that vague and general way. Secondly, it will be observed that he is called upon not to appoint, but to name an arbitrator. When Col. Hamer received that notice on Dec. 30, he wrote this :

> I acknowledge a paper signed by Major Drummond which refers to arbitration concerning " the disputes and differences that are now depending between us " and further states that I am required to name an arbitrator within seven days " to act on your behalf in the matter of the said disputes and differences." I must ask you to furnish me with further and better particulars of precisely what the disputes and differences referred to in the above-mentioned paper constitute.

The notice was later amended by inserting, after the words " now depending between us ", the words : " relative to the assessment of rent payable by you by virtue of cl. 2 (10) of the above-mentioned deed subsequent to the date of the fire which occurred at Cadland on May 5th, 1937." That was sent to Col. Hamer on Jan. 12, 1939, and a copy of it was sent to Woolley on the same date. On Jan. 9, 1939, in answer to the letter defining what the issue was, Col. Hamer had written :

> I have received your letter of the 5th instant in which you state that the proposed arbitration is in respect of assessment of rent. In view of this I have nominated Mr. Frank Ward, F.S.I., of Tavistock, to act on my behalf on the question of assessment of rent. . . . I am returning to you herewith the notice signed by Major Drummond and should be obliged if you would get him to amend it in compliance with your statement that it concerns only arbitration in respect of assessment of rent. It is necessary for my arbitrator to know what the submission is and, as I have already pointed out, Major Drummond's notice is couched in general terms—referring to " disputes and differences." As soon as this is done I will forward to you, for transmission to Major Drummond, my formal appointment of Mr. Frank Ward, F.S.I., as my arbitrator.

It was in answer to that letter that the notice was amended and sent on Jan. 12, 1939.

Even if Ward had not been nominated months before, there again is a fresh nomination. It has been said that all he did was to nominate Frank Ward, and that nomination is not an appointment. Here it seems to me that Major Drummond is in a dilemma. If nomination and appointment are two different things, he has not complied with the statutory requirement of calling upon Col. Hamer to appoint. All he had said in this notice was, " I require you to name an arbitrator." If naming an arbitrator is not the same thing as appointing, then the statutory notice has not been served. If, on the other hand, nomination and appointment are the same thing, then the answer, " I have nominated Mr. Frank Ward " is sufficient. Assuming that the notice is in order, assuming it is enough to call upon the other side to name an arbitrator, the appointment was re-affirmed. How, in view of that, Major Drummond had any right to appoint his arbitrator the sole arbitrator, I do not know. It seems to me he had not; but there is a still further difficulty. He never did appoint Woolley to act as sole arbitrator. When I asked what was relied upon as an appointment, all that was suggested was the sending to Woolley of the notice which was served on Col. Hamer. What the Act requires is the appointment of a sole arbitrator after the default. The Arbitration Act, 1889, s. 6 (*b*) is quite clear:

> If, on such a reference, one party fails to appoint an arbitrator, either originally or by way of substitution as aforesaid, for seven clear days after the other party, having appointed his arbitrator, has served the party making default with notice to make the appointment, the party who has appointed an arbitrator may appoint that arbitrator to act as sole arbitrator . . .

In construing this subsection, one must be guided by the words of MAUGHAM, J., in *Re Franklin and Swathling's Abritration* (1) at p. 241:

> The Arbitration Act, 1889, is, in my view, a technical statute; it is a statute which provides for the ousting of the jurisdiction of the court; the language of it has to be carefully observed, and it is not open for me to give it any meaning except that which is expressly provided for in the various clauses.

The subsection requires two things to be done. One party has got to appoint, and he can only do so after the other party has failed for 7 days to comply with the notice served upon him. In RUSSELL ON ARBITRATIONS, p. 127, the conditions for the appointment of an arbitrator to act as sole arbitrator are enumerated. It is there emphasised that 7 clear days must have elapsed, and that the other party must have failed to make the required appointment. Even on the assumption that there had been a default, what is being relied on here as the appointment of Woolley as sole arbitrator is something sent to him before any default on the part of Col. Hamer. It is common ground that it was only on the receipt of that notice of Jan 12 that the duty arose, and the 7 days began to run from that same day.

A mere statement to the other that, as a matter of law, the result will be that one arbitrator is a sole arbitrator is not an appointment as sole arbitrator, and it seems to me that Col. Hamer is right when he says that Woolley never was in fact appointed, and that, if this method of appointment was sufficient, it was something done before any default on the part of Col. Hamer.

The conclusion I come to is, first, that Ward was properly appointed as arbitrator in the summer of 1938; and that, if he was not, the letter of Jan. 9, 1939, was a compliance with the notice served upon Col. Hamer; it only called upon him to name, and he did name again, the same man Frank Ward. If being called upon to name is something different from being called on to appoint, then Major Drummond has never complied with the statutory requirement of calling upon his opponent to appoint. Col. Hamer did what he was asked to do. Further, in my view Woolley never was in fact appointed as sole arbitrator. If I am wrong about that, and the method adopted was sufficient, then it was wrong because the notice was given before the default, and not after the default. It is to be observed that Woolley himself does not suggest that he ever was appointed sole arbitrator, for at the arbitration he said:

> I do not think I was appointed sole arbitrator after that notice. I think I took upon myself the burden of the arbitration.

That is precisely what the letters show that he did. He never received a copy of the letter of Jan. 9, 1939, in which Col. Hamer says: "I have nominated Mr. Frank Ward." There is no suggestion that this matter was in any sense waived. The award must, therefore, be set aside on the ground that Woolley acted as sole arbitrator without being properly appointed as such.

Motion granted with costs.

Solicitors: *William P. Webb* (for the applicant); *Boodle, Hatfield & Co.* (for the respondent).

[*Reported by* D. K. BELCHER, *Barrister-at-Law.*]

HOLT *v.* HEATHERFIELD TRUST, LTD. AND G. & T. BRIDGEWATER, LTD.

[KING'S BENCH DIVISION (Atkinson, J.), **January 21, 22, and 28, 1942.**]

Choses in Action—Assignment of debt—Legal assignment—Date of completion of legal assignment by notice—Priority—Sufficiency of equitable assignment where garnishee order nisi served—Consideration—Law of Property Act, 1925 (*c.* 20), *s.* 136 (1).

P. was indebted to the defendants, and on June 15, 1940, they obtained a garnishee order *nisi* on money owing to him by the C. Co., and they served the order on the company on June 17. P. obtained judgment against the company for the sum owing to him on June 14, 1940, and on the same day assigned the sum due under the judgment to the plaintiff in part satisfaction of loans advanced to him by the plaintiff during the 6 preceding years. Both P. and the plaintiff gave notice of the assignment to the company, which notices were dated June 17 but were not received by the company till June 18. On a claim by the plaintiff for the sum due under the judgment, the defendants contended (i) that the assignment to the plaintiff was void as a fraud on creditors under the Law of Property Act, 1925, s. 172, and (ii) that the plaintiff's title was incomplete on June 17, the date on which the garnishee order became effective, in that the assignment was only an equitable assignment until completed by notice and being given without consideration was of no avail as against the defendants' rights under the garnishee order :—

HELD : (i) the assignment was not void as a fraud upon creditors within the meaning of the Law of Property Act, 1925, s. 172.

(ii) upon the proper construction of the Law of Property Act, 1925, s. 136 (1) the date of the notice of the assignment required to be given to the debtor in order to complete a legal assignment under the Act is the date on which such notice is received by or on behalf of the debtor. Therefore, the assignment did not operate as a legal assignment until June 18, 1940.

(iii) the efficacy of an equitable assignment of an existing legal chose in action does not depend on the giving of consideration for it, and a judgment creditor by serving a garnishee order can only take what his debtor can honestly deal with at the date of the service of the order. Consequently, though the assignment to the plaintiff had not been completed by notice under the Law of Property Act, 1925, s. 136, on June 17, the date on which the defendants served their garnishee order, it operated as a valid equitable assignment by which the defendants' rights to the debt were postponed to those of the plaintiff.

[**EDITORIAL NOTE.** A legal assignment of a chose in action is only complete upon notice being given to the debtor. It does not seem to have been decided, before the decision herein, whether in this respect the material date was the date on which the notice was despatched or that on which it was received. This point is settled in favour of the latter view. There then remained the point whether, for the purposes of deciding the question of priority, the date on which the assignment became a legal assignment was to be considered, or whether it was sufficient that an equitable assignment had been executed. Upon a review of the cases, the judge has had regard to the fact that a garnishee order can only attach debts which the debtor himself is free to deal with at the time the garnishee order *nisi* is served. The debtor himself is bound by an equitable assignment, which is independent of the giving of notice. The garnishor, therefore, cannot attach a debt which has been equitably assigned, or, in other words, the equitable assignee has priority over the person serving the garnishee order.

FOR THE LAW ON THE POINT, see HALSBURY, Hailsham Edn., Vol. 4, pp. 433-440, paras. 800-810 ; and FOR CASES, see DIGEST, pp. 477-483, Nos. 463-522].

Cases referred to :

(1) *Glegg* v. *Bromley*, [1912] 3 K.B. 474 ; 25 Digest 167, *133* ; 81 L.J.K.B. 1081 ; 106 L.T. 825.

(2) *Balfour* v. *Sea Life Fire Assurance Co.* (1857), 3 C.B.N.S. 300 ; 6 Digest 119, *799* ; 27 L.J.C.P. 17 ; 30 L.T.O.S. 122.

(3) *Master* v. *Miller* (1791), 4 Term Rep. 320 ; *affd.* 5 Term Rep. 367 ; 1 Digest 78, *631*.

(4) *Fitzroy* v. *Cave*, [1905] 2 K.B. 364 ; 1 Digest 76, *617* ; 74 L.J.K.B. 829 ; 93 L.T. 499.

(5) *Performing Right Society* v. *London Theatre of Varieties, Ltd.*, [1924] A.C. 1; 28 Digest 391, *208*; 93 L.J.K.B. 33; 130 L.T. 450.

(6) *Wigan* v. *English & Scottish Law Life Assurance Assocn.*, [1909] 1 Ch. 291; 25 Digest 166, *126*; 78 L.J.Ch. 120; 100 L.T. 34.

(7) *Re General Horticultural Co., Ex p. Whitehouse* (1886), 32 Ch.D. 512; 8 Digest 477, *469*; 55 L.J.Ch. 608; 54 L.T. 898.

(8) *Watts* v. *Porter* (1854), 3 E. & B. 743; 8 Digest 477, *464*; 23 L.J.Q.B. 345; 23 L.T.O.S. 228.

(9) *Hirsch* v. *Coates* (1856), 18 C.B. 757; 21 Digest 631, *2138*; 25 L.J.C.P. 315; 27 L.T.O.S. 202.

(10) *Badeley* v. *Consolidated Bank* (1888), 38 Ch.D. 238; 21 Digest 630, *2133*; 57 L.J.Ch. 468; 59 L.T. 419.

(11) *Re Westerton, Public Trustee* v. *Gray*, [1919] 2 Ch. 104; Digest Supp.; 88 L.J.Ch. 392; 122 L.T. 264.

(12) *Harding* v. *Harding* (1886), 17 Q.B.D. 442; 8 Digest 442, *191*; 55 L.J.Q.B. 462.

(13) *Re Griffin, Griffin* v. *Griffin*, [1899] 1 Ch. 408; 8 Digest 449, *238*; 68 L.J.Ch. 220; 79 L.T. 442.

(14) *Strong* v. *Bird* (1874), L.R. 18 Eq. 315; 25 Digest 538, *268*; 43 L.J.Ch. 814; 30 L.T. 745.

(15) *Re Williams, Williams* v. *Ball*, [1917] 1 Ch. 1; 8 Digest 443, *192*; 86 L.J.Ch. 36; 115 L.T. 689.

PRELIMINARY ISSUE set down for trial in an action by Richard Henry Holt against the Heathfield Trust, Ltd., and G. & T. Bridgewater, Ltd., claiming a sum of money due under a judgment obtained by Samuel Whitmore Partington against the Chloride Electrical Storage Co., Ltd. The facts are fully set out in the judgment.

P. B. Morle for the plaintiff.

Geoffrey Lawrence for the defendants.

ATKINSON, J.: This is an issue for trial pursuant to the order of MASTER SIMNER, and the question is who is entitled to a sum of money owing by the Chloride Electrical Storage Co., Ltd., to Samuel Whitmore Partington under a judgment obtained by Partington against the company and dated June 14, 1940. The claimant, Richard Henry Holt, claims this money under an assignment dated June 14, 1940, and received by him on the following day. The Heatherfield Trust, Ltd. and G. & T. Bridgewater, Ltd., obtained judgment against Partington for £313 14*s.* 9*d.* on June 19, 1939, for costs of an unsuccessful action brought against them by Partington. On June 15, 1940, they obtained a garnishee order *nisi* on the money owing by the Chloride Electrical Storage Co. which was served on that company on June 17. On the same day both Holt and Partington sent notices of the assignment to the Chloride Co., but those notices, although dated June 17, were not received by the company until June 18. On June 14, 1940, the very day on which Partington recovered his judgment, he made an assignment of the sum due under that judgment to Holt, and Holt claims by virtue of that assignment. The Heatherfield Trust, Ltd., claim that the assignment to Holt was void and a fraud on them and other creditors under the Law of Property Act, 1925, s. 172. Alternatively, they claim that at the date on which their garnishee order became effective, i.e., June 17, 1940, Holt's title was incomplete, in that the assignment to him was only an equitable assignment until completed by notice to the debtor, and that, since it was given without consideration, it is of no avail as against their rights under the garnishee order.

I am satisfied that Holt was a *bona fide* creditor of Partington for nearly £700. They were brothers-in-law, and during the six preceding years Holt had lent to Partington, or paid on his behalf and at his request, the various sums of money specified in the particulars. It is suggested that these payments were gifts. I accept Holt's evidence that they were not gifts, and, moreover, he is corroborated by two letters dated May 14, 1937, and May 4, 1936, both of which refer to sums being paid and treated as loans. Partington frequently spoke about repayment of the loans, and while the action against the Chloride Co. was going on he promised Holt that he would give him all the damages he recovered in part payment. On the evening of June 14, 1940, after the judgment had been obtained, he telephoned to Holt, told him that he had recovered £250 damages, and said: "I have posted you an assignment of this money." The wording of the assignment is as follows:

> I am very pleased to send you some good news, which is that I have won the case against the Chloride Corporation. The amount awarded will be disappointing to you,

> as it was to me, only £250. However, I have informed my solicitors that I am assigning this money over to you direct. The moneys you have advanced to me for the Magnifier and so long previously entitle you to a lien on any cash I receive. Thus I assign this sum to you direct. I am writing the company later giving them authority to pay the amount direct to you. Will you kindly write them yourself. They are so very slow at paying, perhaps a letter from you might expedite the settlement . . .

That is the document that is said to be an assignment. I have no doubt that Partington wanted to pay this money to Holt rather than to the Heatherfield Trust, Ltd., and Bridgewater, Ltd. I have no doubt that he intended to prefer him, but that does not make the assignment fraudulent within 13 Eliz., c. 5, or the Law of Property Act, 1925. I repeat what Moulton, L.J., said in *Glegg* v. *Bromley* (1), at p. 485 :

> Now it is well settled law that apart from the rules of bankruptcy a person may pay his debts in any order he pleases, and may charge his property as he will as security for paying those debts. The covenous assignments referred to in the 13 Elizabeth are mock assignments whereby in some form or other the assignor reserves some benefit to himself, but an out and out assignment by way of charge to secure an actual existing creditor is not within the class of assignments which are affected by that statute, and, as the facts prove to my satisfaction that this assignment comes under that class, I am satisfied that there is nothing to be made of the suggestion that it was void under the statute of Elizabeth.

Indeed, the only ground for the suggestion that the assignment was fraudulent, was that Partington's solicitors exercised their lien for solicitor and client costs on this money. The judgment had been for £250 ; £50 had been paid into court and the order was that the £50 should be paid out to the plaintiff or his solicitors, and it is quite clear that the solicitors insisted on that money being paid out to them, and that later on they claimed a charge upon the remaining £200 for the balance of their costs, so that the amount was reduced to something over £150. The payment of these costs, however, was one which Partington was not in a position to resist, and that is no reason whatever for casting suspicion upon the genuineness of the transaction.

The next point is more difficult. It is said that the assignment was ineffective, inasmuch as notice had not been given before the service of the garnishee order, and no valuable consideration had been given for it. It was said that, at the date of the service of the garnishee order, this assignment was merely equitable and depended for its efficacy upon proof of valuable consideration. The mere existence of an antecedent debt is not valuable consideration, but forbearance to sue may be. There have been one or two cases referred to, in which light has been thrown upon the question as to when the court may draw the inference that the creditor has forgone proceedings in consideration of a promise to assign, or as a result of assignment. There is no evidence in this case of any threat to take proceedings. Holt was not asked any question that I can remember as to whether he intended to do anything if Partington had not been willing to assign this debt. Holt had been singularly patient for six years, and the point as to the necessity for consideration for the assignment had not been raised when he gave evidence. However, I need not determine the difficult question of consideration, because I am satisfied that the validity of the assignment did not and does not depend upon its having been given for valuable consideration.

I think the authorities establish the following propositions. At common law, things in action were not assignable, and an assignee had to go to equity to enforce his claims. If the thing in action was a legal claim, he had to file a bill to compel the assignor to permit him to sue in the name of the assignor, and equity would help him only if he had given valuable consideration for the assignment. Even before the Supreme Court of Judicature Act, 1873, the doctrine that there could not be an assignment at law of an existing debt had long been exploded. In *Balfour* v. *Sea Fire Life Assurance Co.* (2), Willes, J., said this, at p. 308 :

> With regard to the authority cited from Brooke's Abridgment, I should have thought a much better authority might have been found for the proposition that a court of equity would prevent a party from suing upon a security the consideration for which had failed. The court there seem to have considered that there could not be an assignment of a debt. That doctrine has, as every one must know, long, long since exploded, certainly so long since as the year 1791, and probably two hundred years before, as appears from *Master* v. *Miller* (3), where Buller, J., says : " It is laid down in our old books, that, for avoiding maintenance, a chose in action cannot be assigned

> or granted over to another : Co. Litt. 214*a.*, 266*a.*, 2 Roll. 45, l. 40. The good sense of that rule seems to me to be very questionable ; and in early as well as modern times it has been so explained away that it remains at most only an objection to the form of the action in any case."

In *Fitzroy* v. *Cave* (4), COZENS-HARDY, L.J., said, at p. 372 :

> There are, however, other choses in action which, though not assignable at common law, were always regarded as assignable in equity. A debt presently due and payable is an instance. At common law such a debt was looked upon as a strictly personal obligation, and an assignment of it was regarded as a mere assignment of a right to bring an action at law against the debtor. Hence the assignment was, with some exceptions which need not be referred to (see 1 HAWKINS' PLEAS OF THE CROWN, p. 458) looked upon as open to the objection of maintenance. After a time the Common Law Courts recognised the right of any one who had a pecuniary interest in the debt to sue in the name of the creditor. This, however, was the limit of their departure from the old strict rule, as far as I have been able to discover.

I have no need to explore exactly what was meant by " this doctrine being exploded " in the case of a debt, because under the Supreme Court of Judicature Act, 1873, and now by the Law of Property Act, 1925, s. 136, an absolute assignment of a debt, of which express notice in writing has been given to the debtor, is effectual in law to transfer the legal right thereto.

Absence of notice does not affect the efficacy of the transaction as between the assignor and the assignee. Until notice be given the assignment is an equitable assignment, but it is an assignment which requires nothing more from the assignor to become a legal assignment. The assignee may himself give notice at any time before action brought, and, further than that, even before notice he may sue in his own name, provided that he makes the assignor a party to the action, as plaintiff if he consents, and as defendant if he does not consent. That is made quite clear in *Performing Right Society, Ltd.*, v. *London Theatre of Varieties, Ltd.* (5). VISCOUNT CAVE, L.C., said, at p. 14 :

> . . . no action can now be defeated by reason of the misjoinder or non-joinder of any party ; but this does not mean that judgment can be obtained in the absence of a necessary party to the action, and the rule is satisfied by allowing parties to be added at any stage of a case.

That case turned upon whether an assignment of a musical composition not yet composed passed a good title to the Performing Right Society as and when the composition came into existence. It was held that there was no right of action for an infringement of copyright unless the composer was joined as plaintiff or defendant. VISCOUNT FINLAY put it thus, at p. 8 :

> The society became entitled to sue in respect of the interests so acquired, but their right to sue is subject to the general rule that the owner of the legal estate should be joined as a party.

At p. 25, LORD SUMNER pointed out that the matter had been raised and the plaintiffs had been given an opportunity of joining the legal owner ; that deliberately the plaintiffs had not taken advantage of that opportunity ; and that the courts were dealing with the matter in the absence of the legal owner and they could not give the relief prayed. It is elementary, I think, in such a case, because even in a student's book (SNELL'S PRINCIPLES OF EQUITY) it is laid down quite clearly [22nd Edn., at p. 52] :

> But, if the assignment of a legal thing in action is only equitable, the original creditor must usually be joined, as plaintiff if he consents, if not, as defendant.

Therefore, it seems beyond argument that the absence of notice does not affect the efficacy of the transaction as between assignor and assignee. The Supreme Court of Judicature Act, 1873, relieved the assignee from the necessity of applying to equity for help, and therefore valuable consideration is no longer necessary. Neither the Supreme Court of Judicature Act, 1873, nor the Law of Property Act, 1925, says a word about consideration. It can hardly be suggested that, if there is an absolute assignment and notice is given, valuable consideration is necessary. Indeed, I do not gather that it is suggested, but it is contended that, although valuable consideration may be unnecessary if notice be given, it is necessary to give validity to the transaction if notice be not given, or until notice be given. If A. holds by way of gift an absolute assignment of an existing debt of which notice has not yet been given, it is said to be unenforceable and invalid. Yet, once A. gives notice, the invalidity is destroyed ; the invalid becomes valid. It would be indeed strange if mere notice of an invalidity could destroy that invalidity ; and, so far from being invalid, the assignment entitles the assignee to sue for the debt assigned even before notice given, so long as he joins the assignor on one side or the other.

An assignment can operate as an assignment only with regard to an existing legal chose in action. An assignment purporting to assign a future debt can operate only as a contract to assign. It remains a purely equitable assignment which will be enforced like any other contract only if given for value. The assignment with which I am concerned is absolute in form and purports to assign an existing legal debt.

Counsel for the plaintiff said that according to the Law of Property Act, 1925, s. 136, the notice is to operate from the date of the notice, and, as the date of the notice was June 17, 1940, he argues that the notice must be effectual as from the date and not from the date of receipt by the debtor on June 18. That point, in my opinion, is a bad one. The Law of Property Act, 1925, s. 136 (1), reads as follows :

> Any absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal thing in action, of which express notice in writing has been given to the debtor, trustee or other person from whom the assignor would have been entitled to claim such debt or thing in action, is effectual in law (subject to equities having priority over the right of the assignee) to pass and transfer from the date of such notice—(*a*) the legal right to such debt or thing in action . . .

The date of the notice is the date of a notice which has been given to the debtor, and refers back to the express notice in writing mentioned earlier in the section. It is express notice in writing given to the debtor, and, in my judgment, the date of such notice is the date on which it is received by or on behalf of the debtor. If the notice arrives at his place of business, and he happens to be away and does not see it personally for another day or two, I think that would be immaterial; it would be received on his behalf. I think it is the date of the receipt by him or on his behalf. It cannot be the date of the notice, because a notice might be written and dated a week before it was posted, and it would be absurd to suppose that that would be effective. I need not say more on that point.

The further proposition which has been established is that a judgment creditor stands only in the shoes of his debtor and can take only that which the debtor can honestly deal with at the time the order *nisi* is served. Thus, he is not in as good a position as an assignee, who may defeat an earlier assignee by getting his notice in first. Notice is required only for the protection of the debtor or subsequent assignees. I think it will be found that the cases establish that quite clearly. If the creditor were in as good a position as the subsequent assignee, it might be that the defendants would come in first, but the cases show that a creditor who has obtained a garnishee order is not in as good a position as a subsequent assignee.

Counsel for the defendants relied on two cases. The first is *Wigan* v. *English & Scottish Law Life Assurance Assocn.* (6). It is quite plain that the question of valuable consideration was being considered only because the saving clause in the life policy which had been assigned required that the *bona fide* interests of the third parties must be based on valuable consideration. The question arose in this way, as is quite clear from the headnote, which reads as follows :

> The mere existence of an antecedent debt is not valuable consideration for a security given by the debtor.

One H. was entitled to a policy of assurance for £5,000 on his own life subject to conditions which made the policy void if the lives assured died by their own hands, but without prejudice to the *bona fide* interests of third parties based on valuable consideration. He owed Wigan £15,000, and he executed a deed of assignment of the policy to Wigan by way of mortgage to secure the moneys owing. Therefore, there was no consideration for the assignment. H. did die by his own hand, and no notice of the existence of the assignment was given to the insurance company during his lifetime. A claim was made, and the court held that, as there was no valuable consideration for the assignment within the saving clause in the policy, the action failed. What was said in the argument and the judgment as to the necessity for valuable consideration was not directed to the question whether there could be a good assignment without consideration, but whether there was valuable consideration as required by the terms of the policy itself. The case throws no light at all upon the question which I have to consider.

The other case relied upon was *Glegg* v. *Bromley* (1), to which I have already referred. Mrs. Glegg was heavily indebted to her husband, Captain Glegg. In May, 1909, she started an action against a person named Hay for damages for false representation, and in October of the same year commenced an action against a Lady Bromley for slander. At that time Mrs. Glegg was indebted to her husband to the extent of about £7,000 on the security of mortgages of her property, and she owed large sums to other creditors. In May, 1910, before the action against Hay had been heard, she assigned to her husband all the moneys she might get in the latter action. In June, Hay recovered judgment against her for £218 for his costs in the action against him, and in July Mrs. Glegg recovered judgment for £200 against Lady Bromley. Hay thereupon obtained a garnishee order to attach those damages in respect of the debt due to him for costs, and his claim was met by the assignment to Captain Glegg. The issue was first tried by a master, and he upheld the assignment to Glegg. He said, in effect, that the assignee was entitled to defeat Hay's claim, for, since Mrs. Glegg owed money to her husband, the assignment was for value, and the intention to prefer did not prevent it from being *bona fide* under 13 Eliz., c. 5. The Divisional Court reversed that decision on the ground that the assignment was a fraudulent assignment within 13 Eliz. c. 5, and that an antecedent debt was not valuable consideration within the proviso. It will be remembered that the statute made an assignment in fraud of creditors bad, and then there was a proviso protecting the rights of *bona fide* assignees or *bona fide* holders who had given valuable consideration. The Divisional Court thought the assignment fraudulent and that, as there was no valuable consideration because the debt was a past debt, the proviso did not save the situation. On appeal, the decision of the master was restored. The Court of Appeal upheld the assignment, and three propositions were laid down by the court. First, the assignment was not fraudulent and void within the statute, because it was not a mock assignment under which the assignor reserved some benefit for herself and there was no need to prove consideration in order to rely upon the proviso in the statute. Secondly, since the assignment was of future property, it could only operate as a contract to assign when the property came into existence, and, since a contract without consideration will not be enforced, the assignment did require consideration in order to have legal operation. Thirdly, the law, if it possibly can, will infer forbearance to sue where the assignment has been made to an existing creditor, and in that case the inference was in fact drawn. Words which were clearly used with reference to an equitable assignment of a future debt are sought by counsel for the defendants to be referred to the case of an assignment of an existing debt. VAUGHAN WILLIAMS, L.J., dealt mainly with the question of consideration, but he said, at p. 484:

> Upon these grounds I think that the judgment of the Divisional Court was wrong, and that the decision of MASTER CHITTY should be restored—that is to say, the result will be that this debt which has been sought to be attached by Mr. Hay as being a debt which was due to his judgment debtor cannot be so attached. I think I have already said that Mr. Hay stands exactly in the shoes of the judgment debtor, and that if as between her and the assignee, Mr. Glegg, she could not have questioned his right as against her to this debt, so neither can Mr. Hay assert anything which Mrs. Glegg, his judgment debtor, could have been prevented from asserting.

The question whether the assignment was bad under 13 Eliz., c. 5, was dealt with by FLETCHER MOULTON, L.J., at p. 485, and he proceeded to deal with the second proposition, at p. 486:

> But the counsel who have argued most ably on behalf of Mr. Hay have raised two further difficulties. They claim that this was an assignment of future property. In olden times before the Judicature Act such an assignment would not be recognised in law. The parties would have had to go to equity to get it enforced, and equity would not enforce such an assignment if it was voluntary. Therefore prior to the Judicature Act you must have shown that there was some good consideration for it before it would have had any practical operation, and they claim that the same effect must be given to it now. I am not disposed to disagree with them in their view of the law. I think that an assignment of future property does require to be something more than a mere voluntary assignment, a gift, in order that it may have legal operation.

Lastly, PARKER, J., who was sitting in the Court of Appeal, said, at pp. 489, 490:

> It is not an existing chose in action, but future property identified by reference to an existing chose in action. It is, I think, necessary to bear this distinction in mind,

> particularly in view of the course taken by the argument of counsel for the respondent. Ordinary choses in action were not assignable at law, but were, generally speaking, assignable in equity whether themselves legal or equitable choses. In the former case equity compelled the assignor to allow his name to be used for their recovery in legal proceedings, in the latter case the assignee could sue in equity in his own name. There was one exception to this rule. Equity on the ground of public policy did not give validity to the assignment of what is in the cases referred to as a bare right of action, and this was so whether the bare right were legal or equitable . . . It is to be observed that an equitable assignee of a chose in action, whether it is legal or equitable, could institute proceedings and maintain proceedings for its recovery. The question was whether the subject-matter of the assignment was, in the view of the court, property with an incidental remedy for its recovery, or was a bare right to bring an action either at law or in equity. With regard to the assignments of future property, they stand, I think, on a totally different footing. Nothing passes, even in equity, until the property comes into present existence. Only when this happens can the assignment attach and an interest pass.

Therefore, he proceeded to consider the question whether there was valuable consideration, and decided that there was and that, therefore, the husband's rights prevailed. I cannot see that counsel for the defendants gets any help from that case.

However, those are not the only relevant authorities. In *Re General Horticultural Co., Ex p. Whitehouse* (7), the headnote reads as follows:

> A garnishee order under R.S.C., 1883, Ord. XLV, binds only so much of the debt owing to the debtor from a third party as the debtor can honestly deal with at the time the garnishee order *nisi* was obtained and served; consequently it is postponed to a prior equitable assignment of the debt, even in the absence of notice.

In that case there was a sum of money amounting to £245 in the hands of the liquidator of the General Horticultural Co., and by a memorandum given in June, 1884, this sum had been charged in favour of one creditor with the repayment of £81, and that creditor gave notice of his charge. No point was raised about the efficacy of that, but by two memoranda in writing, each dated July 7, 1884, John Wills, to whom this sum of money was due, charged it in favour of one creditor of his for £100 and another for £70, and they neglected to give notice. The liquidation came, and the question arose as to the validity of these two assignments. Whitehouse, who was claiming this sum under a judgment recovered a fortnight or so after the two assignments, gave notice to the official liquidator a fortnight after the judgment, so that (as in the present case) the dispute was between a judgment creditor who had given notice and two assignees who had failed to give notice. Chitty, J., said, at p. 515:

> The Common Law Procedure Act, 1854, is, so far as attachment of debts is concerned, in *pari materia* with 1 & 2 Vict. c. 110, and as to a charging order under these latter Acts it has now been settled that it charges only what the judgment debtor can himself honestly deal with; that rule is now settled. Ord. XLV is in *pari materia* with both the Acts I have mentioned. It is argued by Mr. Browne that I ought not to apply the well-settled rule to this case. But I see no reason why any Act of Parliament or Rules of Court should be so interpreted as to make a man do a dishonest act, and yet if I were to allow Mr. Browne's argument the judgment creditor would obtain, not the property of the judgment debtor, but that of someone else. The court cannot arrive at such a conclusion unless the Act of Parliament compels it to do so. It was considered at one time that the court could, under the wording of 1 & 2 Vict., c. 110, arrive at the conclusion contended for by Mr. Browne, and in *Watts* v. *Porter* (8), one of the Common Law Courts actually did arrive at that curious conclusion, but on the question being reconsidered in subsequent cases the law was set right. The principle, which is well stated in *Hirsch* v. *Coates* (9) as long ago as 1856, applies in full force to Ord. XLV, and it is upon this principle I propose now to act. The assignment and charge from Wills to Hillier and Segar is binding and good as between assignor and assignee, and the equitable doctrine of notice only comes in as between incumbrancers. As between two incumbrancers the court looks at the equitable position of the two claimants, and holds that as between them the first assignee, by omitting to give notice of his charge has enabled the assignor to deal with the fund as if he were still the owner, and thus to commit a fraud upon the subsequent assignee, and consequently must be postponed: the first assignee had been negligent, the second diligent, and therefore the second assignee was allowed for his diligence by being first to give notice, to rank first.

The next case was *Badeley* v. *Consolidated Bank* (8). That was rather a complicated case where one man held a charge upon moneys due to another, and the main point in dispute was whether the agreement between them had not constituted him a partner. It was decided that he was not a partner. I just want to refer to the last paragraph of the headnote :

> . . . a creditor can only attach by a garnishee order such property of his debtor as the debtor could deal with properly and without violation of the rights of other persons. Therefore an equitable charge, obtained before a garnishee order, takes priority of the order, even where no notice of the charge was given.

That is on the same lines as *Re General Horticultural Co.* (7). In neither of those cases was a word said about the necessity for consideration. It is put broadly that the garnishee order is postponed to a prior equitable charge. I have read those cases carefully, and I can find no suggestion of any limitation of that proposition.

However, the precise point was dealt with by SARGENT, J., in *Re Westerton* (11), at p. 104. In that case, about a year before his death, the testator had handed to his landlady, a Mrs. Gray, a deposit receipt for £500 deposited with his bank and an order in writing signed by him directing the bank to pay her this sum of £500 on deposit, and also a letter addressed to her saying : You have been very kind to me and I desire to make some return by giving you the amount of £500 now on deposit at such and such a bank, as per the receipt enclosed. He handed her an envelope saying : "I will keep this for you" and took it back and put it in his safe, and there it was found after his death. He had left a will in which he had left all his estate elsewhere, and the question was whether this was a valid and complete gift to Mrs. Gray. Obviously, there was no consideration whatever, and notice had not been given. SARGENT, J., held that her title was good. The headnote reads :

> The effect of [the Judicature Act, 1873, s. 25 (6)] has been to improve the position of the donee of a legal chose in action by enabling him to sue at law in his own name as assignee without regard to the question whether the assignment was or was not made for valuable consideration.

In the judgment, SARGANT, J., says, at pp. 111-113 :

> Another point which I ought to mention is that no notice of the assignment was given to the bank at the time ; but it was not disputed by Mr. Paterson that the mere omission to give notice at the time was of no consequence so long as notice was given before action brought. That omission in no way affected the efficacy of the assignment as between the donor and the donee, though, if the bank, having had no notice of the assignment, had paid the money to the testator, that payment would have been a good payment as against the donee . . . It seems to me, though I am not sure that it was completely admitted by Mr. Gover, that apart from the Judicature Act, 1873, s. 25 (6), the want of consideration would have been fatal to Mrs. Gray's claim. Prior to the Judicature Act, 1873, a legal chose in action such as this debt could not be transferred at law, and the assignee of the debt could only have sued in the name of the assignor, and in the absence of consent by the assignor or of a binding contract by the assignor to allow the use of his name, the use of the assignor's name could only have been enforced by filing a bill in equity and so obtaining an injunction in *personam* to allow the use of the name, and equity would not have granted that relief unless the assignment had been for valuable consideration. But to my mind the effect of sect. 25 (6) of the Judicature Act, 1873, has been to improve the position of the assignee of a chose in action who satisfied the words of the subsection, that is to say, an assignee under an absolute assignment by writing under the hand of the assignor not purporting to be by way of charge only, by enabling that assignee to dispense at law with the use of the name of the assignor and so to dispense with the circuitous process of compelling the assignor in equity to allow his name to be used in proceedings by the assignee. The result of the subsection is that an assignee who takes under such an absolute assignment as is there mentioned can now sue at law in his own name, and I see no reason why in the present case the assignee should not do so.
>
> There appear to me to be two, if not three, decisions which assist me in coming to that conclusion. The first case is *Harding* v. *Harding* (12), which was a case at law where a person taking under a voluntary assignment of an ascertained balance due from trustees was held to be entitled to sue the trustees directly. The second case in *In Re Griffin* (13), decided by BYRNE, J., in 1899, which is in many respects a case very much like the present. There there had been a gift of a banker's deposit receipt with an indorsement by the donor on the back, and the learned judge held that that was a good equitable assignment of the amount on deposit at the bank.
>
> It is quite true that in that case there was a second ground on which the learned judge said that the donee was also entitled to succeed—namely, that he had been appointed executor of the donor, and that therefore the transaction fell within the decision of *Strong* v. *Bird* (14). It is quite clear, however, from his judgment that the learned judge would have reached the same conclusion apart from that second ground.

and the first reason which he gave for his decision is, in my opinion, completely applicable to the present case. The third case which is in some respects similar to the present is *Re Williams* (15), where it was held that the alleged assignment was bad as being conditional and future. It is to be noticed, however, that the assignment in that case was an assignment without consideration, and if the question of consideration was essential there was a very simple means of arriving at the conclusion at which the Court of Appeal arrived without the necessity of going through the difficult questions arising in that case as to the real meaning of the documents. It appears to me that the Court of Appeal really assumed in that case—without, I agree, actually deciding the point—that the voluntary character of the assignment was not fatal to its efficacy.

I would like to refer to one passage in the judgment of Warrington, L.J., in *Re Williams* (15). In that case, as Sargant, J., said, the question was whether there was an assignment. The words of the document were these :

> I authorise . . . my housekeeper, and no other person to draw this insurance in the event of my predeceasing her this being my sole desire and intention at time of taking this policy out and this is my signature.

That was the document relied on, and it was decided that it was not an assignment at all. It was regarded as a somewhat difficult point. As Sargant, J., said, however, there was a very simple answer if valuable consideration was necessary to support an equitable assignment. The Court of Appeal assumed that, if the document had in form been an assignment, it would have been good. Warrington, L.J., said, at p. 8 :

> Claiming as she does as a volunteer and alleging that the assignor made this gift to her, she can only succeed if she can show that the assignor did everything which according to the nature of the property comprised in the assignment was necessary to be done in order to transfer the property and render the assignment binding upon him.

Bearing in mind these two results, first, that the assignment was a perfectly good equitable assignment, which could be turned into a legal assignment at any moment by giving notice, and which, without notice, the assignee could have sued upon so long as he joined the assignor as defendant, and, secondly, that a judgment creditor is in no better position than the assignor and cannot garnishee anything which the assignor could not honourably deal with, it seems to me perfectly clear that Holt's title is a good one, and I so decide. I hold that his claim to this money is good.

Judgment for the plaintiff on the issue with the costs of the issue.

Solicitors : *Warmingtons* (for the plaintiff) ; *Thompson & Co.* (for the defendants).

[*Reported by* D. K. Belcher, *Barrister-at-Law.*]

KERR *v.* KENNEDY.

[King's Bench Division (Asquith, J.), **February 4, 5, 20, 1942.**]

Libel and Slander—Slander—Slander per se—Words spoken imputing lesbianism—Whether imputation of unchastity within Slander of Women Act, 1891 (c. 51).

In the course of a statement made concerning the plaintiff, the defendant said of her : " She used to live with other women. She is a lesbian . . . " :—

Held : the imputation of lesbianism in a woman is an imputation of unchastity within the meaning of that word in the Slander of Women Act, 1891, and, therefore, it was not necessary for the plaintiff to prove actual pecuniary damage.

[**EDITORIAL NOTE**. The point here is a short one, which has not been before the court on any previous occasion and is whether the word " unchastity " in the slander of Women Act, 1891, is to be confined to unchaste relations between the sexes or extends to homosexual practices. The judge has decided in favour of the wider meaning.

As to Statements Imputing Unchastity in a Woman, see HALSBURY, Hailsham Edn., Vol. 20, p. 398, para 488 ; and for Cases, see DIGEST, Vol. 32, p. 59.]

Action for damages for an alleged slander. The plaintiff in the course of certain remarks alleged that the defendant said of the plaintiff : " She used to live with other women. She is a lesbian." The gist of the words complained of was that they imputed that the plaintiff was a female homosexual.

Three defences were raised. First, that the words were never spoken or published by the defendant at all ; secondly, that, if spoken, they were incapable of a defamatory meaning ; and thirdly, that, if spoken, they were not actionable without proof of special damage, which had been neither pleaded nor proved. The judge held that, if it was established that the words in question were in fact spoken by the defendant, the defence that they were incapable of a defamatory meaning was quite unarguable, and, on a review of the evidence, he found as a fact that they were spoken.

G. O. Slade for the plaintiff.

Valentine Holmes for the defendant.

A ASQUITH, J.: No actual pecuniary damage has been pleaded or proved. Hence, the plaintiff must fail, or bring the facts within one or other of the four categories of slander in which damage is, according to the current phrase, presumed. Of these categories of slander, the only relevant one is that in which slander imputes unchastity or adultery to a woman within the Slander of Women Act, 1891.

B Before considering whether the present slander falls within this category, it is pertinent to consider what is meant by saying that in the four special categories damage is presumed. What is so meant would seem to be that these exceptional slanders are either so obviously damaging to the financial position of the victim that pecuniary loss is almost certain, or so intrinsically outrageous that they ought to be actionable, even if no pecuniary loss results. The slander of a person in the way of his profession or trade is an example of the first class. C A slander imputing certain infectious diseases is an example of the second. A novelist falsely said to suffer from leprosy may suffer no falling-off in his sales—his sales may rise—but he will be shunned and avoided, and he should have an action on that account irrespective of cash. The false imputation of unchastity in whatever sense of the term to a woman falls within both of these classes since it is calculated both to bring her into social disfavour and, as the phrase runs, to damage her prospects in what is vulgarly called the marriage D market and thereby her finances.

It is contended for the defendant that an imputation of lesbianism is not an imputation of unchastity within the Slander of Women Act, 1891, the argument being that the term "unchastity" in the Act is limited to unchastity between a woman and a man and excludes immorality between persons of the same sex. In weighing this argument, certain considerations should, I think, be ruled out. First, it is quite irrelevant that lesbianism is not a criminal E offence. Fornication is not a criminal offence either, but no one disputes that that is covered by the term "unchastity." Secondly, it is, in my view, equally irrevelant that lesbianism is not a matrimonial offence or a ground for divorce. Gross indecency between males falling short of sodomy is not a ground for divorce either. Here we are concerned not with grounds for divorce or with matrimonial law, nor, indeed, with the law of settlements of property F or the construction of a *dum casta* clause. What we are concerned with is defamation, and in particular the defamation of a woman *qua* woman. Again, in my view, it is not important, even if true, that in 1891 lesbianism, either as an expression or a practice, was not prominent in the public eye, or not so prominent as it has since become. As a phenomenon it has existed for at least 2,500 years; and I should be very surprised if, under whatever name, the parliamentary draftsmen in 1890 were ignorant of its existence, for to G assume this to be the case one must assume that they had no knowledge of the literature of the ancient world.

These, are negative considerations. Affirmatively it may be observed, first, that, if the Act had intended to limit its purview to relations between opposite sexes, it could easily have spoken, as has been pointed out by counsel for the plaintiff, not of "unchastity or adultery," but of "fornication or adultery," covering hetero-sexual relations only under two heads: (*a*) H where neither partner is married, and (*b*) where one or both are married. I do not stress this or similar considerations as the Act on any view is ill-drafted; whatever meaning is attached to the word "unchastity," the addition of "adultery" is surplusage, for unchastity must, at the very least, include adultery. Secondly, the true approach to the construction of "unchastity" seems to me to appear when the question is put, what imputations on a woman, *qua* woman, in the sphere of sexual morality are grave enough to be actionable without proof of pecuniary loss, or so likely to cause pecuniary loss as not to call for such proof? Can any distinction be drawn on this basis between imputation of adultery and fornication on the one hand, and of unnatural relations with other women on the other—except that the latter are, if anything, more wounding, more likely to excite abhorrence on the part of average reasonable people, more likely to spoil the victim's prospects of marriage than the former ?

In my view, no such distinction can be drawn ; nor does it seem to me sense to say of a woman : "She is a notorious lesbian, but she is perfectly chaste." In the absence of any judicial guidance or authority as to the meaning of unchaste or chaste in this connection, dictionaries can be consulted and their definitions have been cited in this case. Almost all under the term "unchastity" include "impurity," "lasciviousness," and the like. Can anyone doubt that lesbianism is covered by such terms ? In my view the imputation of lesbianism is an imputation of unchastity within the Act, and the legal objection of the defendant fails.

The only other point concerns damages. On the one hand, this slander was uttered to one person only ; and as far as the evidence goes was not repeated by her. On the other hand, it is in itself a very grave slander. Taking those considerations together I assess the damages at £300 and I give judgment for that sum with costs.

Judgment for the plaintiff.

Solicitors : *Hasties* (for the plaintiff) ; *Withers & Co.* (for the defendants).

[*Reported by* D. K. Belcher, *Barrister-at-Law.*]

Re GENERAL MORTGAGE SOCIETY (GREAT BRITAIN) LTD.

[Chancery Division (Bennett, J.), **March 2, 1942.**]

Companies—Winding-up—Scheme of arrangement—Meeting of creditors—Proxies—Appointment of Official Receiver to act as proxy—Companies (Winding-up) Rules, 1929, *r.* 150.

A scheme of arrangement between a company, which was being wound up by the court, and certain classes of its creditors authorised the creditors to appoint the Official Receiver to act as proxy for them at a meeting ordered by the court. Objection was taken that such proxies would be invalid, since the Official Receiver was not a member of the class or classes of creditors in question :—

Held : having regard to the wording of the Companies (Winding-up) Rules, 1929, r. 150, creditors might appoint the Official Receiver to act as proxy for them. Decisions to the contrary, based on the wording of rules since repealed, are no longer of any effect.

[**EDITORIAL NOTE.** There was a conflict between certain decisions under the earlier rules with respect to proxies and the Companies (Winding-up) Rules, 1929, r. 150. This decision clears the matter up, and it is definitely decided that the 1929 rule overrules the previous decisions.

As to Proxies at Meetings of Creditors of a Company, see HALSBURY, Hailsham Edn., Vol. 5, pp. 792, 793, para. 1362 ; and for Cases, see DIGEST, Vol. 10, pp. 1058, 1059, Nos. 7408-7411.]

Cases referred to :

(1) *Re Madras Irrigation & Canal Co.*, [1881] W.N. 120 ; 9 Digest 576, *3832*.

(2) *Re Central Bahia Ry. Co., Ltd.* (1902), 18 T.L.R. 503 ; 10 Digest 1059, *7411*.

Petition under the Companies Act, 1929, s. 153, to sanction a scheme of arrangement between the company and certain classes of its creditors. Proxies settled by the court authorised creditors to appoint the Official Receiver as proxy for them at the meeting of creditors ordered to be summoned by the court.

H. E. Salt for the petitioners, the company and the Official Receiver.

Bennett, J. : The company is being wound up by the court, and it was suggested by the Registrar that, having regard to the decisions in *Re Madras Irrigation & Canal Co.* (1) and *Re Central Bahia Ry. Co., Ltd.* (2), the proxies settled by the court, whereby the creditors were authorised to appoint the Official Receiver as their proxy, were invalid, because the Official Receiver was not a member of the class or classes of creditors convened to the meeting ordered by the court.

In my judgment, having regard to the Winding-up Rules as they now stand, those two decisions are no longer of any effect. In *Re Madras Irrigation & Canal Co.* (1), Sir George Jessel, M.R., decided that :

For the purposes of the meeting of any particular class of persons, proxies could only be given to and held by members of that class, and that a proxy given to the Official Liquidator was, therefore, invalid.

When that decision was given, the winding-up rule in force was the General Order and Rules of the High Court of Chancery, 1862, r. 46, a rule which provided as follows :

> The votes of the creditors or contributories of a company at any meeting summoned by the direction of the judge may be given either personally or by proxy, but no creditor shall appoint a proxy who is not a creditor of the company whose debt or claim has been allowed, and no contributory shall appoint a proxy who is not a contributory of the company.

That General Order was also in force when BUCKLEY, J., came to the same conclusion in *Re Central Bahia Ry. Co., Ltd.* (2).

The General Order and Rules of 1862 were annulled by the Companies (Winding-up) Rules, 1903, which, in their turn, have been replaced by the Companies (Winding-up) Rules, 1929. Rule 150 of the 1929 Rules is as follows :

> A creditor or contributory in a winding up by the court may appoint the Official Receiver or Liquidator and in a voluntary winding up the liquidator, or if there is no liquidator the chairman of the meeting to act as his general or special proxy.

It seems plain to me, therefore, that, in the case of a company which is being wound up by order of the court, the creditors have the right to appoint the Official Receiver to be their proxy at meetings convened by the court. The decisions referred to are no longer of any effect, and the suggestion in this case that the proxies were invalid is unfounded.

Scheme sanctioned.

Solicitors : *Stafford Clark & Co.* (for the petitioners).

[*Reported by* IRENE G. R. MOSES, *Barrister-at-Law.*]

COMMISSIONERS FOR THE GENERAL PURPOSES OF THE INCOME TAX FOR THE CITY OF LONDON *v.* GIBBS AND OTHERS.

[HOUSE OF LORDS (Viscount Simon, L.C., Lord Russell of Killowen, Lord Macmillan, Lord Wright and Lord Porter), **December 1, 4, 5, 8, 1941, February 20, 1942.**]

Income Tax—Partnership—Admission of new partner—Assessment of profits—"Succession"—Continuance of business—Income Tax Act, 1918, (*c.* 40), *Sched. D, Cases I and II, rr.* 8, 9, 10, 11—*Finance Act,* 1926 (*c.* 22), *s.* 32.

The appellants were a firm of London stockbrokers. During the year of assessment, there had been a change in the firm through the taking in of a new partner on Feb. 7, 1938, and also a falling off of its profits far below its current assessment. The revenue claimed to act upon a power conferred by Sched. D, cases I and II, r. 9, to apportion the existing assessment between the parties of the year before and after the change, on the footing that one firm of 4 partners had " ceased to carry on the business " and had been " succeeded " by a new firm of 5 partners. The procedure laid down by the rule had been strictly followed, and, if the rule were applicable, the result claimed by the revenue—namely, that the existing assessment as apportioned became unalterably binding—would *prima facie* seem to follow. The firm contended that the rule had no application to such a change in the constitution of a partnership, and that it was limited to a case of one person really ceasing to carry on a business and another person succeeding to it. On Mar. 22, 1938, the firm of 5 partners agreed to take in a sixth partner as from Mar. 25, 1938. On Apr. 1, 1938, all the 6 partners sent a notice, in accordance with the proviso to r. 11 (1), requiring computation of the tax payable in accordance with that rule. No such notice had been sent in respect of the change on Feb. 7, 1938. The business was carried on after each of these dates in the same manner as before :—

HELD (LORD RUSSELL OF KILLOWEN *dissenting*) : (i) the rule applicable, so far as the admission of the new partner on Feb. 7, 1938, was concerned, was r. 9, and the procedure laid down in that rule ought to be followed.

(ii) where there is a difference between English and Scots law, the Income Tax Acts, which apply to both countries, should be so construed as to obviate differences of construction in the two countries.

Decision of the Court of Appeal ([1940] 3 All E.R. 613) *reversed.*

[**EDITORIAL NOTE.** LORD RUSSELL OF KILLOWEN has dissented from the other members of the House for the reason that he had heard no argument in favour of the more liberal construction placed on the rule by the majority which did not appear to him to be irreconcilable with the plain meaning of the words under construction. Whether this is a further instance of the conflict between the liberal and literal construction of statutes may be doubted, since, as the majority admitted, neither view presented to the House was entirely satisfactory. It has, however, given an opportunity to the majority to repeat the many arguments in favour of the liberal construction, which has so many practical advantages. If it is permissible to add a word or two on this matter, it might be said that the real and fundamental objection to a literal construction is that it places an impossible burden on the parliamentary draftsman. This silent worker is usually, as, indeed, he is in the opinions herein, subjected to criticism, but it is to be remembered that he had to draft a clause, of the practical application of which he could be given only one or two concrete examples, and it must almost always be the case that the words which he has used have to be construed with reference to problems that were not only not presented to him, but are in fact widely different from anything presented to him. Further, if his words are not to be liberally construed, he would have to insert so many explanatory phrases and provisos that the clause would, in most cases, become practically unintelligible. It is, therefore, very helpful that their Lordships have again emphasised the first rule of construction, that effect is to be given to the intention with which the enactment was passed. At the same time, no meaning can be ascribed to any enactment or part of an enactment which is irreconcilable with its meaning ; but upon the application of this rule two minds seldom think alike. Another useful point made in the course of the case here reported is that Acts which apply to both England and Scotland should, where the law of England differs from that of Scotland, be so construed as to obviate differences of construction in the two countries. It is, perhaps, idle to deal in any detail with the particular rule under consideration, for, no doubt, when opportunity occurs, the rules will, in accordance with the suggestion of the House, be redrafted.

AS TO SUCCESSIONS IN PARTNERSHIPS, see HALSBURY, Hailsham Edn., Vol. 17, pp. 109-113, paras. 204-209 ; and FOR CASES, see DIGEST, Vol. 28, pp. 40-42, Nos. 208-214.]

Cases referred to :

(1) *Income Tax Special Purposes Comrs.* v. *Pemsel*, [1891] A.C. 531 ; 28 Digest 10, *51* ; 61 L.J.Q.B. 265 ; 65 L.T. 621.
(2) *Baird's Trustees* v. *Lord Advocate* (1888), 15 R. (Ct. of Sess.) 682 ; 28 Digest, 10, *g*.
(3) *R.* v. *Hogg* (1787), 1 Term Rep. 721 ; Cald. Mag. Cas. 266 ; 42 Digest 671, *818*.
(4) *Saltoun (Lord)* v. *Advocate General* (1860), 3 Macq. 659 ; 42 Digest 675, *868* ; 3 L.T. 40.
(5) *Caledonian Ry. Co.* v. *North British Ry. Co.* (1881), 6 App. Cas. 114 ; 42 Digest 638, *410*.
(6) *Sadler* v. *Whiteman*, [1910] 1 K.B. 868 ; 36 Digest 319, *21* ; 79 L.J.K.B. 786 ; 102 L.T. 472 ; *on appeal sub nom. Whiteman* v. *Sadler*, [1910] A.C. 514.
(7) *Watson & Everitt* v. *Blunden* (1933), 18 Tax Cas. 402 ; Digest Supp.
(8) *Brace* v. *Calder*, [1895] 2 Q.B. 253 ; 36 Digest 392, *652* ; 64 L.J.Q.B. 582 ; 72 L.T. 829.
(9) *Kensington Income Tax Comrs.* v. *Aramayo*, [1916] 1 A.C. 215 ; 28 Digest 102, *622* ; 84 L.J.K.B. 2169 ; 113 L.T. 1083.

APPEAL by the Commissioners from an order of the Court of Appeal (SCOTT, CLAUSON and GODDARD, L.JJ.), dated Aug. 2, 1940, and reported [1940] 3 All E.R. 613, allowing an appeal by the taxpayers from an order of a Divisional Court (HAWKE, CHARLES and HILBERY, JJ.), dated May 10, 1940. The facts are fully stated in the opinion of VISCOUNT SIMON, L.C.

The Attorney-General (*Sir Donald Somervell, K.C.*) and *Reginald P. Hills* for the appellants.

Cyril King, K.C., and *Frederick Grant* for the respondents.

VISCOUNT SIMON, L.C. [read by LORD RUSSELL OF KILLOWEN] : My Lords, by a document dated Nov. 5, 1937, the Commissioners for the General Purposes of Income Tax for the City of London gave notice to the stockbroking firm of Sir R. W. Carden & Co., of an assessment under Sched. D, for the year ending Apr. 5, 1938. The assessment was in respect of the profits of the partnership, and by Sched. D, cases I and II, r. 10, the assessment was a joint assessment made in the partnership name, and the tax was " computed and stated jointly and in one sum." The total figure upon which tax was to be charged was fixed, in the ordinary way, upon the profits made in the previous year 1936-7, and after adjustment was agreed at £69,355.

The firm of Sir R. W. Carden & Co., at the time when the assessment was made, consisted of four partners who for the present purpose may be designated A, B, C and D, and this continued to be the composition of the firm on Jan. 1, 1938, when the first half of the income tax resulting from the assessment became due. On Feb. 7, 1938, however, the composition of the firm changed owing to the taking in of a fifth partner, who may be called E. On July 27, 1938, the inspector of taxes, purporting to act in accordance with Sched. D, cases I and II, r. 9 (1), certified to the general commissioners particulars of the change which had taken place, and the commissioners thereupon purported to adjust the assessment by charging to the firm of five persons, out of the total assessment of £69,355, the apportioned amount of £11,078, with the result that the firm of four persons would be relieved of liability for tax on this latter figure but would be left answerable for tax on the balance of £58,277. As a matter of mathematical calculation there is no dispute that these figures are correct. They represent the fair apportionment of the total between that part of the year of assessment which lies before Feb. 7, 1938, and that portion which remains from that date. Though the apportionment is correctly worked out, the respondents have throughout insisted that no such apportionment under r. 9 could lawfully be made, since, according to them, the change during the year of assessment in the composition of a firm does not constitute a cesser in carrying on the trade by A, B, C and D, and the succession "by another person," viz., A, B, C, D and E in that trade. It is as to the validity of this contention, and as to the proper construction and application of r. 9, that the House has now to pronounce.

The respondents applied, on Jan. 17, 1940, to a Divisional Court of the King's Bench Division for an order to prohibit the commissioners from adjusting under r. 9 the assessment made upon them. On May 10, 1940, a Divisional Court, consisting of Hawke, Charles and Hilbery, JJ., dismissed the application, but the Court of Appeal (Scott, Clauson and Goddard, L.JJ.), on Aug. 2, 1940, reversed this decision and directed that the order of prohibition should be made, taking the view, as Clauson, L.J., expressed it, that "the condition precedent to the operation of r. 9—namely, that a person has ceased to carry on a business and has been succeeded therein by another person—is not fulfilled by the circumstances of the case."

It may contribute to a just appreciation of the reality involved in this highly technical question if I add at this point what is the practical reason why the respondents challenge the Crown's right to proceed under r. 9. This was frankly stated to the Divisional Court by counsel when he applied for the rule and was further explained to this House. The actual profits of this stockbroking business made in the year 1937-8 were less than its profits in the preceding year, by reference to which the total assessment was made. Just before the end of the fiscal year 1937-8, viz., on Mar. 25, 1938, a sixth partner, who may be called F, was taken into the firm, and on Apr. 1 all the partners joined, under the proviso to r. 11 (1)—which was first enacted by the Finance Act, 1926, s. 32—in sending to the surveyor of taxes a signed notice claiming that, in consequence of this change in the partnership, income tax should be computed as if the trade had been discontinued on Mar. 25, and a new trade had then been been set up. The result of this would be that the old trade would be treated as coming to an end in the course of the fiscal year, and the assessment in respect of this broken period would be based, not on the greater profits of the year before, but on the actual profits of the final period. There would, however, also be a revision of the figure for the previous year. Similarly, if a new trade is to be deemed to be set up on Mar. 25, 1938, income tax in respect of the opening period could not be ascertained by reference to past profits. Apart from these considerations, which may explain the action taken by the respondents, the Crown naturally wishes to secure a final and authoritative interpretation of r. 9, especially in view of the difficulties which now arise from comparing it with r. 11.

The Income Tax Act, 1918, Sched. D, cases I and II, r. 9 reads as follows:

> (1) If a person charged under this Schedule ceases within the year of assessment

to carry on the trade, profession, or vocation in respect of which the assessment is made, and is succeeded therein by another person, the surveyor shall, within four months from the fifth day of April next after any such change, certify to the general commissioners for the division in which the assessment is made the particulars thereof, and the full name and residence of the person charged and of his successor and the date of the change, if the same be known to the surveyor.

(2) On receipt of the certificate the commissioners shall cause notice to be given to the respective persons of a meeting of the commissioners to consider it, and after examination of the said persons, if they attend, or on other satisfactory proof of the facts, the commissioners shall adjust the assessment by charging the successor with a fair proportion thereof from the time of his succeeding to the trade, profession, or vocation, and relieving the person originally charged from a like amount. A

(3) The determination of the commissioners on any such certificate shall be final, and the sum apportioned to each such person shall be recoverable from him in like manner as if he had been charged under the original assessment.

(4) If either of the said persons has paid in respect of an assessment so certified more than the proportion which appears by the determination of the commissioners to be chargeable on him, the amount overpaid shall, when recovered from the person liable, be paid to the person by whom the overpayment was made. B

The word " assessment " is used in our income tax code in more than one sense. Sometimes, by " assessment " is meant the fixing of the sum taken to represent the actual profit for the purpose of charging tax upon it. In another context the " assessment " may mean the actual sum in tax which the taxpayer is liable to pay on his profits. These two things are, of course, not the same, or at any rate will not become the same unless and until income tax is charged at the rate of 20s. in the pound. It is remarkable that these two separate meanings of the word " assessment " may occasionally be found within the bounds of a single section, e.g., r. 9, (1) and (2) appear to contemplate the splitting of the assessment in the first sense (and this is the practice that was followed when an assessment of £69,355, being the amount of profits assessed, was apportioned as above stated), whereas in r. 9 (3) the words " the sum apportioned to each such person shall be recoverable from him " obviously mean the amount of tax due in respect of the apportioned fraction of profits. C D

Rule 9 deals with the persistence of a trade, profession or vocation, notwithstanding a change in the persons carrying it on. Such a situation cannot arise in the case of some professions or vocations, e.g., in that of a barrister or of a portrait painter. There are other branches of activity where the persistence of the same enterprise, notwithstanding a change of personnel, may be to some extent possible, e.g., on the sale of a country doctor's practice ; and then there is the large and important class of an established business capable of transfer as a going concern. It may be worth observing, in passing, that the preservation of the identity and continuity of a business, notwithstanding a change in those who carry it on, is probably most completely illustrated by changes which may occur from time to time in a partnership firm. E F

The question in the present case is whether, if a stockbroker's business is carried on for part of the year by A, B, C, and D in partnership and for the next part of the year by A, B, C, D, and E, this change can be described, within the meaning of r. 9, as a case in which a person charged " ceases " to carry on the trade and " is succeeded therein by another person." It cannot be disputed that the language of the rule would apply if an individual A ceases to trade and is succeeded in the business by an individual B, and the same result follows if a corporation, limited or unlimited, is substituted for A or B, or both. There would also be no difficulty in treating the rule as applying to the transfer of a business from a partnership consisting of A, B, C, and D to another partnership consisting of W, X, Y, and Z, for " person " includes " persons." The difficulty is to construe and apply the rule if the new partnership contains a member or members of the old. In the present case none of the former partners has retired and the new combination is the result of an addition. It seems to me—and, indeed, this is admitted by counsel for the respondents—that no distinction, in principle, can be drawn between this case and the case in which all the previous partners, except one, have retired and a large number of new partners are added. The crucial case always is one in which there is one individual at least who is a partner throughout. G H

If we were concerned with nothing more than the strict legal construction of r. 9 without regard to its setting in the income tax code, I should have no difficulty in agreeing with the view of the Court of Appeal. That view is crystallised in the closely reasoned judgment of CLAUSON, L.J., insisting that it is not a partnership firm which carries on trade, but its individual members who carry it on in partnership, and that the old partnership is not to be regarded as ceasing to carry on trade. and the new partnership is not to be regarded as succeeding when new members of the old partnership are also some of the members of the new and thus do not individually cease to carry on the trade at all.

It seems to me, however, that regarded in its historical setting this interpretation of r. 9 involves difficulties which must be examined. The scheme of income tax imposed under Sched. D in respect of annual profits or gains arising in respect of any trade etc. provides that the figure taken to represent profits in the year of assessment shall be arrived at by reference to the results of former trading (originally the average of profits of the three previous years, and now, under the Finance Act, 1926, the previous year's profits). It is obvious that this feature of the system, if not modified, might operate with special hardship in the event of a change in the composition of a partnership in the course of the year of assessment, and indeed in the case of any change in the personnel of those carrying on the business in the year for which the tax is being collected. In the case of a partnership, the tax is to be computed and stated jointly and in one sum, separately from any other income tax chargeable on any of the partners, and the joint assessment is to be made in the partnership name (Income Tax Act, of 1918, Sched. D, cases I and II, r. 10). The liability, therefore, is joint and, unless the income tax code provides some mitigation, the Crown would be entitled (though we are told this is not what in fact is ordinarily done) to demand the whole amount of tax from a new partner who has only joined towards the end of the year. Moreover, the very fact that there has been a change in the composition of the partnership during the year may, owing, for example, to the dropping out of a partner who has been chiefly instrumental in making the business a success, cause a fall in profits. Again, the same result might follow where the carrying on of a trade passes from a single individual to another individual, and this remains true if a corporation, limited or unlimited, is substituted for the individual in either or both cases.

In the Income Tax Act, 1842, Sched. D., cases I and II, r. 4 Parliament dealt with this situation as follows :

> If amongst any persons engaged in any trade, manufacture, adventure, or concern, or in any profession, in partnership together, any change shall take place in any such partnership, either by death, or dissolution of partnership as to all or any of the partners, or by admitting any other partner therein, before the time of making the assessment, or within the period for which the assessment ought to be made under this Act, or if any person shall have succeeded to any trade, manufacture, adventure, or concern, or any profession, within such respective periods as aforesaid, the duty payable in respect of such partnership, or any of such partners, or any person succeeding to such profession, trade, manufacture, adventure, or concern, shall be computed and ascertained according to the profits and gains of such business derived during the respective periods herein mentioned, notwithstanding such change therein or succession to such business as aforesaid, unless such partners or such person succeeding to such business as aforesaid shall prove, to the satisfaction of the respective commissioners, that the profits and gains of such business have fallen short or will fall short from some specific cause, to be alleged to them, since such change or succession took place, or by reason thereof.

It will be observed that in this rule a " change " is regarded as taking place, not only if some one or more members of a partnership drop out, but also if there is a dissolution of partnership as to all the partners. Yet, if the partnership is completely dissolved, and the trade goes on in new hands, this seems to involve a change which amounts to a succession. On the other hand, the rule goes on to speak of the case in which any person shall have " succeeded " to the trade etc., and it is not easy to give a confident application to the phrase " such partners " which follows the word " unless ", for there is no expressed antecedent to the word " such." Yet the reason of the thing strongly suggests that the partners who can secure relief by alleging a falling short of profits from a specific cause would be the partners who are left after the change has taken place. These obscurities would be more important if the Act of 1842 had not been repealed in 1918 and if the existing provisions on the subject were not differently expressed.

In 1880, a new and more effective method was adopted for providing against the hardship which might otherwise be suffered from a change in the carrying on of a concern during the year of assessment. The Taxes Management Act, 1880, is described in its full title and in its preamble as a consolidating Act, but in fact the provision under the head of "Changes" in sect. 62 was new. The provision was in almost the same terms as the present r. 9 and provided that, if a "person" ceases within the year of assessment to carry on the concern in respect of which the assessment is made, and is succeeded therein by another "person," there shall be a splitting of the assessment by the commissioners so that the predecessor and the successor shall each be liable for a fair proportion of the resulting tax. The proof, therefore, that as the result of the change some specific cause had operated to reduce the profits was no longer necessary in the cases to which sect. 62 applied for the purpose of getting an adjustment. Sect. 62 manifestly applied, and its substitute, r. 9, now manifestly applies, to every case where a business during the year of assessment passes from the hand of one person or set of persons to another person or another completely different set of persons. The question is whether it applies in a case where the new set of persons is not completely different, because, though there is a change in the composition of the partnership, there is a common element of one or more partners in each combination.

I now turn to the Income Tax Act, 1918, where r. 9 is immediately followed by rr. 10 and 11. Rule 10 merely carries forward the provision for making a joint assessment in the partnership name in the case of a concern carried on by two or more persons jointly, and making it separately from any other assessment on the individuals who are partners. Rule 11 reproduced in substance r. 4 in the Act of 1842 above set out. The Finance Act of 1926, s. 32 (1), however, substituted in place of the former r. 11, the following:

> 11.—(1) If at any time after the fifth day of April, nineteen hundred and twenty-eight, a change occurs in a partnership of persons engaged in any trade, profession, or vocation, by reason of retirement or death, or the dissolution of the partnership as to one or more of the partners, or the admission of a new partner, in such circumstances that one or more of the persons who until that time were engaged in the trade, profession, or vocation continue to be engaged therein, or a person who until that time was engaged in any trade, profession or vocation on his own account continues to be engaged in it, but as a partner in a partnership, the tax payable by the person or persons who carry on the trade, profession or vocation after that time shall, notwithstanding the change, be computed according to the profits or gains of the trade, profession or vocation, during the period prescribed by the Income Tax Acts:
>
> Provided that, where all the persons who were engaged in the trade, profession or vocation, both immediately before and immediately after the change require, by notice signed by all of them or, in the case of a deceased person, by his legal representatives, and sent to the surveyor within three months after the change took place, that the tax payable for all years of assessment shall be computed as if the trade, profession or vocation had been discontinued at the date of the change, and a new trade, profession or vocation had been set up or commenced, and that the tax so computed for any year shall be charged on and paid by such of them as would have been charged if such discontinuance and setting up or commencement had actually taken place, the tax shall be computed, charged, collected and paid accordingly.
>
> (2) If at any time after the said fifth day of April any person succeeds to any trade, profession or vocation which until that time was carried on by another person and the case is not one to which paragraph (1) of this rule applies, the tax payable for all years of assessment by the person succeeding as aforesaid shall be computed as if he had set up or commenced the trade, profession or vocation at that time, and the tax payable for all years of assessment by the person who until that time carried on the trade, profession or vocation shall be computed as if it had then been discontinued.
>
> In this paragraph references to a person include references to a partnership.
>
> (3) In the case of the death of a person who, if he had not died, would, under the provisions of this rule, have become chargeable to income tax for any year, the tax which would have been so chargeable shall be assessed and charged upon his executors or administrators, and shall be a debt due from and payable out of his estate.

Reading rr. 9 and 10 and the amended r. 11 together, a puzzle is disclosed to which, as it seems to me, no entirely satisfactory solution can be found. One effect of r. 11 (2) is that, if there is a complete change in the persons or person carrying on the trade during the year of assessment, the tax in respect of the trade carried on down to the change shall be computed as if the trade had then been discontinued, i.e., the actual profit in the broken period is the basis of tax, with the possibility of consequential adjustments in respect of the previous completed year; and the trade as from the date of the change shall be treated as the setting up of a new trade from that date. Consequently, r. 9 is no longer needed and can have no operation in such cases. To what then can r. 9 have any application, unless it be when there is a change in the composition of the partnership during the year of assessment, such that there is not a complete substitution of new partners for old, but some partner or partners remain in the partnership throughout?

It was pointed out during the argument that the amended r. 11, though enacted in 1926, did not operate until two years later, and, therefore, there was a field in which r. 9 could apply to complete changes in personnel during the intervening two years. That is true; but this only amounts to saying that the difficulty in finding any usefulness in r. 9 did not arise till two years later. Certainly, we cannot attribute to the legislature the mistake, as CLAUSON, L.J., is inclined to do, of overlooking the fact that r. 9 was useless, for the Finance Act, 1926, s. 35, contains a reference to the power of the commissioners to adjust the assessment under that very rule. In the case of a provision in the Finance Act, in connection with which there is an annual review for purposes of amendment in every session of the House of Commons, I find it very difficult to suppose that the existence of r. 9 as part of the existing code has been forgotten, or that it would be deliberately left, year after year, as a piece of dead wood without any possible usefulness or effect in the ramifications of the ever-spreading income tax tree.

There is, indeed, another indication that Parliament regards the transfer of a business from one partnership to another as a "succession," even though some of the partners remain in the firm throughout. Rule 11 (2), in which it is expressly stated that references to a person include references to a partnership, provides that, if, after Apr. 5, 1928, any person succeeds to any trade which until that time was carried on by another person, and the case is not one to which para. 1 of this rule applies, tax shall be calculated as though there had been the discontinuance of one trade and the commencement of another. What is the case to which para. (1) of the rule applies? It is the very case under discussion, where there is a persistence of certain partners while other partners have changed. This, then, assumes that such a change in partnership amounts, in the language of the income tax code, to a succession.

Moreover, if r. 9 is not left to operate in the only case conceivably remaining for its operation, this curious result follows. If there is a change in a partnership such as is described in r. 11 (1), and, if all the partners, old and new, combine to give the notice therein referred to, then there will follow a division of responsibility for the tax, the old partners being liable on the basis that the trade was discontinued at the date of the change, and the new combination being liable for a new trade thenceforward. What happens, however, if the whole body of partners do not make this unanimous application, perhaps because one of them objects to do so, or because it is not in their interest to do so? If r. 9 has no application in such a case, then, as above pointed out, the Crown could call upon a single partner, even one who had only joined the firm at the time of the change, to pay the whole tax. This, to say the least of it, appears to be quite contrary to the trend of the efforts which the legislature has made for a century past to limit the rights of the Crown in this respect. It would be very extraordinary if the legislature, while enacting in r. 11 (1) what would happen on the hypothesis that all the partners agreed to act together, has never asked itself what would happen if all the partners did not so agree. Construing this bundle of rules as a whole, I feel forced to the conclusion that it was the intention of the legislature to leave r. 9 to apply in such a case. It was suggested by counsel for the respondents that rr. 9 and 11 could not live together. I do not think that this is so. If we imagine a case in which the profits of the trade actually made in the year of assessment greatly exceed the assessed profits derived from the past, it might not at all suit the partners to make use of r. 11 (1), for they would thereby bring upon themselves much heavier claims for tax at once. In such a case the partners would much prefer to have the smaller total divided by the machinery of r. 9.

I concede without any doubt or qualification the proposition relating to the English law of partnership upon which the judgment of the Court of Appeal is largely based. Strictly speaking, it is certainly true that an old partnership cannot be regarded as "ceasing" to carry on the trade, and the new partnership cannot be regarded as "succeeding" to it when some members of the old partnership are also members of the new, and thus do not individually cease to carry on the trade at all. A, B, C and D are carrying on the trade throughout the year. How, then, can it be said that they, or any of them, have in the course of the year ceased to carry it on? If language is accurately used, a partnership firm does not carry on a trade at all. It is the individuals in the firm who carry on the trade in partnership. It is not the firm which is liable to income tax. The individuals composing the firm are so liable, though by r. 10 when a trade is carried on by two or more persons jointly the tax is computed and stated jointly and in one sum and is separate and distinct from any other tax chargeable to those persons or any of them, and a joint assessment is made in the partnership name. If, therefore, (it is argued) r. 9 is applied to a partnership, it applies not because a partnership is "a person charged under this schedule," but because the singular includes the plural, and instead of a single person the case is one of a number of persons who are jointly so charged.

So far as English law is concerned, it is indisputable that a partnership firm is not a single *persona*, though a different view obtains in Scotland, and in construing a taxing statute which applies to England and Scotland alike, it is desirable to adopt a construction of statutory words which avoids differences of interpretation of a technical character such as are calculated to produce inequalities in taxation as between citizens of the two countries. LORD HALSBURY affirmed this principle in *Income Tax Special Purposes Comrs.* v. *Pemsel* (1), at p. 548, when he adopted the canon of construction laid down by the Court of Session in *Baird's Trustees* v. *Lord Advocate* (2), and quoted the general principle of common sense which GROS, J., laid down in a rating case (*R.* v. *Hogg* (3), a universal law cannot receive different constructions in different towns. In *Pemsel's* case (1), at p. 557, LORD WATSON deduces from the Scottish decision of *Lord Saltoun* v. *Advocate-General* (4), the principle, which he there applies, that the Income Tax Act, 1842, must, if possible, be so interpreted as to make the incidence of its taxation the same in both countries.

It is these considerations which have made it necessary for me to look further into the statutory history and possible application of r. 9, not because I have any doubt as to the correctness of the proposition of English law as to the nature of a partnership firm, but because our duty in construing a statute such as this is to find out what the legislature must be taken really to have meant by the expressions which it has used, without necessarily attributing to the legislature a precise appreciation of the technical appropriateness of its language. In *Caledonian Ry. Co.* v. *North British Ry. Co.* (5) LORD SELBORNE, L.C., said, at p. 122:

> The more literal construction ought not to prevail if . . . it is opposed to the intentions of the legislature, as apparent by the statute; and if the words are sufficiently flexible to admit of some other construction by which that intention will be better effectuated.

As a strict proposition of English law, there is no doubt at all that a partnership is not, as such, a single juristic person. As FARWELL, L.J., said in *Sadler* v. *Whiteman* (6), at p. 889:

> In English law a firm, as such, has no existence; partners carry on business both as principals and as agents for each other within the scope of the partnership business; the firm name is a mere expression, not a legal entity, although for convenience under R.S.C., Ord. 48A, it may be used for the sake of suing and being sued. . . . It is not correct to say that a firm carries on business; the members of the firm carry on business in partnership under the name or style of the firm.

In the end, the House has to choose between two views, neither of which is entirely satisfactory. For the reasons I have given, I think that we must in this case be prepared to construe the rule under discussion in a popular rather than in a technical sense, and I am not greatly shocked to find that when dealing with a joint assessment of trade carried on by a partnership, the legislature has proceeded on the view that, when the trade was first carried on by A, B, C and D in partnership and was subsequently carried on by A, X, Y and Z, in partnership, this is to be regarded as though the first partnership ceased and the second partnership succeeded to the first. At the same time, this result, though in my opinion preferable to treating r. 9 as obsolete lumber, is only reached by giving to the rule an application which is difficult to reconcile with the aptest use of legal terminology, and it is to be hoped that Parliament, in a future Finance Act, may, by the use of amending language, think fit to illuminate the obscurity in which the judiciary for the time being has to grope.

In my view, therefore, this appeal should be allowed. I must point out, however, that, in substance, the respondents do not appear to lose anything by this reversal. The claim made on Apr. 1, 1938, under the proviso to r. 11 (1) remains valid, with the consequences that the business carried on down to Mar. 25 must be regarded as discontinued at that date and a new trade must be re- A garded as having been set up thenceforeward. In the circumstances, I think that there should be no costs in this House; the decision of the Court of Appeal except as to costs should be reversed, but its order as to costs must stand, as that was the agreement when leave to appeal to this House was given.

LORD RUSSELL OF KILLOWEN: My Lords, one question only arises on this appeal, viz., the true meaning and construction of the language employed in the Income Tax Act, 1918, Sched. D, cases I and II, r. 9. The particular question B is: Does that rule apply where the change is of this nature, viz., where a partnership consisting of four individuals takes in, during the year of assessment, a fifth partner, with the result that during one part of the year a business is carried on by four individuals in partnership and is carried on during the remaining part of the year by those four individuals and a fifth person in partnership? That is the precise question which arises in regard to the facts of the present C case; but in the argument on construction the broader question is involved, whether the rule applies to any case in which, after such a change, one or more of the members of the old partnership continue to carry on the business as members of the new partnership. I am using the word "business" so as conveniently to cover "trade, profession or vocation."

In my opinion, the language of the rule, interpreted according to the ordinary meaning of the words used, admits of no doubt. It does not apply to such a D case. Rule 9 does not, in terms, refer to partnerships as such at all. Partnerships as such are dealt with by rr. 10, 11 and 12. The word "person," in the singular, in r. 9, could not, of its own force, include a partnership of two or more persons. Businesses carried on in partnership can only come within the purview of r. 9 by reason of the Interpretation Act, 1889, which enables the singular word "person" to be read as including the plural "persons"; for businesses carried on in partnership are carried on by individuals who are in partnership, E and not by the partnership firm as a separate conception. The firm name is a mere expression to denote the individuals. Read in the light of the Interpretation Act, the rule comes into operation upon, but only upon, the following hypothesis (I omit words immaterial for this purpose):

> If a person or persons . . . ceases or cease within the year of assessment to carry on the trade . . . in respect of which the assessment is made, and is or are succeeded therein by another person or other persons.

F As I read it, that hypothesis, according to its plain meaning, postulates that there shall be at a point of time a ceasing to carry on by a person or persons, and a commencement to carry on by other, i.e., different, person or persons. In other words, the language used contemplates only the case of an owner or owners of a business ceasing to carry it on, and a different owner or owners commencing to carry it on within the year of assessment.

G In coming to this conclusion, I rely simply upon the language of r. 9 (1), without any reference to its pedigree, or to the history of income tax legislation. If, however, reference is made to this history, it becomes abundantly clear that two conceptions have always (since 1842) been distinguished and dealt with separately, viz. (i) changes in partnership, and (ii) successions to businesses. I do not think it necessary to explore this history in detail. It has been done by CLAUSON, L.J., in his judgment, and, as he pointed out, had this case arisen H before the new r. 11 had come into operation, it must have been dealt with under the old r. 11, and could not have been dealt with under r. 9. If this view be right, and it is, in my opinion, obviously right, the case cannot, after the alteration of r. 11, fall under r. 9, unless, notwithstanding that the language of r. 9 remains unaltered, the meaning of the words used in it has undergone some change. I feel unable myself to assent to the suggestion that the legislature has in this way, not merely enacted a new r. 11, but has also, in some way—I suppose by necessary implication—enacted that a new meaning shall attach to the language of r. 9. Nor do I rely on the difficulty of fitting in the mandatory provisions of r. 9 (2), (3), with the provisions of the new r. 11. These matters however, help to corroborate what I take to be the plain meaning of the language used in r. 9.

My Lords, I heard arguments on behalf of the appellants which purported to show that the construction for which they contended was a useful one from the point of view of the tax authorities or a beneficial one to the taxpayer, or was one which was in accordance with the view which had prevailed in official circles. I heard no argument on construction which did not appear to me irreconcilable with the plain meaning of the words under consideration. Rule 9 became, in my opinion, a spent force when the new r. 11 came into operation. There is no longer any case to which it can apply. I have stated in my own words my views upon this question of construction, but I am not conscious of having added anything to the judgment of Clauson, L.J., which, in my opinion, is unanswerable.

Lord Macmillan: My Lords, on Nov. 5, 1937, the commissioners of income tax issued to Sir R. W. Carden & Co., a firm of London stockbrokers, a notice of assessment to income tax under Sched. D, for the year ending Apr. 5, 1938. In the annexed particulars the assessed amount of the profits of the firm's business for the year 1937-38 was stated at £70,000, based on the profits of the preceding year. The amount was subsequently adjusted at £69,355, and is not in dispute. When the notice of assessment was issued the firm consisted of four partners. On Feb. 7, 1938, the four partners assumed a fifth. Thus, for approximately five-sixths of the year of charge, the business was carried on by four partners and for approximately one-sixth of the year by five partners. The name of the firm remained the same throughout.

The question for decision is whether the Income Tax Act, 1918, Sched. D, cases I and II, r. 9, applies to the circumstances which I have stated. That rule provides that, if a person charged under Sched. D " ceases within the year of assessment to carry on the trade, profession or vocation in respect of which the assessment is made, and is succeeded therein by another person," then certain procedure shall be set in motion within four months from Apr. 5 next " after any such change," having for its object and effect an adjustment by the general commissioners of the assessment " by charging the successor with a fair proportion thereof from the time of his succeeding to the trade, profession or vocation and relieving the person originally charged from a like amount." The determination of the general commissioners is to be final and " the sum apportioned to each such person shall be recoverable from him in like manner as if he had been charged under the original assessment." It was common ground that, if r. 9 does not apply to the circumstances of the present case, there is no other provision in the income tax statutes for the apportionment of liability for the total tax payable under the assessment for the year 1937-38, and the new partner in a question with the Crown must remain under liability for the whole amount of the tax jointly with the original partners, although he participated for less than two months in the year 1937-38 in the carrying on of the business. It was also common ground that, if r. 9 does not apply to such a case as the present, it has no application to any case and is entirely inoperative.

These considerations are argumentatively impressive and ought not to be left out of account; but the real question is whether the present case falls within the language of r. 9 when soundly construed. I propose, therefore, to begin by examining the terms of r. 9 as it stands by itself, apart from its history.

In order that the rule may be applicable there must first of all be " a person charged." The word " person " is in the singular, but it includes the plural and also any body of persons corporate or unincorporate. (Interpretation Act, 1889, ss. 1 (1) (*b*), 19). In considering whether a partnership or a group of persons associated in partnership constitutes " a person charged " within the meaning of the rule, I think it right to lay aside any preconceptions derived either from the law of England or from the law of Scotland as to the technical legal nature of a partnership. In Scotland a firm is " a legal person distinct from the partners of whom it is composed " (Partnership Act, 1890, s. 4 (2)), but this is not so under English law. For the present purpose this distinction should, in my opinion, be disregarded. The Income Tax Acts are Imperial statutes equally applicable on both sides of the border, and the language which they employ ought to be construed so as to have, as far as possible, uniform effect in England and in Scotland alike. (*Income Tax Special Purposes Commissioners* v. *Pemsel* (1), *per* LORD HALSBURY, L.C., at p. 548). The important thing to ascertain is the meaning of the word "person" in the vocabulary of the Income Tax Acts. The word constantly occurs throughout the Acts, and I think that it is most generally used to denote what may be termed an entity of assessment, i.e., the possessor or recipient of an income which the Acts require to be separately assessed for tax purposes. Now r. 10 (1) provides that:

> Where a trade or profession is carried on by two or more persons jointly, the tax in respect thereof shall be computed and stated jointly and in one sum, and shall be separate and distinct from any other tax chargeable on those persons or any of them, and a joint assessment shall be made in the partnership name.

The profits of a business carried on by a partnership are thus treated as a separate subject of assessment, and the assessment is made in the partnership name. The personification of partnerships is even more manifest in r. 12, by which, in certain circumstances, a "partnership shall be deemed to reside outside the United Kingdom, notwithstanding that some of the members of the said partnership are resident in the United Kingdom." That rule uses the expressions "the trade or business of a partnership firm," "the said firm shall be chargeable," "an assessment may be made on the said firm in respect of the said profit in the name of any partner resident in the United Kingdom." Justification is thus not wanting for the view expressed by ROMER, L.J., in *Watson & Everitt* v. *Blunden* (7), at p. 409, that for taxing purposes:

> A partnership firm is treated as an entity distinct from the persons who constitute the firm.

Having regard to the special vocabulary of the income tax legislation, I find no difficulty in interpreting the words "a person charged" in r. 9 to include the case of several persons associated together in partnership for the purpose of carrying on a trade in common, whose profits are, by the Acts, made the subject of separate assessment and separate charge.

In order that r. 9 may apply, it is necessary, next, that there should be a "change" in the year of charge in consequence of which one person "ceases" to carry on the trade and is "succeeded" by another person. Both SCOTT and CLAUSON, L.JJ., find it unnatural to describe in these terms what has happened in the present instance. SCOTT, L.J., says:

> I do not think it is a natural use of language to say that a firm ceases to carry on its business and that another firm succeeds to the business when all that happens is, for instance, that a young managing clerk has become a very junior partner with a tiny percentage of the firm's profits added to his salary.

The matter is put thus by CLAUSON, L.J.:

> The four original partners do not cease to carry on the trade; they continue to carry it on with the co-operation of a fifth person. That person in no sense succeeds to the trade; he joins in carrying on the trade.

With all respect, I am not convinced of the soundness of this reasoning. It is not a question whether the four original partners cease individually to be engaged in the business, or the new partner as an individual succeeds to the business. There has undoubtedly been a change in the person charged, as I construe this expression. The trade has ceased to be carried on by four persons in partnership and has become a trade carried on by five persons in partnership. Whereas four persons were jointly chargeable, there are now five persons jointly chargeable by reason of the change in the "person charged." It does not seem forced to say of this change that four persons jointly have ceased to carry on the trade and that five persons jointly have succeeded to it.

I agree with SCOTT, L.J., that, the Attorney-General's contention being one of law, it is fair to test it by an extreme case. Let it then be supposed, to take a case at the opposite extreme, that what has happened is that, in the case of a business carried on originally by four partners, A, B, C, and D, three new partners E, F and G are assumed, and A, B and C resign. It seems quite natural in such a case to say that A, B, C and D have ceased to carry on the business and have been succeeded by D, E, F and G, although D has throughout had a share, possibly different shares, in carrying on the business. In ordinary parlance, one firm would be said to have succeeded to another. B, C and D have certainly ceased to share in carrying it on; E, F and G have certainly succeeded to shares in it. That the terminology of r. 9 is not inapt to describe what happens when a change in the persons constituting a partnership takes place, is illustrated in the case of *Brace* v. *Calder* (8). That was the case of a firm composed originally of four partners. Two of them retired and the business was continued by the two remaining partners. An employee of the original firm declined to serve the two continuing partners, and was held entitled to nominal damages for wrongful dismissal. I am concerned not with the soundness of the decision, but with the language judicially employed. LORD ESHER, M.R., described what had happened thus, at p. 258 : A

> What they did was to alter the constitution of the firm. The old firm ceased to carry on its business, and the business became that of the new firm. For the present purpose it is just the same as if the firm had simply ceased to carry on business.

In that case LORD ESHER was a dissentient from the decision, but that does not affect the passage which I have quoted, for his colleagues in the majority said much the same. Thus, RIGBY, L.J., at p. 262, said that :

> . . . the partnership between the four defendants was put an end to and the business transferred to two of them, who continued to carry on a business under the same firm name. B

Similar language was used by LOPES, L.J. So, if the draftsman of r. 9 intended to include the case of a change in the composition of a firm, but used language inapt for the purpose, he at least erred in good company. I should add that it was agreed on all hands that the language of r. 9 would cover a case in which a firm composed of one set of partners transferred its business to another firm composed of entirely different partners. C

Taking r. 9, then, as it stands, I should be of opinion that the present case falls within it. I must turn now to the history and the context of the rule, which the Lords Justices have closely examined, and on which their contrary conclusion is largely based. The tax under Sched. D extends to " every trade carried on in the United Kingdom or elsewhere," with one specific exception. D The rules prescribe how the profits or gains of the trade are to be computed. However, a trade does not pay taxes ; persons do. Therefore, the tax is charged on and levied from the persons carrying on the trade in respect of the profits or gains arising or accruing to them therefrom, computed in the manner directed. In the case of a trade carried on continuously by the same person or persons from year to year, no difficulty as regards either computation or charge arises. However, there are various special cases to be considered. Thus (*a*) a trade E may be begun or set up for the first time within the year or years forming the basis of assessment or within the year of assessment itself ; (*b*) a trade may entirely come to an end in the course of the year of assessment ; (*c*) a trade may be carried on continuously, but there may be changes in the persons conducting it. Such cases present difficulties both of computation and of charge. Special provision was made for (*a*), new trades, in the 1842 Act, Sched. D, case I, r. 1, in the 1918 Act, Sched. D, cases I and II, rr. 1 (2) and 8 (1), and in the 1926 F Act, s. 29 (1). For (*b*), discontinued trades, provision was made in the 1842 Act, s. 134, in the 1918 Act, Sched. D, cases I and II, r. 8 (2), and the in 1926 Act, s. 31 (1). It is not necessary to say anything more about these special provisions relating to the commencement and the discontinuance of a trade, for they do not apply directly to the case in hand, which is an example of my class (*c*), i.e., where a trade has been continuous, but there have been alterations in the G persons carrying it on.

A survey of the legislation applicable to continuing businesses discloses two main features. First, as regards computation, a consistent disregard (down at least to 1926) of changes of personnel, the object being to secure that the whole profits of the trade, by whomsoever carried on, shall be duly taxed. Second, as regards charge, inasmuch as the tax once computed has to be recovered from " persons," a progressive recognition of the propriety of apportioning liability H where different persons have been concerned in the making of the profits brought into charge. The Act of 1842 showed little compunction in the matter. Sched. D, cases I and II, r. 4, provided that, if amongst any persons engaged in any trade in partnership together any change shall take place " either by death or dissolution of partnership as to all or any of the partners, or by admitting any other partner," or " if any person shall have succeeded to any trade," within the relevant periods, the duty payable in respect of such partnership or any person succeeding shall be computed irrespective of such changes therein or succession to such business unless such partners or such person succeeding are able to prove that since such change or succession took place or by reason thereof there was a falling off in profits or gains from some specific cause. Sect. 134 also dealt with the case where a person "succeeded" to the trade or business of another person and imposed on such person "so succeeding" liability for the full duties without any new assessment unless he could show a falling off of profits due to some specific cause.

A It is noteworthy that, in 1842, r. 4, which I have above summarised, makes provision for the computation of the duty in two cases (*a*) the case of a change among the persons carrying on a trade in partnership, including a change as to "all" the partners, and (*b*) the case of a person succeeding to a trade. The classification is not very logical, for where there has been a change in all the partners, there would seem clearly to be a succession. Then, in sect. 134, which is concerned with liability to charge, the Act deals with persons ceasing B to carry on a trade and being succeeded by other persons, but says nothing expressly about partnership changes. Perhaps this may have been because r. 3 had already made provision for all partners being charged jointly, though it would seem that, if an assessment made on four partners jointly was to affect five partners jointly, an enactment providing that this should be so without any new assessment would have been appropriate, if sect. 134 did not cover such a case.

C The Taxes Management Act, 1880, s. 62, made provision for the first time, in terms almost identical with those of the present r. 9, for the apportionment of the charge of tax in the case of a person ceasing to carry on a trade and being succeeded therein by another person. The section is comprehensively headed with the word "Changes," and refers to such a case as a "change in the carrying on of the concern."

D Now it is said, and fairly said, that, in endeavouring to ascertain the true import of the present r. 9, it is relevant to consider how the case now before the House would have stood after the coming into force of the 1880 Act, containing as it did the progenitor of r. 9, but without the present r. 11. The draftsman of sect. 62 of the 1880 Act, it is suggested, with the provisions of r. 4 of the 1842 Act before him, deliberately elected to deal with one only of the two cases covered by that rule, viz., the case of a person ceasing to carry on a business and E being succeeded in it by another person, and deliberately refrained from dealing with the other case also covered by that rule, viz., the case of a change among the persons engaged in a trade in partnership. The conclusion is sought to be drawn that sect. 62 of the 1880 Act, and so the present r. 9, cannot have been intended to apply to a change in the personnel of a partnership. This is a formidable logical argument, but it is not, in my opinion, conclusive. The scheme of legislation in the matter in hand has been far from logical. It has F been a case of makeshift patches by different hands, and verbal consistency is the last virtue that can be attributed to a code which uses so vital a term as "assessment" in no less than eight differing senses. (REPORT OF COMMITTEE ON INCOME TAX CODIFICATION, 1936, Cmd. 5131, para. 31). Indeed, LORD WRENBURY, in *Kensington Income Tax Comrs.* v. *Aramayo* (9), at p. 228, went so far as to say that

> G . . . no reliance can be placed upon an assumption of accuracy in the use of language in these Acts.

Sect. 62 of the 1880 Act does not profess to be an amendment of the previous law. It is a new departure, and I have offered reasons to show that its language (repeated in r. 9) may fairly be held to cover the case of changes in the persons carrying on a partnership concern. The draftsman of sect. 62 may have taken that view and have regarded a change in partnership personnel as a ceasing by H one set of persons to carry it on and a succeeding of it of another set of persons, notwithstanding, or perhaps without due regard to, the distinction drawn in r. 4 of the 1842 Act.

The next stage is reached in 1918, when the consolidation Act was passed. With minor alterations, it reproduced as Sched. D, cases I and II, r. 9, the provisions of sect. 62 of the 1880 Act, and it reproduced as r. 11 the provisions of r. 4 in the 1842 Act. Being a consolidation statute, it made no attempt to reconcile rr. 9 and 11 or to bridge the gap (if there was one), which, according to the respondents, left partnership changes with no machinery for apportionment. The 1842 distinction between partnership changes and successions may have been brought into more prominence by the new juxtaposition of rr. 9 and 11, but the law remained as it was after 1880 and, if sect. 62 of the 1880 Act was intended to cover changes in partnership personnel, the Act of 1918 did not alter the position.

Finally, in the progressive development of the law, came the Finance Act, 1926, s. 32, which substituted for the previous r. 11 an entirely new rule. It introduced a new refinement by recognising explicitly in para. (1) for the first time that, in the case of a continuing trade, changes in the persons carrying it on in partnership might occur which left one or more of the persons who previously carried it on still engaged in it, though in a new association. In such a case, the rule reasserts the principle of the 1842 Act that the computation of the profits of the trade shall remain unaffected by the change in personnel. Nothing is said about apportionment. There is a proviso, however, to the effect that all concerned may, by notice within three months (subsequently altered to twelve months) after the change, require the surveyor to treat the case as one of a discontinuance of one trade and the commencement of another, and to charge the tax on the several parties as if there had been an actual discontinuance and commencement. The proviso has quite a different effect from what is directed to be done under r. 9. That rule apportions the assessment computed for the whole year among the different persons who carried on the trade during the year. The proviso to r. 11 requires two separate computations, one applicable to the notionally discontinued trade, the other applicable to the trade notionally commenced. Then, in para. (2), the new rule goes on to deal with the case where a person "succeeds" to a trade previously carried on by another person, "and the case is not one to which para. (1) of this rule applies." In such a case, the tax payable is to be computed as if at the time of the change the predecessor had discontinued the trade and the successor had commenced it. It is expressly provided that in this paragraph references to a person include references to a partnership. Sect. 35 (1) of the 1926 Act provides, *inter alia*, that where in the case of any profits or gains chargeable under Sched. D, cases I and II, it is necessary to effect an apportionment thereof to specific periods, it shall be lawful to make such an apportionment:

> Provided that nothing in this section shall be construed as limiting the power of the general commissioners with respect to the adjustment of an assessment under r. 9 of the Rules applicable to Sched. D, cases I and II.

The provisions of Part IV of the 1926 Act (which includes sect. 32 and 35) are, by sect. 37, to come into operation on Apr. 6, 1927, till which time the existing enactments are to continue to have effect: thereafter any provisions inconsistent with Part IV are to cease to have effect.

Having examined the history of r. 9 and set out its context, I now return to the question of the interpretation of the rule with such light as my investigation has afforded. I cannot say that it has afforded much. One thing is clear—namely, that the existence of r. 9 was not overlooked when the new r. 11 was introduced, and that there was no inadvertent omission to repeal it, as suggested by Clauson, L.J., whose attention was apparently not drawn to sect. 35 of the 1926 Act. The operation of r. 9 was not safeguarded merely for the time intervening till the 1926 Act came into effect: that would have been secured by the general saving in sect. 37. Accordingly, in the view of the draftsman of the new r. 11, r. 9 had still a part to play. It may be that he misconstrued the effect of r. 9, as Clauson, L.J., alternatively suggests, but that does not afford an escape from the fact that Parliament has reaffirmed r. 9 as part of the existing code and must be presumed to have intended that it should have some effect. In view of r. 11, the only case left in which it can operate is the case where there has been a change in the personnel of a partnership with a common element continuing, and where no notice has been given to the surveyor under the proviso to para. (1) of r. 11. I agree with Clauson, L.J., that that by itself would be "a very poor ground for giving an entirely unnatural meaning to reasonably plain words," but it is not a circumstance to be disregarded, if the words may be reasonably read in a sense which would not only render r. 9 an effective part of the code, but also supply means of apportionment of tax in a case otherwise not covered.

It will have been observed that the new r. 9 (2), which deals with succession to a trade, is to be applicable only if " the case is not one to which para. (1) of this rule applies," and para. (1) deals with changes in partnership personnel. If, in the income tax vocabulary, a partnership change is never regarded as a succession, it was superfluous to except from the operation of para. (2) cases falling within para. (1). This time logic tells in favour of the Attorney-General's interpretation of r. 9. If the excepting words were introduced *ob majorem cautelam*, it was surely an excessive precaution to except a case which could only on an entirely unnatural reading of para. (1) be thought to be included.

After this long and tedious marshalling of all the relevant considerations, I have now to come to a decision, and my decision is that the arguments in favour of the applicability of r. 9 to the case in hand ought to prevail. I cannot, however, take leave of the case without expressing my regret that so much time and money has had to be spent in unravelling a tangle which could easily have been straightened out by the revenue authorities in one of their annual applications to the legislature and my hope that an early opportunity will be taken of doing so. My vote is in favour of allowing the appeal and restoring the order of the Divisional Court.

LORD WRIGHT : My Lords, I have had the advantage of reading in print the opinion just delivered of my noble and learned friend, VISCOUNT SIMON, L.C. I agree with it, and only add a few words of my own to explain my position out of respect to the distinguished lawyers in the Court of Appeal and in this House who take a different view.

The difficulties in deciding this case result from the extreme parcimony in language practised by the legislature in formulating the Income Tax Act, 1918, Sched. D, cases I and II, r. 9. I confess that for some time I was impressed by the close logic of CLAUSON, L.J., who, agreeing with SCOTT, L.J., has proceeded on the narrow interpretation of the words of the rule. The material words of r. 9 (1) are :

> If a person charged under this Schedule ceases within the year of assessment to carry on the trade, profession, or vocation in respect of which the assessment is made and is succeeded therein by another person . . .

That is the condition upon which the machinery provided by the rule in order to secure a fair apportionment of the tax between the former person and the successor is to operate. This certainly seems simple enough. It appears to contemplate merely a transfer of the undertaking from one person to another. Before this provision was introduced by the Taxes Management Act, 1880, s. 62, which was headed " Changes " and was substantially identical with the present r. 9, there was nothing to mitigate the effect of the provision now embodied in r. 11, which replaced the corresponding provision of sect. 100 of the 1842 Act. Notwithstanding the change, it was there enacted that there was to be only one assessment for the year and only a limited right to claim a reduction of the assessment was given to the successor in the event of there being a reduction of profits consequent on the change. However, the position is not quite so simple. It is a familiar rule of construction that the singular includes the plural. Hence r. 9 is to be read in law as signifying " if a person or persons ceases or cease " and " is or are succeeded by another person or other persons, etc." If persons carry on a business, they do so jointly, and thus the idea of partnership is introduced. Where several persons jointly carry on business, some may retire and others take their place, or a new partner may be admitted by the old partners without any other change in the firm. These and similar questions were, it is clear, present to the mind of the framers of the Act, because r. 11 provides for a change in a partnership " by reason of death or of dissolution of the partnership as to all or any of the partners or by the admission of a new partner." It also provides for a case where a person succeeds to a trade or profession which, on ordinary principles of interpretation, includes a case where several persons succeed. Rule 11 provides that, in all these cases, the tax is to be computed as if there had been no change or succession " notwithstanding the change or succession." Under r. 10, where there is a partnership, the tax is to be computed jointly and in one sum, and a joint assessment is to be made in the partnership name, which means that any partner can be called upon to pay the whole. This rule shows that, while revenue Acts do not deal specifically with partnerships (save exceptionally as in the Finance Act, 1926, s. 32 (2)), they do, in some respects, treat them in a sense as special entities for taxation. though it is still true that the partners, not the firm as an entity, are taxed.

The result is that where a new partner is admitted under r. 11, say, at whatever period of the year, he is liable *in solido* to income tax for the whole assessment, which is a single assessment on the profits of the entire year, before the new partner joined the firm, though no doubt the old and new partners may provide for some adjustment of the burden *inter se.* That this seemed to the legislature A to be an unjust burden to place upon the new partner is shown by the terms of r. 9, particularly when it is realised that the rule refers to persons trading in partnership. It is in r. 9 that the provision (if any) is to be found in the Act of 1918 for a more equitable adjustment of the direct liability for the year's tax, apart, that is, from the limited relief possible under r. 11. However, on the literal construction of the word "ceases," adopted by the Court of Appeal, there is nothing directed to the case, at least where the existing partners remain B but a new partner is admitted. CLAUSON, L.J., can only say that there is a *casus omissus*, which the partners, new and old, can deal with by the agreement under which the new partner is admitted, though clearly their domestic agreement could not affect the statutory incidence of the tax liability. The principles of construction abhor, if it can be avoided, a *casus omissus*, especially one so obvious as this. I do not find the words "cease to carry on the trade" etc. so precise and unambiguous as to be incapable of the meaning for which the appel- C lants contend, when read in their surroundings. Construction *ex vi termini* involves a fitting together of words with their context. Words in most cases take their colour from their environment. We must indeed exclude certain words which are so precise and distinctive as to admit of only one meaning. Such words are generally technical or scientific. Other words are so various in their connotation that without the context they cannot be understood, as, for instance, "quarter." The majority of words and phrases depend on the context, D and hence the familiar phrase that they must be construed *secundum subjectam materiam.*

Rule 9, like sect. 62 of the 1880 Act, is a slipshod piece of draftsmanship. It must, it seems, have been intended to cover the types of case mentioned in r. 11 of the 1918 Act. The framers of r. 9 may fairly be held to have taken the view that, if four partners admit a new partner and continue the business as a partnership of five, there is a change. The four old partners do not carry on E the business on the same footing as before, even if the actual business operations are unchanged. There is on any view a cessation of the old partnership business and the starting of a new partnership business. Even if the business remains the same and the name remains the same as before the change, still the five who carry it on succeed to the four who did so before the change, and the five can only succeed to the four if the four cease to carry it on, which is the fact, because F five partners carrying on a business jointly are different from four. Thus, a change in the persons jointly carrying on a business by the admission of a new partner may fairly be held to come within the very general words of r. 9, even though in one sense the previous partners may not cease to carry on the business. However, the business is not the old business. The old business is superseded by a new business, with a different division of property ownership, of powers of agency and representative capacity, of rights on dissolution and of all the G incidents of partnership, including joint liability. The draftsman may have had in mind that by English law the admission of a new partner involves a dissolution of the partnership and the starting of a new partnership, which succeeds to the old firm. In that sense, the old partners may be said to cease to carry on the business. It is a joint business. A joint business carried on by four is different from a joint business carried on by five, even if the five include the original four. The addition of the new partner changes the constitution H of the firm.

As VISCOUNT SIMON, L.C., has pointed out in his speech, this view brings the English way of looking at a partnership into line with the Scottish way, for practical purposes of the revenue Acts, which apply both to England and Scotland, and prevents a difference between the effect of the Acts in England as compared with their effect in Scotland, which would otherwise result from the fact that by the English law a firm is not, whereas by Scots law a firm is, a legal *persona.*

I have so far ignored the Finance Act, 1926, s. 32, because I do not see how the Act of 1918 can be construed in the light of the later Act of 1926. Sect. 32 of the 1926 Act did indeed give a new machinery to effect an equitable adjustment of tax where a change has taken place in a firm during the year of charge, but there was no complete change of identity in the partners because at least one partner remained throughout. That machinery is optional, and where the option is not exercised, because, for instance, all the partners before and all the partners after the change, would not agree to avail themselves of the machinery, r. 9 is as necessary as it ever was, and, indeed, is the only machinery to effect the readjustment. It was clearly not repealed by the Act of 1926, which, indeed, in sect. 35, expressly refers to it.

I am conscious, like VISCOUNT SIMON, L.C., that the question raised in this case does not admit of an entirely satisfactory solution, whichever view is taken. It can never be satisfactory to a court of construction to have to deal with words such as these. I agree with him also in thinking that, on the whole, it is more correct to give the wider meaning to r. 9 than to leave so obvious an anomaly, even though in practice the revenue authorities may not exercise their powers inequitably. The language of r. 9 is vague and obscure, and, although in ordinary parlance it would not, at first sight, be natural to describe the four partners in a case like the present as ceasing to carry on the business merely because they take in a new partner, yet, in my opinion, when the words are read in their immediate context, in their general setting in the revenue system, and in the light of partnership law, the meaning which I adopt is the true construction. That meaning achieves a practical and reasonable result, which is what the rule must, as it seems to me, have intended. I concur in the motion proposed.

LORD PORTER: My Lords, the question at issue in this case is a short but by no means easy one. Unfortunately, the Income Tax Acts are not a coherent whole, but a congeries of provisions often enacted to deal with specific problems without any sufficient care to see how they fit into the general framework amidst which they are inserted. Some of your Lordships in this House have set out the vital rule (Income Tax Act, 1918, Sched. D, cases I and II, r. 9), which requires elucidation, and in the course of the speeches delivered have traced the history of that rule itself and of the rules following it which deal with partnership businesses.

The argument on behalf of the subject, as I understand it, is that, in the case of a partnership, so long as one partner continues in the business, it cannot be said that the partnership has "ceased to carry on a trade" or has been "succeeded by another person." Partnerships, it is said, do not carry on a trade: the several partners do. An individual may cease to carry on a business and be succeeded by another person, and so may the individuals forming a partnership, provided all the original partners are replaced by another person or other persons, but unless all are changed there is no cessation and no succession by a person carrying on the business. The argument is strengthened by pointing out that in the Act of 1842, Sched. D, cases I and II, r. 4, a distinction is made between a change of partners on the one hand and a succession to a trade on the other, that this distinction was continued in r. 11 of the 1918 Act, which substantially reproduces r. 4 of the 1842 Act, and, it is said, again continued, though perhaps not quite so definitely, in the new r. 11 embodied in the Act of 1926. Rule 9, it is added, deals with cessation and succession, and not with a change of partners. In spite of this forcible argument, if I were faced only with the rules as they now stand, I think that in common with my noble and learned friend, LORD MACMILLAN, I should, without undue difficulty, consider r. 9 at least capable of bearing the interpretation which the appellants put upon it, more particularly in view of the circumstance, which he has pointed out, that r. 10 treats the entity of assessment as being the partnership, and not the individuals composing it.

It is true that r. 9 speaks of persons ceasing to carry on a trade and being succeeded by another, but for my own part I can conceive of the legislature, when dealing with a partnership consisting of A, B, C and D, describing them as ceasing to carry on a trade when those four individuals cease to carry it on as a group and of their being succeeded by other persons when a different group of four carry it on (e.g., A, B, C and F), albeit three out of the four are persons who previously constituted the partnership. Some of the individuals indeed remain, but A, B, C and D have ceased to carry on the business and are succeeded by A, B, C and F. The phraseology may be loose, inasmuch as strict accuracy compels one to acknowledge that in England, though not in Scotland, the business is carried on by the individual partners jointly, and not by the partnership. Nevertheless, it is not unimportant to recall that one partner alone does not carry it on. The totality of members form a joint body of management and responsibility.

It is interesting to observe in this connection that r. 9 speaks of cessation and succession as a change—as indeed it is—and thereby makes less marked the difference between the language used in r. 4 and the earlier r. 11, when referring to a change of partners and that used in a case where persons who are not partners cease to carry on a business and are succeeded by others. Moreover, those rules treat the death or dissolution of partnership as to all partners exactly on the same footing as the death or dissolution of some only. Further, as VISCOUNT SIMON, L.C., has pointed out, it is at least possible to read the phrase "unless such partners or such person succeeding" as if "partners" as well as "persons" were qualified by the word "succeeding."

Nevertheless, if I were dealing with a case where r. 4 of the 1842 Act, or the old r. 11 embodied in the Act of 1918 applied, I should be less willing to disturb the judgment of the Court of Appeal, not only because the construction of the Act is itself a matter of some doubt, but also because I feel the force of the reasoning of the Court of Appeal, and in a case of doubt recognise that your Lordships would affirm their decision.

However, this House is not directly concerned with the Act of 1842 or with r. 11 of the 1918 Act as it originally stood. In the language of the present r. 11 and elsewhere in the Act of 1926, there are, I think, some expressions sufficient to weight the scale in favour of the construction contended for by the appellants. I may tabulate them as follows.

(i) The proviso to the present r. 11 (2) speaks of a case of cessation and succession to which para. (1) of the rule does not apply, and para. (1) deals with changes of partnerships. This phraseology gives some indication that in the Act changes of partnership are treated as involving a cessation of and a succession in the carrying on of the business. In this connection it is also, I think, not unimportant to observe that in the new rule, as in the old, no distinction is made between those cases where all the partners are changed and those where there is a change of some only, or even nothing except an addition to or subtraction from the existent partners without further change. This, in my view, suggests that no difference was intended to be made between a complete and a partial change in the ownership of a business.

(ii) Rule 11 (2) expressly provides that in that paragraph references to a person include references to a partnership. The conclusion I should draw is that the first paragraph was intended to deal primarily with a partial change of partners, and the second as including a complete change and in each case the change is treated as a succession.

(iii) It was conceded by the respondents in argument that, except for the two years before the Act of 1926 came into force, r. 9 would find no set of circumstances upon which to operate. It seems unlikely that Parliament would leave that section unrepealed for all time, if this were the result of the new r. 11.

At best this particular argument is only of slight weight, but I have some doubt as to whether the admission should properly have been made by the respondents if their argument is sound. If the business is carried on, not by the partnership, but by individual partners, I see no reason why a new partner should not buy out an old one with the consent of the others. In such a case, I should have thought it might be contended that the outgoing partner had ceased to carry on the business and the incoming one had succeeded him, and that as between those two an apportionment under r. 9 should be made. This argument, however, does, to my mind, accentuate certain difficulties in the respondents' contentions. In the first place, the outgoing partner does not cease to carry on the business: he only ceases to help in doing so. In the second place, it would be an odd thing if apportionment were possible where partner succeeded partner, but none where the only change was that a new partner was taken in or an old one retired, and odder still if no apportionment were possible unless a new partner took exactly or substantially the old partner's share and place so that it could be said he had succeeded him.

(iv) Finally, sect. 35 (1) of the 1926 Act contains the words "Provided that nothing in this section shall be construed as limiting the power of the general commissioners with respect to the adjustment of an assessment under Sched. D, cases I and II, r. 9." That provision seems to indicate that that rule was intended to retain its effect in addition to the powers granted and obligations imposed by r. 11.

The general effect of this summary is to induce me to believe that in this difficult matter of construction, r. 9 continues to be effective and does apply to a partnership where a change of partners occurs though the old members are not superseded by entirely new persons. I cannot say that this result is achieved by that clarity of expression which one would desire in a taxing, or, indeed, in any, Act of Parliament, but of the two views I think it is the better. Accordingly, I find myself in agreement with the opinions expressed by VISCOUNT SIMON, L.C., and LORD MACMILLAN, and in proposing that the appeal should be allowed.

Appeal allowed.

Solicitors: *Solicitor of Inland Revenue* (for the appellants); *Janson, Cobb, Pearson & Co.* (for the respondents.)

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

RADLEY AND ANOTHER *v.* LONDON PASSENGER TRANSPORT BOARD.

[KING'S BENCH DIVISION (Humphreys, J.), **February 19th, 1942.**]

Negligence—Public vehicle—Omnibus brushing overhanging branch—Injury through breaking of window—Presumption of negligence—Duty to avoid obstructions above the level of the road.

The infant plaintiff was a passenger on the top of an omnibus belonging to the defendants. While the omnibus was proceeding along a country road, its upper part brushed against the branches of a tree overhanging the road, and some of the windows were broken. A splinter of glass penetrated the infant plaintiff's eye and necessitated its removal. The accident occurred at midday, and the tree was clearly visible along the road. There was evidence to the effect that omnibuses passing along the road in question frequently brushed against overhanging trees. The defendants called no evidence to explain the cause of the accident:—

HELD: the facts established a *prima facie* case of negligence against the defendants. It was the duty of the driver of the omnibus to keep a look-out for obstructions, whether on or above the level of the road, and, in the absence of evidence to the contrary, it was to be assumed that he had failed to perform that duty.

[**EDITORIAL NOTE.** Those accustomed to travel along country roads on a double-deck omnibus must be very familiar with the sound of the side of the vehicle brushing against branches. This case shows that it is the duty of the driver to keep a look-out for such overhanging branches, and, when they are of a kind liable to do damage, he must exercise care in avoiding them or in meeting them at such a speed that the likelihood of damage is negatived.

AS TO PRESUMPTION OF NEGLIGENCE, see HALSBURY, Hailsham Edn., Vol. 23, pp. 671-674, para. 956; and FOR CASES, see DIGEST, Vol. 36, pp. 88-91, Nos. 589-605.]

Case referred to:

(1) *Barnet Urban District Council* v. *London General Omnibus Co.* (1908), 100 L.T. 115; 36 Digest 60, *382*.

ACTION for damages for negligence.

On Dec. 17, 1940, the infant plaintiff, then 7 years of age, was on top of an omnibus with his father and other members of his family and Maynard, a friend of the plaintiffs. The omnibus was the property of the defendants and was being driven from Farnham Common to Slough. The infant plaintiff was sitting quietly on the top deck of the omnibus and it was not alleged that he was negligent or careless in any way. He was sitting next but one to the near side, the seat next to the window being occupied by Maynard's son. Something broke the glass of two or three windows, including the window close to the boy Maynard, and a splinter of that broken glass penetrated the infant plaintiff's eye, with the result that the eye had to be removed. It was agreed that the explanation of the window being broken was that there was on the side of the road a tree, a branch or branches of which overlapped the road and brushed against the omnibus in such a way that the windows were broken and the injury inflicted on the infant plaintiff.

The sister of the infant plaintiff stated in evidence that she had been living for some time in that neighbourhood, having been evacuated from London owing to enemy action, and that during that time she had noticed on several occasions that the omnibuses going along that road used to brush against the overhanging trees. Thus it was not the first time that the tree and the omnibus had been brought into contact. The defendants called no evidence and submitted that there was no case to answer.

F. A. Sellers, K.C. and *L. I. Horniman* for the plaintiffs.

R. T. Monier-Williams and *W. B. Franklin* for the defendants.

Humphreys, J.: I have to decide whether or not, in my opinion, the plaintiff has established his case. It seems to me that he has clearly established a case of *prima facie* negligence, because the omnibus was carrying passengers for hire. The duty upon the defendants, the owners of the omnibus, is clearly a duty to take at least reasonable care that the passengers shall not be injured while they are in that omnibus. It is common knowledge that one of the things which lead to accidents is the omnibus running into some obstruction. If the obstruction were on the ground, the case would be unanswerable. In this case, the obstruction was in the air, but not so high as to make it impossible for the upper part of the bus to run into it. It does not seem to me to make the smallest difference to the principle of the thing that it happened to be so placed. The question I have to ask myself is this, whether there is any evidence, one way or the other, to explain why the driver, driving along this road at midday, did not see this obstruction which was clearly visible. There is no evidence with regard to that, and I can only assume that the driver did not, in fact, see the overhanging branch. In my opinion, it was one of the things which it was his duty to look out for, and, even apart from evidence of the infant plaintiff's sister that the same sort of thing had happened before, though happily without breaking the windows, I should say that the brushing of the side of an omnibus by branches *a fortiori* imposed a duty on the defendants—I do not say on the particular driver—to see that it did not recur. In the absence of any evidence at all on the part of the defendants, I think that the plaintiff is entitled to recover.

I do not want my judgment to be misunderstood or that it should be assumed it goes one whit further than the facts of the present case. I can well imagine circumstances in which the defendants might be able to prove that, although omnibuses had come into collision with branches, it was really no fault of the driver that he did not notice the particular branch which was the cause of the accident. In a high gale, a branch may break in an instant and topple down. If that had happened here and it had been proved that, when it happened, the omnibus was perhaps only 20 feet away, it might have been a perfectly good answer for the defendants to say that it was an act of God which could not have been prevented by reasonable care on the driver's part.

I assume no such thing happened in the present case, and that, when the omnibus entered this portion of the road, there was an obstruction clearly visible to the driver, which, in fact, he did not see. He ran into the obstruction, and the plaintiff was injured. In consequence, the plaintiff is entitled to recover upon the ordinary principles of our law. That finding, in my opinion, is not in the least in conflict with *Barnes Urban District Council* v. *London General Omnibus Co.* (1), to which I have been referred. I think that the observations in that case rather support what I have said. However that may be, I find that the plaintiffs succeed.

Judgment for the plaintiffs for £500 *and agreed special damage with costs.*

Solicitors: *Jennings, Son & Ash* (for the plaintiffs); *R. B. McDonald* (for the defendants).

[*Reported by* D. K. Belcher, *Barrister-at-Law.*]

LEADER *v.* COUNSELL (INSPECTOR OF TAXES). BENSON *v.* COUNSELL (INSPECTOR OF TAXES).

[KING'S BENCH DIVISION (Lawrence, J.), **January 19, 20, 1942.**]

Income Tax—Annual profits or gain—Isolated transaction—Purchase of racehorse—Sale of nominations—Income Tax Act, 1918 (*c.* 40), *Sched. D, case VI.*

A number of persons joined together to buy a racehorse in order to prevent it being taken out of the country. They agreed that those joining in the purchase were to be entitled to send mares to the horse free according to the share of the capital which they had subscribed. Alternatively, they were entitled to sell their free nominations to other persons. The Crown claimed that, although the taxpayers were not carrying on a trade, sums received by them from the sale of these nominations were taxable under Sched. D, case VI. It was contended for the Crown that the sale of nominations was merely the user of the property in the horse which the subscribing owners had acquired, and for the taxpayers that it was the purchase and resale of property :—

HELD : the transactions in question were the realisation of the reproductive faculties of the horse, and not the purchase and resale of property. There was no purchase by the taxpayers of the nominations which they sold, the only purchase in which they were engaged being that of the horse itself. Accordingly, the receipts from the sale of nominations were in the nature of income and were taxable.

[**EDITORIAL NOTE.** The difference between capital and income has been illustrated by the difference between the tree and its fruit. There would seem to be some difficulty in applying this metaphor to the case of a racehorse, but the court has decided that the sale of nominations is analogous to the fruit and not to the tree, even in a case where free nominations seem to have been a part of the consideration for which the purchase-price of the horse was subscribed.

AS TO CASUAL PROFITS OF A REVENUE NATURE, see HALSBURY, Hailsham Edn., Vol. 17, pp. 206, 207, para. 423 ; and FOR CASES, see DIGEST, Vol. 28, pp. 81, 82, Nos. 452-462.]

Cases referred to :

(1) *Pearn* v. *Miller* (1927), 11 Tax Cas. 610 ; Digest Supp.

(2) *Jones* v. *Leeming,* [1930] A.C. 415 ; Digest Supp. ; 99 L.J.K.B. 318 ; 143 L.T. 50 ; 15 Tax Cas. 333 ; *on appeal from* [1930] 1 K.B. 279.

(3) *Ryall* v. *Hoare, Ryall* v. *Honeywill,* [1923] 2 K.B. 447 ; 28 Digest 81, *453* ; 92 L.J.K.B. 1010 ; 129 L.T. 505 ; 8 Tax Cas. 527.

(4) *Cooper* v. *Stubbs,* [1925] 2 K.B. 753 ; 28 Digest 22, *113* ; 94 L.J.K.B. 903 ; 133 L.T. 582 ; 10 Tax Cas. 29.

CASE STATED by the commissioners for the special purposes of income tax. The facts are fully set out in the judgment.

J. H. Bowe for the appellants.

The Solicitor-General (*Rt. Hon. Sir William Jowitt, K.C.*) and *Reginald P. Hills* for the respondent.

LAWRENCE, J. : The special commissioners have assessed the appellants under Sched. D, case VI, although they have found that the appellants were not carrying on a trade in respect of the horse Solario, with which the case is concerned. The facts are that in 1932, on the death of Sir John Rutherford, who was the owner of this famous horse, Solario was going to be sold, and a number of racehorse owners decided that they would like to join together in order to prevent Solario being taken out of the country. Accordingly, they empowered Lord Glanely to bid for Solario on their behalf up to £30,000. As a matter of fact, Lord Glanely went beyond that limit and acquired Solario for £47,000, subject to 37 nominations which were already in existence. After this purchase, the racing owners, who had authorised Lord Glanely to bid, made a written agreement under which 24 of them subscribed a sum of £53,000, £47,000 for the price of the horse and the remainder for what is called working capital. Each owner took a certain number of shares, one owner taking some shares which he held on behalf of other people. In accordance with the agreement, they were entitled to send mares to Solario free in proportion to the number of their shares, but the management of the horse was left in the hands of a committee of three, and they were empowered to regulate the number of mares which Solario might serve, the price at which he was to stand, and the suitability of the mares which might be sent to him. It therefore happened that certain of the subscribing owners might not, and did not, have mares which were considered suitable, or, at any rate, they possibly did not want to send to him, and in those circumstances these owners were able to sell their free nominations to other persons who might have mares which were suitable and which would be acceptable to the committee. The question in the case is whether or not the receipts which the two appellants had over the six years, 1934 to 1940, are taxable under Sched. D, case VI, the special commissioners having held that they are, although they found that the appellants were not carrying on a trade.

The argument for the appellants is really based upon the case of *Pearn* v. *Miller* (1), and *Jones* v. *Leeming* (2), and, in particular, upon the *dictum* of LAWRENCE, L.J., in *Jones* v. *Leeming* (2), where he said, at p. 354 :

> It seems to me that in the case of an isolated transaction of purchase and resale of property there is really no middle course open. It is either an adventure in the nature of trade, or else it is simply a case of sale and resale of property.

As it is conceded that nothing turns in this case upon the question whether or not it is an isolated transaction—it was not an isolated transaction—counsel for the appellants has contended that the transfer of these nominations to other persons in return for money is a purchase and resale of property within the meaning of the *dictum* of LAWRENCE, L.J., and that, therefore, as the commissioners have found that there was no trade carried on, the profits cannot be taxed under case VI. To this argument, the Solicitor-General has replied that this is not a purchase and sale of property, that it is in reality merely the user of the property which the subscribing owners acquired in Solario and, being the user, the profits derived therefrom are in their nature revenue or income. Counsel for the appellants, in reply, as I understood him, contended that that was not the true view, because the rights of the appellants are not the unfettered rights of part owners or owners, but are to a considerable extent limited by the terms of the agreement.

In my opinion, the argument of the Crown is correct, and I think it appears from all the cases which have been cited, that, where the commissioners have found that there is no trade, the true question to be considered is whether the profits in question are of an income or revenue nature. That was indicated in the first case that was cited, *Ryall* v. *Hoare* (3), where ROWLATT, J., at p. 454, said this :

> First, anything in the nature of capital accretion is excluded as being outside the scope and meaning of these Acts confirmed by the usage of a century. For this reason, a casual profit made on an isolated purchase and sale, unless merged with similar transactions in the carrying on of a trade or business, is not liable to tax. "Profits or gains" in case 6 refer to the interest or fruit as opposed to the principal or root of the tree.

That appears to me to be applicable to the present case. This is not, in my opinion, a case of an accretion of capital. It is not a case of principal or tree. It is the case of interest or fruit. In *Ryall* v. *Hoare* (3), the profits were held to be taxable, being commissions earned for guaranteeing an overdraft. In *Pearn* v. *Miller* (1), ROWLATT, J., was dealing with the case of a man who had bought seven pieces of real property and who had subsequently re-sold them at a profit, and the question was, the commissioners having found that he was not carrying on a trade, whether those accretions in value of that property were taxable under case VI. ROWLATT, J., said, at p. 613 :

> Now I wish to say very clearly, in order that I may be corrected if I am wrong, that I think it is very often the case that you may say of something that it may be under case I or case VI. That may very often be true, but it is wholly illusive to say anything of that kind where you are dealing with a difference between the purchase and sale price of goods. If it is desired to tax the difference between what a man has bought goods for, or property for, and sold them for, you can only tax it, in my judgment, if you can say that what he did was a trade or adventure or concern in the nature of trade.

He was there dealing with the purchase and resale of real property, but no doubt the same argument would apply, and indeed, by the terms of what he said, did apply, to the purchase and resale of goods; but, in my opinion, in the present case there is nothing like the purchase and resale of goods or any other property in the transactions which give rise to the profits here in question. The appellants did not buy the right to their nominations. They bought the horse. It is true that they sold the right to the nominations, but that was merely a way of realising the fruit of the horse. In *Jones* v. *Leeming* (2), which was again a case of the purchase and resale of real estate, the House of Lords put the matter in very much the same way, and it is perfectly true that reference was made to the *dictum* of Lawrence, L.J., which I have quoted, but Lord Buckmaster said, at pp. 419, 420:

> Can the profits made in this case be described as income? Were the respondent a company promoter or were his business associated with purchase and sale of estates, wholly different considerations would apply, but this is negatived; the transaction in this case stands isolated and alone. It is, to my mind, in the circumstances, purely an affair of capital. I can see no difference between it and what might have happened had the respondent bought shares in two companies which were going to be amalgamated, and then sold equivalent shares in the amalgamated company at a profit: an accretion to capital does not become income merely because the original capital was invested in the hope and expectation that it would rise in value; if it does so rise, its realisation does not make it income.

Lord Warrington, who had been a party to the decision in *Cooper* v. *Stubbs* (4), said this, at p. 425, concerning that case, which, in my opinion, lays down the true principle:

> The nature of the profit must in each case be considered. If it arises from a trade within the definition of the Act no difficulty occurs. If it does not, I know of no better criterion than that adopted by the majority of the Court of Appeal in *Cooper* v. *Stubbs*, (4) and by Lawrence, L.J., in the present case. This is expressed by Atkin, L.J., in *Cooper* v. *Stubbs* (4), as follows [at p. 775]: "Annual profit or gain . . . to my mind, must mean something which is of the nature of revenue or income."

In *Cooper* v. *Stubbs* (4), the Court of Appeal were dealing with transactions entered into by cotton brokers for dealing with futures in cotton transactions, and it was held that, although the commissioners had found that there was no trade being carried on by these cotton brokers in these transactions, which they did privately and apart from their firm, yet they were taxable in respect of the profits which they derived therefrom under case VI, because they were "of a revenue or income nature." It is clear from the judgments in those cases that, although it was not the intention of the cotton brokers who had entered into these transactions, and who were sought to be taxed, that they should take delivery of the cotton in question, yet the contracts which they made were real, enforcible, legal contracts, under which they might have had to take delivery of the cotton. If the *dictum* of Lawrence, L.J., could be pushed to the extent which counsel for the appellants seeks to push it in this case, it would be impossible for the Court of Appeal to have reached the decision which it did in *Cooper* v. *Stubbs* (4), which was approved by the House of Lords in *Leeming* v. *Jones* (2). As I say, the true principle, in my opinion, is that laid down in *Cooper* v. *Stubbs* (4), that where there is no trade it must be seen whether the profits are "of an income or revenue nature," and, if they are, they can be taxed under case VI, notwithstanding the fact that they may be said, from some aspects, to be the purchase and resale of property. In the present case, in my opinion, the transactions in question were not the purchase and resale of property, but were merely realising the reproductive faculties of Solario. There was no purchase of the nomination which was sold. The only purchase in which the appellants engaged was in the purchase of the horse itself.

For these reasons, I am of opinion that the decision of the commissioners was perfectly correct, and the appeal will be dismissed with costs.

Appeal dismissed with costs.

Solicitors: *Ward, Bowie & Co.* (for the appellants); *Solicitor of Inland Revenue* (for the respondent).

[*Reported by* D. K. Belcher, *Barrister-at-Law.*]

FISHER *v.* FISHER.

[COURT OF APPEAL (Lord Greene, M.R., and MacKinnon and Goddard, L.JJ.), **March 5, 1942.**]

Divorce—Maintenance—Application for leave to apply for order over seven years after decree absolute—Reasonable time—Supreme Court of Judicature (Consolidation) Act, 1925 (*c.* 49), *s.* 190 — *Matrimonial Causes Rules,* 1937, *r.* 44.

The appellant obtained a decree *nisi* of divorce in March, 1934, and it was made absolute in the following October. No application was made for permanent maintenance, but an order for alimony *pendente lite* had been made, and the respondent continued to make payments at the same rate until May, 1940. They then fell in arrears, and no payment was made after May, 1941. Negotiations for the settlement of property upon the appellant took place over a long period of time, while the respondent was making the payments to her, but they were never concluded. The appellant applied 7½ years after the decree absolute for leave to file a petition for maintenance :—

HELD : in the special circumstances of this case, leave to make the application ought to be granted. This was not a case where the appellant should be stopped *in limine* by refusing leave to present a petition, which might or might not be successful.

[**EDITORIAL NOTE.** In normal circumstances, a delay of much shorter duration than that in this case would be a bar to any application for maintenance. The decision is, therefore, based purely on the exceptional circumstances of the case, and it must be noted that the court is not deciding upon the merits of the case, but merely that leave to present a petition should not be refused. GODDARD, L.J., has not dissented from the conclusion of the court, but has only agreed with much hesitation.

AS TO PROVISION OF PERMANENT MAINTENANCE, see HALSBURY, Hailsham Edn., Vol. 10, pp. 785-987, paras. 1244, 1245 ; and FOR CASES, see DIGEST, Vol. 29, p. 510, Nos. 5481-5487.]

Cases referred ro :

(1) *Scott* v. *Scott,* [1921] P. 107 ; 27 Digest 510, *5486* ; 90 L.J.P. 171 ; 124 L.T. 619.
(2) *Mills* v. *Mills,* [1940] P. 124 ; [1940] 2 All E.R. 254 ; Digest Supp. ; 109 L.J.P. 86 ; 163 L.T. 272.
(3) *Legge* v. *Legge* (1928), 45 T.L.R. 157 ; Digest Supp.

APPEAL from an order of HENN COLLINS, J., dated Jan. 13, 1942, refusing an application for leave to apply for an order for permanent maintenance under the Matrimonial Causes Rules, 1937, r. 44.

Harold Brown for the appellant.

The respondent did not appear and was not represented.

LORD GREENE, M.R. : The appellant had been petitioner in divorce proceedings. The decree *nisi* was made in March, 1934, and the decree absolute in October of the same year. No application having been made previously for permanent maintenance, by virtue of the Matrimonial Causes Rules, 1937, r. 44, it became necessary to obtain leave of court before any such application could be made. HENN COLLINS, J., refused to grant that leave, and this appeal results.

The first question which arises is one which depends on the effect to be given, in the circumstances of this case, to the Supreme Court of Judicature (Consolidation) Act, 1925, s. 190, which re-enacts, so far as is relevant for the present circumstances, the provisions of the earlier statutes. The crucial words are these :

> (1) The court may, if it thinks fit, on any decree for divorce . . . order that the husband shall, to the satisfaction of the court, secure to the wife such gross sum of money or annual sum . . .

It is clear that, since the present application is one for leave to make an application under sect. 190, if, under that section, the court would have no jurisdiction to entertain it, the matter ought to be stopped *in limine* by refusing the leave to make the application which is being asked for under r. 44.

The question whether or not the court would have jurisdiction under sect. 190, to order permanent maintenance, in the circumstances of this case, is the principal matter which has been discussed before us. The respondent does not appear, although he was duly served with the notice of appeal. Before I come to examine the problem, there is one more thing which must be borne in mind.

If the court is minded to allow this appeal, all that it will be doing will be giving permission to make an application for permanent maintenance under sect. 190. It will not be dealing in any way with the merits of such application, nor will it be in any way tying the hands of the judge before whom such application comes. Should the application come before him, he will then consider whether, in the circumstances of the case, it is right and proper that any order should be made, and, if so, what that order should be. The husband, therefore, will have every opportunity of putting his case on the merits before the court.

I now return to the substantial question whether or not, in the circumstances of this case, an application under sect. 190 would be one which the court could entertain. The meaning of the words, " the court may, on any decree for divorce," the crucial word being the word " on ", has been authoritatively settled in a decision of this court in *Scott* v. *Scott* (1). The words mean, according to the construction then placed upon them, that the application must be made " at " or " within a reasonable time " after the decree, having regard to all the circumstances of the case. It follows, therefore, that what is a reasonable time must depend on the circumstances of the particular case. A time which in one case would be reasonable would in another case with different circumstances be quite unreasonable.

As I understand it, in the present case the judge took the view that it would not be a reasonable time in the circumstances of this case, seven years having elapsed between the date of the decree absolute and the date of the application—in point of fact it is rather more. I should be very loth to interfere with the discretion of the judge in a matter of this kind, if I had not before me material which was not before him. It appeared from the affidavit which was before him that an order for alimony *pendente lite* at the rate of £325 per annum free of tax for the appellant and the child of the marriage had been made, and that payment had been continued by the husband until May, 1940. After that date payments became somewhat irregular, and in May, 1941, were £40 in arrear. Of course, all the payments made subsequently to the decree absolute were voluntary payments, the order for alimony *pendente lite* having no effect after that date. Nevertheless, for all those years he was making these voluntary payments, as appears in the affidavit sworn by the present appellant, which was before the judge. Since then he has paid her nothing, and in order to maintain herself she had to draw on her small capital of about £1,000. She was 50 years of age. She was untrained, or otherwise unable to earn her living. She stated in her affidavit that there were some negotiations for a settlement which extended over some years, but never reached finality. On that evidence the judge apparently did not think that it had been established that the application had been made within reasonable time within the meaning of the decision in *Scott* v. *Scott* (1).

Before us there is a further affidavit sworn by the solicitor advising the appellant. In that affidavit he says that he has known the respondent for over 20 years and had done conveyancing work for him ; that for a long time the respondent had been in the habit of discussing with him the situation with regard to the proposed settlement on the appellant ; and that the matter had got as far as a proposal which was actually signed by the husband on Oct. 19, 1934, at about the time the decree absolute was made. In that proposal he proposed to convey certain property to his wife subject to a mortgage. He was to pay the interest on the mortgage and to redeem it within three years. He was also to pay the costs. That was a serious proposal, but it came to nothing, according to the solicitor's affidavit, because the appellant was diffident about taking over mortgaged property. The affidavit then goes on to say :

> The matter drifted on for a long time, because the respondent would not make up his mind about the redemption of the mortgage, although at the same time always urging his moral responsibility towards his former wife and the daughter of the marriage.

Of course in the meantime he was continuing the annual payments already referred to. The solicitor also says that from time to time the respondent made suggestions to him which he conveyed to the appellant about a proposed settlement which he was suggesting should be made of other properties of his. The solicitor then proceeds to say :

> I frequently discussed with him various proposals made by him for this settlement ; but I was never able to bring them to a definite conclusion. The parties never could

come to a final agreement on the terms. Such negotiations aforesaid continued up to the time when the above-named respondent ceased to make any payments to the above-named petitioner.

Then he says this, in para. 8 :

> The delay in this matter has occurred solely because of the apparently sincere intention of the above-named respondent to make such a settlement as aforesaid coupled with the sense of security which the above-named petitioner had as a result thereof and of his interim payments as aforesaid, and further because of the wish of both the petitioner and myself on her behalf to avoid any action which would antagonise the respondent and to delay still further the execution of a proper settlement. A

In those circumstances, it is, I think, fair to regard this lady as having been lulled to a sense of security by what had taken place, When I use that expression, which I think in the circumstances is a fair one, it is not for one moment to be thought that I am casting any imputation on the husband, or suggesting that anything that he did was in any way improper or not above board. The impression that I get is that both these parties were behaving in a very decent and proper way towards one another ; that the husband was really anxious to make a provision and the wife anxious to have one ; but that the matter was rather allowed to go to sleep, because the wife was receiving regular payments from the husband. B

When the payments have come to an end, and the whole situation has changed in that way, it does seem to me that it would be unfortunate, to say the least of it, if the lady had to be stopped, at the threshold of the court, by failing to obtain an order which would enable her to have the case decided on its merits, because the effect of the judge's order is that she could never prove the real merits of the case before the court. Although I agree it is a matter upon which different minds might take different views, it seems to me that, in all the circumstances of this case, it is fair to say that an application now made for permanent maintenance could properly be said to be an application made within a reasonable time after the decree *nisi*, having regard to all the circumstances of the case. C D

Of course, it may be said that the lady should have broken off negotiations and taken the step of making an application to the court at a very much earlier stage. It is perfectly true that she might have done that. I always feel that in domestic matters the court should be slow to take any course which would discourage the parties from negotiating and discussing in a friendly way, rather than rushing into litigation with one another. Even if they are parties who have been divorced, it is not desirable that they should be always having recourse to the courts if there is a reasonable chance of their being able to compose matters outside. That applies more particularly if there is, as there was in the present case, an infant child of the marriage. Therefore, looking at the whole of the facts, I think that we are justified, having regard to the new evidence before us, in coming to a different conclusion to that to which the judge came. E F

I must say a word with regard to two decisions. The first is *Scott* v. *Scott* (1) to which I have already referred. In that case the decree absolute was made in 1913, and the application was made in Nov., 1919. It was held, on the facts, that the time within which it was proposed to make the application was not a reasonable time. However, the facts were very different from those of the present case. There, the lady was in fact in enjoyment of a sum of £500 a year, paid to her by her husband. He was paying that under what may have been a contract or what may have been merely a friendly arrangement—this court did not decide which it was—but for practical purposes it made no difference. The real point of the case was that she was in receipt of that sum of money, and the husband was willing even to increase it. However, she wanted a very much larger sum, and before she could get that larger sum she had to get an order for permanent maintenance. The court refused to regard that application as having been made in good time, having regard, among others, to that most crucial circumstance. As LORD STERNDALE, M.R., points out, at p. 119 : G H

> It was rightly said, I think, that in substance what the wife is seeking to do is to obtain an increase to the sum of £500 a year payable to her.

That was what the wife was trying to do there. There was no reason to suppose for one moment that the £500 would come to an end. All she was trying to do was to extract something more. The court quite clearly refrained from suggesting that the time which had elapsed in that case, which was a matter of six years, would have been a conclusive answer to an application in different circumstances. Both Warrington and Scrutton, L.JJ., (and, I think, Lord Sterndale, M.R.), framed their conclusions in very careful language. The sentence which I have actually under my eye at the moment is the one in which Scrutton, L.J., expressed his conclusion [pp. 126, 127]:

> Without going through the other cases, seven or eight of which I have referred to while counsel have been arguing this case, I think in this particular case the application ought to have been made within a reasonable time after the decree for dissolution; and I see nothing whatever in the circumstances of this case to justify an application being made seven years after the decree.

He carefully refrained from saying that in any circumstances seven years would have been too long. Warrington, L.J., is equally cautious in the language which he used. In my view that authority does not in any way preclude us from saying that, on the facts of any particular case, a reasonable time may be as much as seven years, or even more.

That leads me to add a word or two, merely for the sake of explaining some observations of my own, about *Mills* v. *Mills* (2), a decision of this court. In reference to the case which was then before the court, I said, at p. 130 ([1940] 2 All E.R. at p. 258):

> If the present application had been a new application made in the year 1940 in reference to a decree of divorce which was made absolute in November, 1932, it could not, in my opinion, be suggested for one moment that the court would have had jurisdiction to deal with the application. An order made on an application launched so many years afterwards would not have been an order made on a decree for divorce.

Later in the judgment there are phrases to the same effect. It must not be thought for one moment that in what I was assuming there was anything but the bald facts which I stated—namely, a decree of divorce in 1932 and an application eight years afterwards, without any further facts at all. I adhere to what I said there: that if that were all the court had to consider—divorce in 1932 and application in 1940—it is quite obvious that there would be no special circumstances which would render that a reasonable time. My language must not be construed as suggesting what I never intended to suggest, namely, that there was any sort of cast-iron period which could be laid down. That becomes particularly clear, because just before the passage quoted I had referred to *Scott* v. *Scott* (1), in which it is laid down with great clearness that all the circumstances of the case had to be considered.

I have given very anxious thought to this case, which is a difficult one. Having regard to the facts which I have mentioned, I think that it would be within the jurisdiction of the court under sect. 190 to entertain the application, and I think that the case is one in which the court ought, under the relevant rule, to grant leave to make it. When the application comes before the court, the merits can be gone into, and it will be for the judge to say on the facts before him whether any, and, if so, what order ought to be made.

In my opinion, therefore, the appeal should be allowed.

MacKinnon, L.J.: I agree, and I do not think I need add anything.

Goddard, L.J.: As both Lord Greene, M.R., and MacKinnon, L.J., are of opinion that there are circumstances in this case which make it reasonable that the lady should be entitled to present this petition, I should feel a difficulty in dissenting. I am bound to say, however, that I only agree with considerable doubt and hesitation. The lapse of time is a very long one. The lady has not been bereft of advice, as was the case in *Legge* v. *Legge* (3). This is a case in which she has been in her solicitor's hands the whole time. However, since I am not dissenting, I do not propose to state at length the doubts and difficulties which I have felt and still feel on the whole case. The fact that we are giving leave to make the application does not deprive the judge before whom it comes of an entirely free hand as to what order, if any, he makes upon it, and, since I do not want to say anything which would indicate a view to him on a matter which is eminently one for his discretion, I will say no more. Therefore, though I have great doubt on the matter, I will not dissent from the order proposed.

Appeal allowed.

Solicitors: *Charles J. Pack & Son* (for the appellant).

[*Reported by* W. K. Scrivener, Esq., *Barrister-at-Law.*]

BORMAN AND OTHERS *v.* LONDON & NORTH EASTERN RAILWAY CO.

[King's Bench Division (Atkinson, J.), **January 16, 30, February 3, 10, 1942.**]

Railways—Amalgamation—Compensation of employees dismissed—Dismissal must be by reason of amalgamation—Railways Act, 1921 (*c.* 55), *Sched. III.*

The applicants were originally employed on a railway which became part of the respondent company's undertaking through the operation of the Railways Act, 1921. They were dismissed from the service of the respondent company in 1938, in order to effect a reduction in expenses, and it was found as a fact that the old company would have been affected by a similar necessity even if the amalgamation had not taken place. The applicants claimed to be compensated under the Railways Act, 1921, Sched. III, para. (5), by which compensation is payable to any such employee whose office is abolished, or who retires, or whose services are dispensed with for any reason except misconduct or incapacity, or whose remuneration is reduced because his duties have been diminished, or who otherwise suffers any direct pecuniary loss by reason of the amalgamation :—

Held : the words " by reason of the amalgamation " govern all the events contemplated in para. (5), and not merely the last-mentioned. Accordingly, the applicants were not entitled to be compensated under this paragraph, since their dismissal was not an event which arose out of the amalgamation.

[**EDITORIAL NOTE.** This is a short point on the construction of the Railways Act, 1921. Amalgamations and transfers of duties and powers have made us familiar with compensation for loss of office and employment, and it seems almost an axiom that compensation provisions added to an Act amalgamating undertakings is to be limited to loss of office or employment arising out of the amalgamation. No doubt there can be cases where the loss of office due to an amalgamation occurs some considerable time after the date of the amalgamation. Reorganisation may sometimes take time ; but, *prima facie*, a loss occurring 17 years after the amalgamation is due to some other cause. In this case the arbitrator found as a fact that the dismissals here in question would have occurred if there had been no amalgamation. The case, therefore, raised the direct question whether a retained employee of one of the constituent companies can be dismissed by reason of his employment becoming unnecessary or impossible for reasons other than misconduct or incapacity and not arising out of the amalgamation. The question is answered by holding that the compensation provisions of the Act apply only to loss arising out of the amalgamation.

For the Railways Act, 1921, Sched. III, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 14, pp. 374, 375 ; and for Cases, see DIGEST, Supp., Railways, Nos. 503a, 503b.]

Case referred to :

(1) *R.* v. *National Arbitration Tribunal, Ex p. Bolton Corpn.*, [1941] 1 K.B. 584 ; [1941] 1 All E.R. 413 ; Digest Supp. ; 110 L.J.K.B. 622 ; *on appeal*, [1941] 2 All E.R. 800.

Case Stated by an arbitrator appointed under the Railways Act, 1921, Sched. III, to determine whether the applicants were entitled to compensation by reason of their dismissal from the service of the respondent company. The facts are fully set out in the judgment.

N. L. C. Macaskie, K.C., and *M. R. Nicholas* for the applicants.

W. H. Cartwright Sharp, K.C., and *B. J. M. MacKenna* for the respondents.

Atkinson, J. : This is a special case raising the question whether certain men in the employ of the London & North Eastern Railway Company, who were dismissed in 1938, are entitled to compensation under the Railways Act, 1921. That Act provided that the great bulk of the railways in Great Britain should be formed into groups, the companies in each group being amalgamated or absorbed. Schemes were prepared, but every scheme had to incorporate Sched. III to the Act, providing for compensation for existing officers and servants suffering loss. In the case of this railway company, a scheme was prepared and became law, and the question is whether or not these servants are within Sched. III. That schedule is really a code providing for compensation for men who suffer damage in various ways or in certain events, and it is the interpretation of that code which is in issue in this case.

There were five of these men, and they were all dismissed in 1938. The arbitrator finds that they were all dismissed without their consent, that their services were dispensed with on the ground that they were not required, and for reasons not being on account of any misconduct or incapacity, that each of them suffered direct pecuniary loss in consequence, and that the reason (or the main reason) for their dismissal was the urgent necessity for reducing expenses. These men had been employed originally by the Hull & Barnsley Co., and the case also finds that, even if the amalgamation had not taken place, that company would have been hit in the same way, and would have been seriously affected by the same circumstances that affected the amalgamated company.

The question is whether a person who has been dismissed must prove that his dismissal was by reason of the amalgamation in order to obtain compensation. The men say that that is immaterial, and that they do not have to establish that. On the other hand, the railway company says that that is an essential condition of the right to recover compensation, and that the Act only provides compensation for those suffering injury or damage by reason of the amalgamation.

Before I come to deal with the precise point, I should like to repeat what I said in *R.* v. *National Arbitration Tribunal, ex p. Bolton Corpn.* (1), at p. 600 ([1941] 1 All E.R. at p. 423):

> The fundamental rule of interpretation to which all others are subordinate is that a statute is to be expounded according to the intent of them that made it. The first rule of construction for determining that intent is that, if the words are unambiguous and precise, they must be construed in their natural and ordinary sense, and phrases and sentences must be construed according to the rules of grammar. This is called the rule of literal construction. MAXWELL in his book on the INTERPRETATION OF STATUTES has an interesting heading to a section dealing with this rule. It is "Fallacy of Literal Construction." I cite a few passages from the section: "The rule is confined to cases where the language is precise and capable of but one construction, or where neither the history or cause of the enactment, nor the context, nor the consequences to which the literal interpretation would lead, show that that interpretation does not express the real intention . . . It is another elementary rule that a thing which is written within the letter of the statute will generally be construed as not within the statute unless it be also within the real intention of the legislature."

The object of the Railways Act, 1921, is declared in sect. 1:

> With a view to the reorganisation and more efficient and economical working of the railway system of Great Britain railways shall be formed into groups in accordance with the provisions of this Act . . .

In other words, reorganisation is the real purpose of the Act. Clearly, the intention of the legislature was that, if anybody suffered damage by anything done in the ensuing inevitable reorganisation for the purpose of achieving these declared objects, he should be compensated.

The first thing to remember is that mere amalgamation or mere transfer could, of course, hurt nobody. The Railway Clauses Act, 1863, s. 49 provided:

> All clerks, officers and servants who at the time of amalgamation are in the employment of the dissolved company, shall thereupon become clerks, officers or servants, as the case may be, of the amalgamated company, with the same rights and subject to the same obligations and incidents . . ."

So that mere amalgamation only has the effect of changing the employer, and no servant can be any the worse for mere amalgamation.

The precise point arises under para. (5) of Sched. III. There, certain existing officers and servants are referred to as people who shall, in certain events, be entitled to compensation. For the purpose of understanding para. (5), I think it is necessary to go through the preceding paragraphs. The introduction defines "existing officers and servants" as people who have been in the employ of one of the companies to be absorbed or amalgamated for not less than five years, and we may take it that all the five persons involved in this case had been in the employment of the Hull & Barnsley Railway Company for over five years.

Paras. (1) and (2) are as follows:

> (1) Every existing officer and servant shall, as from the date of amalgamation or absorption, become an officer or servant of the amalgamated company . . . (2) The amalgamated company may abolish the office or situation of any existing officer or servant which they deem unnecessary.

It is plain that the new company did not need statutory permission to abolish any office, so long as it gave the proper contractual notice to the servant affected. To give these words a meaning, it is clear, as was urged by counsel for the railway company, that they must include the abolishing of an office or situation in breach of contract, i.e., permitting a breach of contract without involving liability to an action for damages at law. It is one thing to give statutory permission to break existing contracts in the course of and for the purpose of the desired reorganisation. It is quite a different thing to impute to the legislature an intention to legalise breaches of contract indefinitely and for all time during the lives of existing officers and servants.

Para. (2) continues as follows:

> . . . and any existing officer or servant required to perform duties such as are not analogous or which are an unreasonable addition to those which as an officer or servant of the company from which he was transferred he was required to perform may relinquish his office or situation.

Again, those words must surely include a departure in breach of contract, or they mean nothing. I repeat, it is one thing for the law to legalise breaches of contract for a limited period and for the purposes of a reorganisation in the interests of the country, but it is quite a different thing to suppose that Parliament intended to legalise them indefinitely.

Next, I come to para. (3):

> No existing officer or servant so transferred shall, without his consent, be by reason of such transfer in any worse position in respect to the conditions of his service as a whole (including . . . remuneration . . .)

I think that the wording of this paragraph is very significant, because the event referred to is clearly governed by the words "by reason of such transfer." I do not know whether there is any difference in meaning between the words "by reason of such transfer" and the words "by reason of the amalgamation," but at any rate para. (3) is clearly limited to something that is to happen "by reason of such transfer."

To take an illustration from the facts of this very case, supposing that, instead of these men being dismissed seventeen years after the passing of the Act, their employers had said: "We cannot go on paying you your old wages; we do not want to dismiss you, you have been in our employ for twenty or thirty years, but we are bound to reduce your wages," it could not have been suggested for one moment that they came within para. (3). Para. (4) provides for compensation for persons affected in the way indicated by para. (3) and, if, instead of dismissing these men, the railway company had reduced their wages, it would have been hopeless to contend that they would have been entitled to compensation under para. (4).

The crucial paragraph is para. (5), which provides:

> Every existing officer or servant whose office or situation is so abolished, or who so relinquishes his office or service, or whose services are dispensed with on the ground that they are not required or for any reason not being on account of any misconduct or incapacity, or whose salary, wages or remuneration are reduced on the ground that his duties have been diminished, or who otherwise suffers any direct pecuniary loss by reason of the amalgamation or absorption, shall be entitled to be paid compensation . . .

The question which the court is asked by the arbitrator is this:

> Do the words "by reason of the amalgamation" in para. (5) of the Railways Act, 1921, Sched. III, govern any of the events contemplated by the preceding words of that paragraph other than the words "or who otherwise suffers any direct pecuniary loss?"

In other words, does the phrase "by reason of the amalgamation" govern the first four classes of people indicated and described in para. (5)? In my judgment, they do.

The three main reasons which have induced me to come to that conclusion are these. First of all, I am bound to consider the broad intention of Parliament in passing the Railways Act, 1921. Parliament was dealing with amalgamation for the purposes of reorganisation, and, *prima facie*, one would say that any provision to be found in the Act was part and parcel of the contemplated reorganisation. There is to be reorganisation, but the old servants are not to suffer by anything done in pursuance of the reorganisation. I do not say that that would be conclusive in itself, but I think it raises a rather strong inference that that was what Parliament intended.

However, I come to two specific reasons. The first, which I have indicated already, is the words "by reason of such transfer" in para. (3). Is it reasonable to suppose that a man whose pay has been reduced because his duties have been diminished is to have compensation at any time, whenever that happens, whereas the man who has been worse treated because his pay has been reduced without any diminution of duties under para. (3) is entitled to have compensation only if it that arises "by reason of such transfer"? One can hardly conceive that for a moment. Para. (3) is quite clear. If "by reason of such transfer" a man's remuneration is less beneficial, then he is to have compensation, but only if it arises out of the transfer. Why should the man whose remuneration is reduced, but who has the corresponding advantage that his duties are diminished, be in a more favourable position than the other, and be entitled to compensation for the rest of his life?

The third point relates to the word "otherwise" in the phrase—"or who otherwise suffers any direct pecuniary loss by reason of the amalgamation or absorption," in para. (5). I cannot get over that word. It seems to me to indicate quite clearly the intention that the paragraph is only dealing with servants who suffer loss by reason of the amalgamation.

One is rather confirmed in this view, I think, if one bears in mind the history of this type of legislation, and there is something to be said for historical harmony. The Local Government Act, 1888, s. 120, which must have been in the minds of the legislature at the time of passing this Act, because it is referred to in this very para. (5), provides as follows:

> Every existing officer declared by this Act to be entitled to compensation, and every other existing officer, whether before mentioned in this Act or not, who by virtue of this Act, or anything done in pursuance of or in consequence of this Act, suffers any direct pecuniary loss by abolition of office or by diminution or loss of fees or salary, shall be entitled to have compensation paid to him for such pecuniary loss.

It is clear under that section that compensation is only due if an injury has been sustained as a result of something done in pursuance of, or in consequence of, the Act.

Therefore, I am driven to the conclusion that the arbitrator took the true view, and I answer the question in the affirmative. I think that the words "by reason of the amalgamation" govern all the events contemplated by the preceding words of the paragraph.

Solicitors: *Pattinson & Brewer* (for the applicants); *I. Buchanan Pritchard* (for the respondents).

[*Reported by* D. K. BELCHER, *Barrister-at-Law.*]

HOBBS *v.* HUSSEY (INSPECTOR OF TAXES).

[KING'S BENCH DIVISION (Lawrence, J.), **January 27, 28, February 18, 1942.**]

Income Tax—Annual profits or gains—Isolated transaction—Payment for articles in newspaper—Revenue payment—Income Tax Act, 1918 (c. 40), *Sched. D, case VI.*

The appellant, a solicitor's clerk, who had never carried on the profession of an author, received a sum of money from a newspaper for the serial rights in his life story, and was assessed to tax under Sched. D, case VI, in respect of it. The appellant contended that the sum was not a revenue receipt, since the transaction was a sale of the copyright of the articles and, therefore, resulted in the realisation of capital:—

HELD: the true nature of the transaction was the performance of services by the appellant, the sale of the copyright being subsidiary thereto, and the sum received was, therefore, assessable as revenue. The performance of services, though they may involve some subsidiary sale of property, are in their essence of a revenue nature, since they are the fruit of the individual's capacity, which may be regarded in a sense as his capital, but are not the capital itself.

[**EDITORIAL NOTE.** The appellant in this case relied upon the decision in *Earl Haig's Trustees* v. *Inland Revenue Comrs.* (1), but that case has been distinguished on the facts. In the present case, the author did not dispose of all his rights in the articles, and could have published the same matter again in a different form. In these circumstances the payment in respect of their publication is held to be a revenue payment, and to be a payment for services rather than the purchase price on the sale of property.

As to Casual Profits of a Revenue Nature, see HALSBURY, Hailsham Edn., Vol. 17, pp. 206, 207, para. 423; and for Cases, see DIGEST, Vol. 28, pp. 81, 82, Nos. 451-462.]

Cases referred to:

(1) *Haig's (Earl) Trustees* v. *Inland Revenue Comrs.*, [1939] S.C. 676; Digest Supp.; 22 Tax Cas. 725.

(2) *Ryall* v. *Hoare, Ryall* v. *Honeywill*, [1923] 2 K.B. 447; 28 Digest 81, *453*; 92 L.J.K.B. 1010; 129 L.T. 505; 8 Tax Cas. 521.

(3) *Martin* v. *Lowry, Martin* v. *Inland Revenue Comrs.* (1925), 42 T.L.R. 433; 28 Digest 22, *114*; 11 Tax Cas. 297.

(4) *Sherwin* v. *Barnes* (1932), 16 Tax Cas. 278.

Appeal by the taxpayer from a decision of the Commissioners for the Special Purposes of Income Tax. The facts are fully set out in the judgment.

N. E. Mustoe for the appellant.

The Solicitor-General (*Rt. Hon. Sir William Jowitt, K.C.*) and *Reginald P. Hills* for the respondent.

Lawrence, J.: In this case the commissioners have held that the appellant, a solicitor's clerk, who has never carried on the profession of an author, is assessable under Sched. D, case VI, in respect of a sum of money received from "The People" newspaper for the serial rights in his life story.

It was contended for the appellant that the transaction was a sale of the copyright of the series of articles and, therefore, resulted in the realisation of capital, and was not a revenue receipt, and *Earl Haig's Trustees* v. *Inland Revenue Comrs.* (1) was relied on. The Solicitor-General, whilst not admitting that the *Earl Haig's Trustees* case (1) was rightly decided, argued that it is distinguishable, and that it was settled by *Ryall* v. *Hoare* (2), so far as courts of first instance are concerned, that profits from a single article by a person who is not an author are assessable under Sched. D, case VI. He also submitted that the true question in such cases is whether the transaction in question is really a sale of property or the performance of services, and that the present transaction falls into the latter category and profits therefrom are therefore of a revenue nature.

In my opinion, the test suggested is correct. Any sale of property where no concern in the nature of trade is carried on must result in the accretion of capital (*per* Rowlatt, J., in *Ryall* v. *Hoare* (2), at p. 454), and it is also true, in my opinion, that the performance of services, though they may involve some subsidiary sale of property (e.g., dentures sold by a dentist), are in their essence of a revenue nature, since they are the fruit of the individual's capacity, which may be regarded in a sense as his capital, but are not the capital itself. Does, then, the fact that the present transaction involved the sale of the copyright in the appellant's series of articles constitute the profits therefrom capital, or is such sale merely subsidiary to what was in its essence a performance of services by the appellant? In my opinion, the true nature of the transaction was the performance of services. The appellant did not part with his notes or diaries or his reminiscences. He could re-publish the very articles themselves so long as they were not in serial form, and, on the whole, I am of opinion that the profits which he received were of a revenue nature and not the realisation of capital. In *Earl Haig's Trustees* v. *Inland Revenue Comrs.* (1), the facts were, of course, totally different. The trustees possessed diaries of unique importance and great value, and the view of the Court of Session was that these diaries were capital assets and that the trustees had realised some part of such assets. The court had not to consider the profits received by the author of the book, nor could it be said that from the point of view of the trustees the sale was subsidiary to the performance of services by them. In any event, in view of the decision of *Ryall* v. *Hoare* (2), which was approved by the Court of Appeal in *Martin* v. *Lowry* (3), and adhered to by Rowlatt, J., in *Sherwin* v. *Barnes* (4), I consider that I ought to follow the *dicta* of Rowlatt, J., which are directly in point and were approved by the Court of Appeal. The appeal will, therefore, be dismissed with costs.

Solicitors: *Vivian J Williams* (for the appellant); *Solicitor of Inland Revenue* (for the respondent).

[*Reported by* D. K. Belcher, *Barrister-at-Law*].

STEELE *v.* ROBERT GEORGE & CO., LTD.

[HOUSE OF LORDS (Viscount Simon, L.C., Lord Atkin, Lord Wright, Lord Romer, Lord Porter), **January 15, March 4, 1942.**]

Workmen's Compensation—Incapacity—Refusal of Workman to undergo operation—Reasonableness of refusal—Question of fact.

In Feb., 1938, the workman fell from a height, as a result of which his left ankle sustained a comminuted fracture. The accident arose out of and in the course of his employment, and he received weekly payments from the employers until Sept., 1940. They were then terminated on the ground that his unreasonable refusal to undergo an operation was the cause of the continuance of his incapacity. Two surgeons had advised the operation, but an adverse opinion was expressed by a third surgeon whom the workman had consulted. The arbitrator held that he could not hold the workman unreasonable in following the advice of a competent surgeon in the present case :—

HELD : the question whether the workman was unreasonable in refusing to undergo the operation was one of fact, and a finding that it was not unreasonable could not be disturbed. The arbitrator's finding, being restricted to the present case, was, upon its proper construction, one of fact and not one of law, and was a finding that, on the facts of this case, the employers had not discharged the onus, which lay upon them, of proving that the workman was unreasonable in his refusal.

[**EDITORIAL NOTE.** As their Lordships have pointed out, by judicial legislation in 1903, the Court of Appeal enunciated the principle that the unreasonable refusal of a workman to undergo an operation caused the incapacity to cease to be the result of the injury within the statutory provision, now the Workmen's Compensation Act, 1925, s. 9, after the time when the rejected remedy might be expected to bring about a cure. Their Lordships do not find this a very logical principle and point out some of the difficulties which it involves, but, since it has been accepted in two decisions of the House and has not been reversed or modified in subsequent amendments of the Act, it must now be considered settled law. It is also settled law that the onus of proof of the unreasonableness of the workman rests upon the employers. How is this onus to be discharged ? The employers have naturally sought to establish the proposition that, if they adduce the evidence of a competent surgeon that, in his *bona fide* opinion, the refusal is unreasonable, that should discharge the onus. The workman, on the other hand, has been equally anxious to establish the proposition that, if his medical adviser pronounces against the operation, his refusal cannot be unreasonable. In this case the employers produced two eminent surgeons who advised the operation, but, upon the workman producing the evidence of one surgeon to the contrary, the arbitrator found that, in his view, the onus had not been discharged. The whole of this question is one of fact, and, as the House points out, not subject to appeal provided there is the evidence to support the finding. The matter, however, is not finally concluded by the surgeon's opinions, for the arbitrator must also give effect to the workman's personality and the special circumstances of the case. The matter, therefore, is one which must be decided on all the facts of each particular case, and is not one which either side can, by a short cut, finally establish his rights. Much of the discussion in the present case turned upon the construction of the arbitrator's award and whether he stated a conclusion of law or one of fact. The opinions, however, also deal with the general question at issue, and state the law in much the same terms as those recently used in the Court of Appeal in *Redpath Brown & Co., Ltd.* v. *Hayes*, [1942] 1 All E.R. 298, but stress, perhaps, even more than the Court of Appeal, that each decision must depend on its own facts. The two cases, however, are not at all on all fours, and the remarks of the Court of Appeal in respect of the amputation of a limb must be regarded as addressed solely to that one particular class of operation.

AS TO REFUSAL TO UNDERGO A SURGICAL OPERATION, see HALSBURY, Hailsham Edn., Vol. 34, pp. 921, 922, para. 1264 ; and FOR CASES, see DIGEST, Vol. 34, pp. 349, 350, Nos. 2807-2820. See also WILLIS'S WORKMEN'S COMPENSATION, 33rd Edn., pp. 273-276.]

Cases referred to :

(1) *Warncken* v. *Moreland (R.) & Son, Ltd.*, [1909] 1 K.B. 184 ; 34 Digest 350, *2817* ; 78 L.J.K.B. 332 ; 100 L.T. 12 ; 2 B.W.C.C. 350.

(2) *Fife Coal Co.* v. *Cant*, [1920] S.C. (H.L.) 15 ; 34 Digest 349, *2811* ; 90 L.J.P.C. 69 ; 124 L.T. 545 ; 13 B.W.C.C. 442.

(3) *Fyfe* v. *Fife Coal Co.*, [1927] S.C. (H.L.) 103 ; Digest Supp. ; 138 L.T. 65 ; 20 B.W.C.C. 548.

(4) *Donnelly* v. *Baird*, [1908] S.C. 536 ; 1 B.W.C.C. 95.
(5) *Gracie* v. *Clyde Spinning Co., Ltd.*, [1915] S.C. 906 ; 8 B.W.C.C. 630.
(6) *Sweeney* v. *Pumpherston Oil Co., Ltd.* (1903), F. (Ct. of Sess.), 972.

Appeal by the workman from a decision of the Court of Appeal in Northern Ireland (Andrews, L.C.J., Babington and Murphy, L.JJ.). The facts are fully stated in the opinion of Viscount Simon, L.C.

Gilbert Paull, K.C. and *J. H. C. Goldie* for the appellant.

T. J. Campbell, K.C. and *J. G. Agnew* (both of the Northern Irish Bar) for the respondents.

Viscount Simon, L.C. : My Lords, the Workmen's Compensation Acts do not contain any express provision that the weekly payment during incapacity shall come to an end, or be reduced, if the workman unreasonably refuses to undergo a surgical operation or other medical treatment for the purpose of ending, or diminishing, the incapacity. This ground of relief to the employer is based on the view that, if the proximate cause of the continuing incapacity is the unreasonable refusal of a workman to avail himself of surgical or medical skill, it can no longer be said that the incapacity " results from the injury " within the meaning of the Workmen's Compensation Act, 1925, s. 9, after the time when the rejected remedy might be confidently expected to bring about a cure. As Fletcher-Moulton, L.J., put it, in *Warncken* v. *Moreland* (1), at p. 189 :

> . . . a workman must behave reasonably, and if the incapacity, or the continuance of the incapacity after a certain time, is due to the fact that he has not behaved reasonably, then the continuing incapacity is not a consequence of the accident but a consequence of his own unreasonableness.

This view of the matter has been recognised by this House in *Fife Coal Co.* v. *Cant* (2) and in *Fyfe* v. *Fife Coal Co.* (3), as well as in many cases in the Court of Appeal in England and in the Court of Session in Scotland. Andrews, L.C.J., in dealing with the present case in the Court of Appeal in Northern Ireland, admirably stated some of the considerations involved as follows :

> If the workman refused to submit to an operation from defect of moral courage or because he is content to put up with the disablement and is willing to live on a pittance under the Workmen's Compensation Act, he is not entitled to compensation. To borrow the language of the Lord Justice-Clerk [Lord MacDonald in *Donnelly* v. *Baird* (4)] the workman should do what " a man of ordinary manly character would do for his own good, in a case when no question of compensation being due by another existed."

The principle is therefore established, though I may observe that cases might arise in which there would be some difficulty in working out the quantitative result of applying it. For example, if the proposed operation can at best only work a partial cure, it does not appear to be an easy matter to fix what the reduced figure of compensation should be. And a converse case may be imagined. Supposing that a workman who is partially incapacitated undergoes an operation which is recommended as likely to cure him, but the operation fails and reduces him to total incapacity—is the compensation due from the employer thereby increased ?

In the present appeal, however, we are not troubled with these conundrums. The appellant was a joiner, and on Feb. 4, 1938, while working for the respondents he fell from a height, landing on his feet on a tiled floor, and as a result his left ankle joint sustained a comminuted fracture which completely incapacitated him. He received weekly payments on this basis until Sept. 3, 1940, when the respondents terminated the payments, alleging that his condition thenceforward was due to his unreasonable refusal to undergo a surgical operation.

The burden of proving this allegation rests on the respondents, and the question to be determined is a question of fact. The case was heard by the recorder of Belfast, and the evidence disclosed a conflict in the medical opinions tendered to the disabled appellant. Mr. Irwin, the surgeon who attended him in hospital after the accident, and who saw him on many occasions during the next two years, advised an operation, which, by making the injured joint stiff, would relieve the pain suffered from standing and would, as Mr. Irwin confidently expected, give him a " strong stable limb." Mr. Irwin described the operation as a reasonable one, without extra risk beyond that attending any operation, and one which, in his own practice, had produced excellent results. Another surgeon, Major Fraser, who had also examined the appellant's injury, confirmed

Mr. Irwin's view. The appellant, however, consulted a third surgeon, to whom he was sent by his trade union, and this gentleman advised against the operation. In his candid and ingenious argument, counsel for the respondents examined the grounds advanced for this adverse opinion with a view to showing that the reasoning of the two experts who advised an operation should be preferred. This, however, is not the immediately relevant issue. The relevant question is whether the appellant was unreasonable in refusing to submit himself to the operation. It may in some cases be quite reasonable for a man to decide not to undergo an operation if his own doctor advises against it, for it is the conclusion reached by his doctor which governs his decision much more than the logic by which his doctor has reached the conclusion. In 1915, Lord Strathclyde, then Lord President of the Court of Session, went so far as to say in *Gracie* v. *Clyde Spinning Co., Ltd.* (5), that he was prepared to hold

> . . . that, save in very special circumstances, the proximate cause of incapacity never can be the unreasonable refusal of a workman to undergo an operation if his own medical adviser advises him against undergoing that operation.

The Lord President regarded this as the result of the decision in 1903 of the Court of Session in *Sweeney* v. *Pumpherston Oil Co., Ltd.* (6). It is not necessary to adopt a proposition which goes so far as this, and, indeed, Lord Birkenhead, L.C., in *Fife Coal Co.* v. *Cant* (2), at p. 22, insisted that in each case the circumstances must be considered and that there was no general rule excusing the workman from undergoing a reasonable operation because his medical adviser advised against it. It is enough to say that the question whether the workman is unreasonable in refusing to undergo an operation is a question of fact to be decided by the judge of fact on the evidence, and that, where the workman has been advised against the operation by a skilled medical man in whom he has confidence, it would be necessary to bring home to the workman an extremely strong body of expert advice to the contrary before the onus which rests on the employer should be regarded as discharged.

The recorder considered it to be proved that the operation was one which a man in the appellant's condition might reasonably undergo. It afforded a reasonable chance of relief from pain and of ability to do some work, while the alternative was a lifetime of pain and idleness. He went on to say, however :

> . . . but I cannot hold the claimant unreasonable in following the advice of a competent surgeon in the present case.

The Court of Appeal in Northern Ireland has interpreted this last sentence as a ruling in point of law. If the recorder should be understood as having asserted as a matter of law that, as long as an injured workman follows the advice of his own doctor in refusing to undergo the operation, the employer's case must fail, whatever the other circumstances are, he would have misdirected himself. I do not so understand the sentence. The last four words of it show that no abstract doctrine was being enunciated, and when the recorder said " I cannot hold," he did not, in my opinion, mean that the law constrained him to decide as he did, but that on a review of all the circumstances of the particular case, he felt unable to decide as a matter of fact that the workman had acted unreasonably. There was evidence to support this conclusion of fact, and it cannot be upset on appeal. If the recorder, as the final judge of fact, had decided otherwise, his decision would have been equally unassailable. The appeal must therefore be allowed. I must add that, even if the recorder had been open to correction in point of law, I do not see how the Court of Appeal could itself properly undertake to determine the question of fact which would then arise. It would still be for the recorder to decide upon the evidence to what conclusion of fact he himself would arrive. I move that the appeal be allowed with costs here and in the Court of Appeal.

Lord Atkin : My Lords, I agree with the opinion which has just been given by Viscount Simon, L.C., and only add a few words since we are differing from the decision of the Court of Appeal in Northern Ireland. The appeal turns upon the true view to be taken of the judgment of the recorder on a pure question of fact. The Court of Appeal appears to have considered that the recorder had found as a fact that the employers had proved that the workman was unreasonable in not submitting to the operation, but had held as a matter of law that the advice of the workman's doctor compelled a decision in his favour. I do not think that such a view does justice to the recorder. It appears to me that he rightly considered all the facts, including the important fact of the advice of the workman's doctor, and came to the conclusion in fact that the employers had not discharged the onus which lay on them to prove that the refusal of the workman to undergo the operation in the circumstances was unreasonable. As that decision was one of fact, to support which there was ample evidence, it is unassailable. I agree with the proposed motion.

Lord Wright: My Lords, the appellant is appealing against an order of the Court of Appeal in Northern Ireland, discharging an award made by the A recorder of Belfast in favour of the appellant for compensation under the Workmen's Compensation Act. The Court of Appeal held that, though the appellant had received an injury by accident arising out of and in the course of his employment, it had been established to the satisfaction of the court that he had been unreasonable in refusing to undergo an operation by which the incapacity resulting from the accident might be removed or reduced. The court ordered that the arbitration should stand adjourned with liberty to either party B to apply.

The decision of the Court of Appeal presupposes, as I understand it, either that the recorder has made no finding of fact on the relevant issue, which is whether there has been an unreasonable refusal on the part of the man, or that the finding of fact is unsupported by evidence or involves a misdirection in law, and therefore cannot stand. It is clear that the question whether a refusal to C undergo an operation in cases of this character is reasonable or unreasonable is "a pure question of fact" as Lord Dunedin said in this House in *Fyfe* v. *Fife Coal Co.* (3), at p. 106. If the arbitrator decided that the refusal was not unreasonable, there is an end of the matter, unless there was no evidence to support his finding or he misdirected himself. In the present case, the recorder's words were:

> ... I cannot hold the claimant unreasonable in following the advice of a competent D surgeon in the present case ...

The words which precede or follow in the award are merely argumentative. The precise words of decision which I have quoted correctly approach the problem as being one the solution of which depends on the facts of the case. The recorder expressly limits his decision to the present case. The recorder also treats the problem as being one in which the precise issue is whether the employers have discharged the burden of proof which rests upon E them of showing that the man was unreasonable in his refusal to undergo the operation, and refuses to hold that they have.

That is how I construe the award, and, in my opinion, the result is that the decision is final. It is not based on any principle as to what does or does not in law constitute unreasonableness in these matters. Indeed, I do not see that any legal rule can be stated to determine the decision of the arbitrator. F As Lord Birkenhead, L.C., explained in *Fife Coal Co.* v. *Cant* (2), the circumstances must be considered in each case. A good many decisions have been reported on this question, but once it is appreciated that the question is one of fact, decisions in other cases are more likely to mislead than to guide, though perhaps sometimes it may help to know what was decided on more or less similar facts.

The rule as to the effect of an unreasonable refusal by a workman to undergo G an operation, which has been approved by the two decisions of this House which I have quoted, was a piece of judicial legislation adopted by the Court of Appeal as long ago as 1903, but it has not been disavowed or qualified by the legislature in the subsequent revisions or re-enactments of the Act. It must be taken to have commended itself to the general sense of the community, but it is not easy to understand or apply. It is rather a penalty provision than anything else. I find it not very logical to say that the man's refusal breaks the chain H of causality between the accident and the incapacity. On the contrary, effects of the accident still remain. The operation furthermore may not be successful, even if it is not refused. Quite apart from the surgical evidence in the particular case, which may be conflicting, the man's own physical or mental idiosyncracy cannot, in general, be excluded. I believe that arbitrators have approached these questions in a humane and liberal spirit, realising that the question cannot be decided save on a sympathetic estimate of the man's personality and the special circumstances of the particular case. With the greatest respect to the

Court of Appeal in Northern Ireland, I cannot agree with their conclusion. In any event, they were not entitled to usurp the function of the recorder as the judge of fact. For the reasons stated by my noble and learned friend, VISCOUNT SIMON, L.C., I concur in the motion proposed.

LORD ROMER [read by LORD PORTER]: My Lords, on Feb. 4, 1938, the appellant, while in the employment of the respondents, was totally incapacitated as the result of personal injury caused by an accident arising out of and in the course of such employment. He was paid compensation by the respondents on that footing down to Sept. 3, 1940, when they terminated the payments on the ground that his incapacity (if any) was no longer due to the accident, but to his unreasonable refusal to undergo a surgical operation. It appears to have been decided by authorities that are binding on this House that, where an incapacitated workman unreasonably refuses to submit himself to an operation which, if successful, would restore his capacity in whole or in part, his right to compensation on the footing of his existing incapacity ceases as from the date on which the capacity might reasonably be expected to have been so restored had the operation been successfully performed.

The question whether in any particular case the workman has unreasonably refused to undergo an operation is purely a question of fact, and is, therefore, one upon which the finding of the arbitrator is conclusive unless there is no evidence upon which his finding can properly be based, or unless he has misdirected himself in law. In the present case, the arbitrator was the recorder of Belfast, and he plainly decided the question of fact in favour of the appellant. For he said:

> . . . I cannot hold the claimant unreasonable in following the advice of a competent surgeon in the present case . . .

and he made an award in the claimant's favour. It cannot be denied that there was ample evidence on which this finding of fact could be based. The Court of Appeal in Northern Ireland, however, set aside the award of the arbitrator on the ground that he had misdirected himself in law. Looking at the award as a whole, they came to the conclusion that the arbitrator himself was of opinion on the evidence that the appellant was unreasonable in refusing to undergo the operation, but that he, the arbitrator, considered himself bound, as a matter of law, to decide in the appellant's favour merely by reason of the fact that the appellant's own surgeon had advised against it, and without the arbitrator forming any conclusion as to the weight that ought to be attached to the surgeon's opinion or as to the grounds upon which that opinion was based. ANDREWS, L.C.J., after referring to the finding which I cited a few moments ago, said this:

> In this finding, at which he appears to have arrived without considering the grounds or the sufficiency of the reasons advanced by the surgeon in support of his opinion, the learned recorder was, in my opinion, in error on the authorities to which I have referred, and on this vital issue he accordingly misdirected himself.

Later, BABINGTON, L.J., said:

> As I read his award the recorder finds that the applicant was unreasonable in not submitting to the operation in fact, but that he was not unreasonable in law because his refusal was based on the advice of his own doctor.

After referring to the opinion of the surgeon in question, MURPHY, L.J., said that the recorder did not appear to have agreed with it, and that, in treating that opinion as conclusive on the question of the reasonableness of the applicant, the recorder had misdirected himself.

My Lords, if the Court of Appeal was right in the construction that they put upon the award, it was unquestionably right in allowing the appeal. With all respect to the recorder, it must be confessed that his award is not so clear as could have been wished. I have nevertheless come to the conclusion, after giving it my careful consideration, that it does not bear the meaning attributed to it by the Court of Appeal. A perusal of the judgments of that court makes it clear that the conclusion to which its members came was largely, if not wholly, based upon a finding in the award that comes a little earlier than the one that I have already cited. It is in these words:

> On balance of evidence I would hold operation one which a man might reasonably undergo. It affords a reasonable chance of relief from pain and ability to do some work, and the alternative is a lifetime of pain and idleness. There is no other remedy.

This was understood by the Court of Appeal to be a finding by the recorder that, in his opinion, the refusal of the applicant to undergo the operation was unreasonable. I do not so read it. It is no more than a finding that there was nothing unreasonable in asking a man, i.e., any man suffering from the same physical disabilities as the applicant's, to undergo the operation. Had the finding been the other way, there would have been no more to be said. The award would necessarily have been in the appellant's favour. As it was, it was necessary for the arbitrator to go on to consider whether in the particular case before him the appellant's refusal was unreasonable. He held that it was not, and I can find nothing inconsistent in the two findings. Nor can I find in the A later of the two findings any indication that the recorder regarded himself as bound by law to hold that a workman necessarily acted reasonably in refusing an operation merely because his own surgeon advised him to do so. The recorder was careful to confine his finding to the advice of the "competent surgeon in the present case." I cannot think that he would have described the surgeon as competent if he had considered neither the grounds not the sufficiency of his opinion, nor would he have added the words "in the present case" if he had B been merely intending to state a proposition of law. The surgeon had stated in his evidence that, although the operation, if successful, would prevent lateral movement of the joint, it would, if unsuccessful, result in there being no movement in the joint at all. I can find no indication in the award that this evidence was not accepted by the recorder, and, if he did accept it, it is only reasonable to suppose that he took it into consideration in forming an opinion as to the reasonableness or otherwise of the applicant's refusal. With all deference to the Court C of Appeal, I am unable to agree with them that the recorder misdirected himself in any way. If he did not, his finding that the applicant was not unreasonable in his refusal must be taken to be conclusive. For these reasons I would allow the appeal, and I concur in the motion now before the House.

Lord Porter: My Lords, I agree and have little to add. The only question in the present case, as I understand the matter, is to determine whether D the arbitrator was justified in law, on the facts found or admitted, in holding that the respondents had not proved the appellant to have acted unreasonably in refusing to undergo the operation which was suggested. His main findings were (i) that on a balance of evidence the operation is one which a man might reasonably undergo, but (ii) "I cannot hold the claimant unreasonable in following the advice of a competent surgeon *in the present case*"—the italics are mine. E

If this were all, the respondents' case would be unarguable, but it is said that the second finding, when read in the light of his other conclusions, means "I cannot hold any claimant including this one unreasonable in any case where he follows the advice of a competent surgeon. If it were not that I take this view, I should hold him unreasonable." The other findings which are relied upon to support this contention are: F

> (i) The man seemed more anxious to establish his right under workmen's compensation than to get well.
>
> (ii) The operation affords a reasonable chance of relief from pain and ability to do some work, and the alternative is a lifetime of pain and idleness. There is no other remedy.

As to the first of these additional findings, it is said that the true test is laid down in the Court of Session in the judgment of Lord MacDonald in *Donnelly* G v. *Baird* (4), and that, where a tribunal has to decide as to the reasonableness or unreasonableness of a workmen's attitude in refusing to undergo an operation, the questions to be determined are: Was there any serious risk and would a claimant of manly character undergo the operation? In making up his mind, it was said the claimant was not entitled to consider that, by refusing, he would retain his compensation, when, by consenting, he might lose the whole or part of it. H

This statement of the law does not, to my mind, mean that, wherever a claimant is influenced by the fact that he is receiving compensation, he is acting unreasonably in refusing to undergo an operation. Probably no claimant can fail to be moved to some extent by such a consideration. Between starvation and an operation involving a serious risk, he might well choose the latter, but yet refuse to undergo it where he was in receipt of compensation, and yet not be held unreasonable in doing so. The overriding consideration must not be the retention of compensation where other circumstances make the refusal to undergo the operation unreasonable. It is true that in the present case the operation is not a serious one, but, nevertheless, it seems to me impossible to overrule the finding of an arbitrator who comes to the conclusion that the claimant has not been unreasonable in the circumstances in following the advice of a competent surgeon—the circumstances apparently being that the surgeon took the view that, if the operation were unsuccessful, the workman would be worse than before, and that, even if it were successful, both the man himself and his trade union representative thought that he would still be unable to follow his former employment. The witnesses might be wrong in their beliefs yet not unreasonable in holding them, and the claimant not unreasonable in acting upon them. It is admitted that the onus of proving that the workman has been unreasonable is upon the employer, and in order to succeed he must, I think, procure a finding of the arbitrator to that effect. It is not enough that there was evidence both ways, or even that there was evidence from which a finding might be drawn that the man was unreasonable. In default of such a finding, the matter should be referred back to the arbitrator. It could only be decided by a court of appeal in favour of the employer if it inevitably followed from the facts found that the workman must in law have been held to be unreasonable. So far from this being the case in the present instance, there is a finding of fact in favour of the claimant, and, in my view, no lack of evidence to support it. There are no findings or admitted facts from which it was incumbent upon the arbitrator to find the man unreasonable. In the course of the argument, we have been referred to a number of cases where the workman has or has not been held to be unreasonable as the case might be. I do not find myself much assisted by them. They seem to turn largely upon the facts of the individual case and upon the findings of the several arbitrators.

My Lords, in arriving at this conclusion, I am not conscious of differing from the views of the members of the Court of Appeal in Northern Ireland in any general matter of the law applicable to workmen's compensation. I differ only on their construction of the finding of the arbitrator. They took him to mean that, where the workman followed the advice of his doctor, he could never be held to be unreasonable, and that, in this particular case, he would have found the appellant unreasonable had it not been for this view. As I have pointed out, I do not so understand him. I think that he took into consideration, as, indeed, he states, all the circumstances of the case, and, having regard to those circumstances, I think that he had legal grounds for his conclusion. I should allow the appeal.

Solicitors: *L. Bingham & Co.*, agents for *H. J. Catchpole*, Belfast (for the appellant); *C. Grobel, Son & Co.*, agents for *J. Donnelly & Co.*, Belfast (for the respondents).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

PRICE *v.* MANN.

[COURT OF APPEAL (Lord Greene, M.R., and MacKinnon and Goddard, L.JJ.), **March 13, 1942.**]

Landlord and Tenant—War damage—Notice to avoid disclaimer—Form of notice—Reference to wrong section—Landlord and Tenant (War Damage) Act, 1939 (*c.* 72), *s.* 4.

Premises having been rendered unfit by enemy action, the tenant served a notice of disclaimer under the Landlord and Tenant (War Damage) Act, 1939, s. 4. The landlord then served what was intended to be a notice to avoid disclaimer, but inadvertently referred therein to the Landlord and Tenant (War Damage) Act, 1939, s. 10, instead of referring to sect. 11 of the Act. A notice of retention by the tenant and a notice to avoid disclaimer by the landlord are in much the same terms except that the former should refer to sect. 10 and the latter to sect. 11 of the Act:—

HELD: the notice served by the landlord was a good notice to avoid disclaimer, and the reference to the wrong section could not affect the perfectly plain meaning appearing upon the face of the document.

Decision of WROTTESLEY, J. ([1942] 1 All E.R. 62) *reversed.*

[**EDITORIAL NOTE.** Wrottesley, J., thought that a notice referring to the wrong section of the Act was sufficiently ambiguous to make it so vague as to be a notice that the recipient could disregard. The Court of Appeal, however, have found that the intention of the notice was clear upon its face, and, therefore, was not vitiated by the reference to the wrong section.

As to Notices under the Landlord and Tenant (War Damage) Act, 1939, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 32, pp. 987, 990, 991. See also BUTTERWORTH'S EMERGENCY LEGISLATION SERVICE, Statutes Vol., pp. 325, 332, 333.] A

Appeal by the plaintiff from a judgment of Wrottesley, J., dated Dec. 11, 1941, reported [1942] 1 All E.R. 62, where the facts are fully set out.

H. G. Garland (*P. B. Morle* with him) for the appellant.

A. C. Longland for the respondent.

Lord Greene, M.R. : If it had not been for the fact that the judge took a different view, I should have thought that the case of the tenant in the present B case was quite unarguable. Under the Landlord and Tenant (War Damage) Act, 1939, s. 4, there are three notices which may on appropriate occasions be served ; two of them are notices by the tenant and one of them is a notice by the landlord. The notices by the tenant are set out in subsect. (2), and they are a notice of disclaimer and a notice of retention. The notice which the landlord can serve is a notice requiring the tenant to retain the lease " on the terms hereafter specified in this Act," and it is referred to in the Act as a " notice C to avoid disclaimer." The Act lays down no form which those various notices are to take, and on ordinary principles it is quite clear that it is sufficient if a document is served which brings to the mind of the recipient a clear intention that the document is to be one of the documents of the kind specified in the section. It is conceded, and rightly conceded—indeed, the contrary would seem to be unarguable—that, where the landlord serves a notice to avoid disclaimer, and the document on its face is clearly intended to be such a document D under the relevant provisions of the Act, there is no need for him to insert expressly in that notice that he requires the tenant to retain the lease " on the terms specified " in the Act. The result of the service of a notice to avoid disclaimer is that the terms specified in the Act then apply, and the fact that a particular reference to those terms is omitted does not make the notice a bad notice. In the present case the notice, which is the subject of the controversy, E was dated Nov. 29, 1940, and was sent by the landlord. Omitting, for the moment, certain words at the end, which are those which have given rise to the litigation, it is in these terms. It is addressed to the tenant ; it is headed " Landlord and Tenant (War Damage) Act, 1939," and says :

> Pursuant to the Landlord and Tenant (War Damage) Act, 1939, and pursuant to the notice of disclaimer under the said Act served upon your landlord, Alfred Allen Price, of 22, Harborne Road, Edgbaston, Birmingham, we hereby give you notice on behalf F of the said Alfred Allen Price that he requires you to retain your lease of all that messuage tenement or flat situate on the fourth floor in the block of flats known as No. 8 Connaught Place, Paddington, in the County of London.

If the document had stopped there, there is no doubt whatsoever that, upon its true construction, it is intended to be, and clearly is, sufficiently expressed to be a notice to avoid disclaimer served by the landlord in pursuance of the tenant's notice of disclaimer under the powers in that behalf contained in the Act. G That is what the document is declaring on its face in the clearest possible terms that it is. Unfortunately, the draftsman added these words, " on the terms specified in sect. 10 of the said Act." In point of fact the terms which result from the service of a notice to avoid disclaimer are set out, not in sect. 10 of the Act, but in sect. 11. Sect. 10 of the Act deals with a totally different matter—namely, a notice of retention served by the tenant. Therefore, on the face of it, the reference to sect. 10 of the Act is a reference to something which has no H relevance whatsoever to the obvious purpose and intention of this document. Reading this document as a whole, it seems to me perfectly manifest that a person who received it, and who had that familiarity with the provisions of the Act which a recipient of such a document must be presumed to have, could not possibly be under any illusion as to what it was intended to be and what its legal consequences were. It is argued that, on the true construction of the document, the addition of those words at the end turned it into one by which the landlord is requiring the tenant to hold the lease there mentioned on the terms set out in sect. 10 which are relevant, not to the case of a notice to avoid disclaimer, but to the case of a tenant's notice of retention. In other words, that on its true construction, it is said that this document is not a notice to avoid disclaimer under the Act, but it is a private experiment by the landlord to try to tie his tenant to some terms which are not contained in the Act at all in connection with a notice to avoid disclaimer. It seems to me quite impossible to say that that mistake in the reference to the section can have such a destructive effect on the perfectly plain meaning of the document appearing on its face. In my opinion, the point taken by the tenant is a quite hopeless one, and the appeal must be allowed. It is interesting to notice, although it cannot affect the decision of the case, that in point of fact the notice deceived nobody. The appeal must be allowed with costs here and below and the appropriate order made.

MACKINNON, L.J.: I agree.

GODDARD, L.J.: I agree.

Appeal allowed with costs.

Solicitors: *W. F. Foster, Hedge & Clare* (for the appellant); *Peacock & Goddard* (for the respondent).

WALES (INSPECTOR OF TAXES) *v.* TILLEY.

[KING'S BENCH DIVISION (Lawrence, J.), **January 13, 14, February 18, 1942.**]

Income Tax—Sched. E—Commutation of salary and pension rights for sum payable in two instalments—Income Tax Act, 1918 (*c.* 40), *Sched. E.*

By an agreement made in June, 1937, a company, of which the respondent was managing director, agreed to pay him £6,000 per annum and a pension for £4,000 per annum for 10 years after he ceased to be managing director. By a subsequent agreement, made in April, 1938, the respondent agreed to release the company from the obligation to pay the pension and to serve as managing director for £2,000 per annum, and in consideration for these stipulations the company agreed to pay him £40,000 in 2 equal instalments. The Revenue contended that this sum was assessable under Sched. E as being profits arising from the office of managing director of the company. The respondent contended that the sum was paid in commutation of the company's contingent liability to pay the pension, and was in the nature of a capital receipt:—

HELD: in form and in substance the payment was made in consideration of the respondent agreeing to serve at a reduced salary without any pension rights. The pension itself would have been assessable under Sched. E, and the same would apply to that part of the payment which was made in commutation thereof. Accordingly, the payment was assessable as a profit from the respondent's office.

[**EDITORIAL NOTE.** *Prima facie*, a sum paid in commutation of an annual payment is a principal or capital sum representing the sum which, if suitably invested, would at the end of the period covered by the annual payments, produce, by reason of the interest it would earn, the same result to the payee. Under Sched. E, however, all sums received by reason of the employment are assessable to tax, and, upon the wording of the agreement, the payment here made appears clearly to have been made in consideration of services to be rendered. It is, however, a little difficult to understand how a capital sum paid in commutation of a pension is assessable to tax as income, for, in the case of a life pension, at any rate, it would appear to be a capital payment.

AS TO PAYMENTS ASSESSABLE UNDER SCHED. E, see HALSBURY, Hailsham Edn., Vol. 17, pp. 212-217, paras. 431-438; and FOR CASES, see DIGEST, Vol. 28, pp. 85-88, Nos. 490-507.]

Cases referred ro:

(1) *Dewhurst* v. *Hunter* (1932), 146 L.T. 510; Digest Supp.; 16 Tax Cas. 605.
(2) *Short* v. *Inland Revenue Comrs.* (1928), 12 Tax Cas. 995.

APPEAL by the inspector of taxes from a decision of the commissioners for the special purposes of income tax that a sum of £40,000 paid to the respondent by a company of which he was managing director was not income in the hands of the respondent. The facts are fully set out in the judgment.

The Attorney-General (Rt. Hon. Sir Donald Somervell, K.C.,) and Reginald P. Hills for the appellant.

Terrence Donovan for the respondent.

Lawrence, J. : The question in this case is whether a sum of £40,000 paid to the respondent under an agreement of April 6, 1938, is assessable under Sched. E as profits arising from the office of managing director of a certain company.

Under an agreement of June 28, 1937, the company had agreed to pay the respondent, as managing director, £6,000 per annum and £4,000 per annum as a pension for 10 years after he ceased to be managing director. By the 1938 agreement the respondent released the company from the obligation to pay the pension and agreed to serve as managing director at a reduced salary of £2,000 per annum, and in consideration of these stipulations the company agreed to pay the respondent by two equal instalments the sum at present in question—namely, £40,000. The Special Commissioners have held :

> . . . that the payment of £40,000 was not made to the respondent as remuneration for services rendered or to be rendered by him in his office as a managing director of the company. It was a payment in commutation of the company's liability under the 1937 agreement to pay to him a pension on his ceasing to hold the office and an increase of salary during the continuance of his tenure. It was not income in the hands of the respondent.

Counsel for the respondent contends that the 1938 agreement is in substitution for the 1937 agreement ; that the payment is to get rid of the company's contingent liability to pay the pension and cannot, therefore, be regarded as remuneration for services in the office ; that it is not a profit from the office, but is a capital receipt, and he relied upon *Dewhurst* v. *Hunter* (1). I am unable to agree with the commissioners' decision or with the argument of counsel for the respondent.

Both in form and in substance the payment was made in consideration both of the release from the company's obligation to pay the pension and the respondent's agreement to serve at a reduced salary of £2,000 per annum without any pension rights. It is, therefore, in my opinion, impossible to say that the payment was not a profit from the office.

Dewhurst v. *Hunter* (1) is, I think, distinguishable from the present case, even if it is treated as laying down the principle that a sum of money agreed to be paid to an office-holder in consideration of the release from a contingent liability to pay him another sum stipulated for in his original contract of service is not taxable, for, in the present case, it is expressly agreed in cl. 2 of the 1938 agreement that the sum in question is in consideration of the respondent's agreement to serve at a reduced salary, and such a sum is, in my opinion, clearly a profit from the office. Part of the £40,000 was no doubt payable in commutation of the 10 year pension, but, as that pension would have been assessable under Sched. E by virtue of the Finance Act, 1932, s. 17, in my opinion the sum payable in commutation thereof is also assessable under Sched. E. If it were not so, any prospective pensioner could, by agreement with the prospective payer of the pension, defeat the Crown's right to income tax under Sched. E and the Finance Act, 1932. The pension is income within the meaning of the Income Tax Acts, and a sum paid in commutation of the pension in such circumstances as the present appears to me to be income in accordance with the reasoning in such cases as *Short* v. *Inland Revenue Comrs.* (2).

I am, however, of opinion that there must be two assessments for the years 1938-39 and 1939-40, in each of which years the sum of £20,000 was payable to the respondent, and not one assessment on £40,000, as was made in the assessment appealed against, since a person to whom income can by no possibility become payable in a particular year is not, in my opinion, liable to income tax and sur-tax in respect of that year in respect of that sum.

Appeal allowed. No order as to costs.

Solicitors : *Solicitor of Inland Revenue* (for the appellant) ; *R. G. Percival* (for the respondent).

[*Reported by* D. K. Belcher, *Barrister-at-Law.*]

Distinguished. JONES *v.* HERXHEIMER. [1950] 1 All E.R. 323. *Distinguished.* CUNLIFFE *v.* GOODMAN. [1950] 1 All E.R. 720.

SALISBURY AND ANOTHER *v.* GILMORE AND MARCEL.

[COURT OF APPEAL (Lord Greene, M.R., and MacKinnon and Goddard, L.JJ.), **March 2, 16, 1942.**]

Landlord and Tenant—Repairs—Claim for damages for failure to repair—Failure to deliver up in repair—Premises to be demolished—Intention to demolish—Intention known to tenant at termination of lease—Construction of statute—Landlord and Tenant Act, 1927 (*c.* 36), *ss.* 4, 5, 18 (1).

A landlord sued his tenant for damages for failure to deliver up the demised premises in repair according to the covenants in the lease. The landlord, from 1937, had intended to pull down the premises and erect more modern premises on the site. Owing to the war, he abandoned that intention for the time being. The lease expired on Sept. 29, 1939, and on Dec. 5, 1939, a letter was sent to the tenant which contained the first notification of the change in the intention of the landlord to demolish the building. On behalf of the tenant, it was contended that the case fell within the terms of the Landlord and Tenant Act, 1927, s. 18 (1), and that, since the change in the landlord's intention had not been communicated to the tenant before the expiration of the lease, there was no liability under the covenant to repair :—

HELD : (i) the crucial date is the determination of the lease, since, after that date has passed, the tenant is no longer in a position to fulfil his covenant, and, if it is shown that before that date arrives the landlord has decided to pull down the building and that this intention is still subsisting at that date, the requirements of the subsection are satisfied. In the present case, therefore, the tenant was entitled to the relief which the subsection gives.

(ii) there is no need to transpose or add any words in order to construe the Landlord and Tenant Act, 1927, s. 18 (1). The explanation of the apparent difficulty is that two points of time have to be considered. The fate of the building has to be considered at the termination of the lease, but the tenant has to prove the intended fate of the building at the hearing of the action.

(iii) since it was agreed that the premises at the termination of the lease, had only a site value, there could be no diminution of the value of the reversion, and, for this reason alone, the action failed.

Decision of HILBERY, J., [1941] 2 All E.R. 817 *reversed.*

[**EDITORIAL NOTE.** In the court below, the judge was urged to find that there had been an omission in the drafting of the subsection, but he found it unnecessary to hold that there was any omission, although the words, in his opinion, required transposition before they could be properly understood. The Court of Appeal, however, finds no difficulty in the wording of the subsection, which, in its view, is quite grammatical without either transposition or addition. The main point which the Court of Appeal decides is that the crucial date, which must be regarded in determining whether the subsection is to be applied to the circumstances of any particular case, is the date of the termination of the lease. In the present case it seems clear that the facts show that the landlord intended to demolish premises from some time in 1937, and it is now stated as a fact that he did not change that intention until Oct. 5, 1939, a few days after the termination of the lease. Therefore, questions of the necessity of an actual communication of a change of intention to the tenant or the duty to do so do not arise in this case, though they were argued at some length or are to some extent dealt with in the judgment of MACKINNON, L.J. It was thought in the court below that restrictions on building and the repair of buildings made any demolition impossible as from the commencement of the war, but it is now shown that the first regulations imposing restrictions of this nature were not made until Oct., 1940, a year after the termination of the lease.

AS TO DAMAGES FOR FAILURE TO DELIVER UP IN REPAIR, see HALSBURY, Hailsham Edn., Vol. 20, pp. 220, 221, para. 241 ; and FOR CASES, see DIGEST, Vol. 31, pp. 340, 341, Nos. 4835-4844.]

Cases referred to :

(1) *Birmingham & District Land Co.* v. *London & North Western Ry. Co.* (1888), 40 Ch.D. 268 ; 31 Digest 507, *6541* ; 60 L.T. 527.

(2) *Jorden* v. *Money* (1854), 5 H.L. Cas. 185 ; 21 Digest 292, *1041* ; 23 L.J.Ch. 865 ; 24 L.T.O.S. 160.

(3) *Traill* v. *Baring* (1864), 4 De Gex & G. 318 ; 35 Digest 32, *234* ; 33 L.J.Ch. 521 ; 10 L.T. 215.

(4) *With* v. *O'Flanagan*, [1936] Ch. 575 ; [1936] 1 All E.R. 727 ; Digest Supp. ; 105 L.J.Ch. 247 ; 154 L.T. 634.

(5) *Hughes* v. *Metropolitan Ry. Co.* (1877), 2 App. Cas. 439 ; 31 Digest 498, *6443* ; 46 L.J.Q.B. 583 ; 36 L.T. 932.

(6) *Panoutsos* v. *Raymond Hadley Corpn. of New York*, [1917] 2 K.B. 473 ; 12 Digest 434, *3516* ; 86 L.J.K.B. 1325 ; 117 L.T. 330.

(7) *Smith* v. *Chadwick* (1884), 9 App. Cas. 187 ; 35 Digest 18, *106* ; 53 L.J.Ch. 873 ; 50 L.T. 697.

(8) *Citizens Bank of Louisiana* v. *First National Bank of New Orleans* (1873), L.R. 6 H.L. 352 ; 35 Digest 7, *12* ; 43 L.J.Ch. 269.

(9) *Chadwick* v. *Manning*, [1896] A.C. 231 ; 35 Digest 294, *1047* ; 65 L.J.P.C. 42.

Appeal of the defendant Marcel from the judgment of Hilbery, J., dated July 21, 1941, reported [1941] 2 All E.R. 817. The facts are fully set out in the judgment of Lord Greene, M.R.

A. T. Denning, K.C. and *David Weitzman* for the appellant.

Cecil R. Havers, K.C. and *C. E. Rochford* for the respondents.

Denning, K.C. : In *Traill* v. *Baring* (3), a statement of intention had been made, and it was held that, where there was a change of intention, there was a duty to communicate it. In *With* v. *O'Flanagan* (4), it was held that there was a duty to communicate the change of circumstances. *Jorden* v. *Money* (2) introduced the doctrine that statement of intention is not a ground for estoppel. That doctrine, however, does not apply here. In most cases it does not matter in law what a man's intentions are. A man does not lose his rights unless he contracts himself out of them. In the present case, liability depends upon the intention of the landlord. *Jorden* v. *Money* (2) must be confined to cases of intention which have no relation to legal liability. Moreover, *Hughes* v. *Metropolitan Ry. Co.* (5) has to be reconciled with *Jorden* v. *Money* (2). *Jorden* v. *Money* (2) deals with the enforcement of a debt and not with things to be done *in futuro*. Although I have to accept *Jorden* v. *Money* (2) as law, so far as it goes, it should not be extended. *Hughes* v. *Metropolitan Ry. Co.* (5) is of equal authority with it. The present case is not governed by *Jorden* v. *Money* (2). The principle laid down in *Birmingham & District Land Co.* v. *London & North Western Ry. Co.* (1) has been applied in many later cases. As regards the latter words of sect. 18 (1) of the Act, the judge was wrong in taking the date as the date of the hearing. The latest date should be the date when the cause of action arose. [Counsel referred to *Panoutsos* v. *Raymond Hadley Corpn. of New York* (6) and *Smith* v. *Chadwick* (7).]

Havers, K.C. : The first part of the Landlord and Tenant Act, 1927, s. 18 (1), made very little, if any, alteration in the law. If there was any alteration in the law, it did not alter the measure of damages, but prescribed a statutory limit which should not be exceeded. The second part of sect. 18 (1) has no application to an agreement to put premises in repair and to keep them in repair. The crucial date is the date at which the covenant ought to be performed. If any words have to be added to the section, the appropriate words would be " but for this covenant." There is no justification for putting upon the words of the Act, the construction which the appellants are asking should be put upon it. With regard to *Hughes* v. *Metropolitan Ry. Co.* (5), it is settled law that the equitable doctrine of estoppel by representation does not apply to statements by a man as to what he is going to do in the future : *Jorden* v. *Money* (2). In *Citizens Bank of Louisiana* v. *First National Bank of New Orleans* (8) the principle of *Jorden* v. *Money* (2) was affirmed. *Chadwick* v. *Manning* (9) is a similar case. *Hughes* v. *Metropolitan Ry. Co.* (5) was decided upon a special state of facts which bear no similarity to the facts of the present case. In *Birmingham & District Land Co.* v. *London & North Western Ry. Co.* (1), the landlords' agents gave a direction to suspend the work. That case bears no analogy to the present case. With regard to damages, there is undisputed evidence that the property was not so valuable as it would have been if the repairs had been done in accordance with the covenant.

Lord Greene, M.R. : The defendant was the assignee of a lease for 14 years of No. 59, New Bond Street, expiring on Sept. 29, 1939. The premises consisted of a shop with three floors above it. The shop and the first floor were occupied by the defendant for the purposes of his business of a dressmaker. The two top floors he had sublet. The lessor was the plaintiff, the Marquess of Salisbury. The claim in the action was for damages for breach of covenant.

The statement of claim alleged breaches of the repairing covenants in the lease and breach of the covenant to deliver up in repair. There is nothing in the language of these covenants requiring special mention. At the trial no sufficient evidence was produced to establish breaches of the repairing covenants, and the plaintiff's case was concentrated upon the claim under the covenant to deliver up in repair. HILBERY, J., found for the plaintiff on the issue of liability and awarded as damages the sum required to put the premises into repair in accord-
A ance with the covenant. This sum was agreed at £350.

In the argument before us, a number of points were raised. The most important of them concerned the application of the Landlord and Tenant Act, 1927, s. 18 (1), to the facts of the case. Those facts, so far as is relevant, are as follows. On May 26, 1937, the defendant wrote to the solicitors to the plaintiff asking for a renewal of the lease. After some correspondence, Messrs. Chesterton & Sons, who were the agents for the plaintiff, wrote to the defendant
B on Nov. 5, 1937, stating that it had been decided not to renew his lease, as it was intended to demolish the building and also the adjoining building, No. 58, and to erect a new building. It contained a suggestion that the defendant might be willing to take accommodation in the new building, but, since the proposed accommodation was not suitable for the defendant's business, he declined the offer. No further communication took place between the parties until Dec. 5, 1939, more than two months after the expiration of the lease, when it was no
C longer possible for the defendant to perform the covenant to deliver up in repair. In a letter of that date, Messrs. Chesterton & Sons, on behalf of the plaintiff, claimed from the defendant damages for breach of covenant and enclosed a schedule of dilapidations. The letter contained the following paragraph :

> The future of the premises is somewhat uncertain, and it may be that after the war they will be pulled down and rebuilt. We are instructed, therefore, to request you to pay to our clients the amount of damages to be agreed, but should the premises be pulled
> D down within a reasonable time, or any alteration be made which would render valueless any of the works contained in the schedule if carried out, our clients will refund to you the whole or a proportion of the sum in question, as provided by the Landlord and Tenant Act, 1927, s. 18.

This was the first notification received by the defendant of any change in the intention of the plaintiff to demolish the building upon the termination of the lease, of which the appellant had been informed by the letter of Nov. 5, 1937.

E In the interval which elapsed between the two letters, the plaintiff had obtained from the London County Council the necessary permission for the proposed development work and had also obtained the approval of the City Corporation. The scheme had been expanded by the inclusion of a third building, No. 57, New Bond Street, which the plaintiff had acquired for the purpose. There is no doubt whatever that the intention of the plaintiff to proceed with the scheme was quite settled ; indeed, it was admitted at the trial that, having regard to the
F age and nature of No. 59, the only thing to do with it at the end of the lease was to pull it down, since its only value lay in the site.

On Sept. 3, 1939, war broke out. On Sept. 26, Messrs. Chesterton & Sons wrote to the plaintiffs' solicitors a letter in which they stated that the redevelopment programme had " of course been completely upset by the war," and said that, as far as they could then see, it would not be practicable to start building
G during the war. " In any case," they said, " it seems inadvisable to contemplate erecting a new building while the risk of war damage is still present." They went on to suggest approaching the tenants of Nos. 58 and 59 and the vendor of No. 57 in order to see if it was possible to arrange for their continued occupation on quarterly tenancies. They concluded by saying that they could, in the meantime, proceed with preliminary work in connection with drawings and specifications for rebuilding. The plaintiff stated in his evidence that his solicitors wrote
H to him on the matter on Oct. 4, and that he answered them on Oct. 5, giving his decision as to what should be done. This decision was communicated to Messrs. Chesterton & Sons by a letter dated Oct. 6 from the solicitors, who said that the plaintiff approved of the suggestion as to quarterly tenancies, but did not think that any expenditure on preliminary work for rebuilding should be undertaken for the time being. The only person who could decide whether or not the demolition of the building should be proceeded with in spite of the outbreak of war was the plaintiff himself. He does not appear to have taken the matter into his consideration until he received the letter of Oct. 4 from his solicitors,

and his decision to postpone the work was not taken until Oct. 5, six days after the expiration of the lease and, therefore, at a time when the covenant to deliver up in repair had become incapable of performance. Hilbery, J., took the view that immediately upon the outbreak of war the project of pulling down and rebuilding was at an end. I am unable to agree with him. Chesterton & Sons had no power to come to any decision in the matter. There was at the time no regulation in force prohibiting such work although its execution might have been difficult. Hilbery, J., appears to have thought that there was such a prohibition against building at a cost of more than £500, and one of the witnesses so stated. This is an error. So far as I have been able to discover (and I am supported by counsel for the respondent) no restriction was in existence before the making of S.R. & O. 1940, No. 1678, which came into force on Oct. 7, 1940, a year later than the relevant date. I come, therefore, to the conclusion that on Sept. 29, no change had taken place in the intention of the plaintiff to pull down the building.

It must now be considered whether, in the circumstances stated, the second branch of sect. 18 (1) of the Landlord and Tenant Act, 1927, frees the defendant from liability to pay damages for breach of the covenant to deliver up in repair. That branch is worded in a way which at first sight appears crabbed and ungrammatical. Hilbery, J., took the view that no coherent meaning could be given to it without transposing certain of the words. I do not share his difficulty. I find no necessity and accordingly no justification for rewriting the relevant words in the way in which he has rewritten them. In order to make the matter clear, however, I must examine the actual language of the relevant part of the section. Its broad purpose is not open to doubt. Before it was enacted, a lessor could recover damages from his tenant for breach of a covenant to deliver up in repair notwithstanding that the buildings were going to be pulled down or structurally altered in such a way as to make it useless to perform the covenant. The enforcement of the covenant in such circumstances were regarded as an unjust enrichment of the lessor, and the legislature in sect. 18 (1) set itself to remove the injustice. The relevant words are as follows:

> . . . and in particular no damage shall be recovered for a breach of any such covenant or agreement to leave or put premises in repair at the termination of a lease, if it is shown that the premises, in whatever state of repair they might be, would at or shortly after the termination of the tenancy have been or be pulled down, or such structural alterations made therein as would render valueless the repairs covered by the covenant or agreement.

The words which Hilbery, J., found incapable of construction as they stand are the words:

> . . . if it is shown that the premises . . . would at or shortly after the termination of the tenancy have been or be pulled down . . .

It may be asked why the words "would have been or be" were used rather than words referring to the intention of the lessor. The answer is that a building might be destined for demolition for some reason other than the intention of the lessor, e.g., under a demolition order or a compulsory purchase under a street widening scheme. It was therefore necessary to use words of general import expressing the future fate of the building whatever the cause of that fate might be. The draftsman might have used the expression "were going to be pulled down at or shortly after the termination of the tenancy," but he preferred to express futurity in a different but grammatically legitimate way.

Two more points must be borne in mind in considering the structure of the sentence. The first is that the point of time in relation to which the fate of the building is to be considered is that at which the covenant to deliver up falls to be performed, namely, the termination of the lease. The other is that the date at which the tenant is to prove the intended fate of the building is the date at which the action claiming damages for breach of the covenant is heard, which is necessarily subsequent to the termination of the lease.

These considerations appear to me to explain the construction of the sentence. The words "would have been" are, I think, grammatically correct to express in a statement in *oratio obliqua* ("if it is shown that") made at a subsequent date (the date of trial) in relation to what, at an earlier date (the termination of the lease), was a future event which at that date was in contemplation. The moment before the termination of the tenancy it would be correct for the tenant to say "I say that this house will be pulled down at the termination of the tenancy." If at a date later than the termination of the tenancy he wishes to describe the future fate of the house regarded from the same moment of time, he would say, if he spoke grammatically, "I say that this house would have been pulled down at the termination of the tenancy." What else as a matter of English could he say? He could not say, "I say that the house will be pulled down at the termination of the tenancy," since the termination of the tenancy has already taken place, nor could he say, "I say that this house would be pulled down at the termination of the tenancy." He might have said, if the subsection had been so framed, "I say that this house was going to be pulled down at the termination of the tenancy," and this seems to me to be an accurate paraphrase of the language used. It is, I think, incorrect to say that the words "would have" make it necessary to imply a conditional sentence such as "if it had not been for the landlord's action in claiming damages" or "if it had not been for some extraneous cause." In my view, no such implication is necessary.

The remaining words "be pulled down" must, I think, be linked up to the words "would" and "shortly after the termination of the tenancy," so that this limb of the subsection will run "if it is shown that the premises would shortly after the termination of the tenancy be pulled down." Here the draftsman has, I think, to some extent sacrificed grammar to conciseness. His difficulty was a real one, since he had to deal with an event—namely, pulling down shortly after the termination of the tenancy—which, at the relevant time, namely, the hearing of the action, might be past or future, and he has apparently used the words "would be" to meet this difficulty. However this may be, I am of opinion that, if the tenant can show at the trial that at the moment when the covenant fell to be performed the building was one which was going to be pulled down at or shortly after the termination of the tenancy, he is entitled to the relief which the subsection gives.

The question then arises, what is the test by which the fate of the building as at the relevant date—namely, the date at which the covenant ought to be performed—is to be ascertained? I have already pointed out that a building may be destined for demolition either because the landlord has so determined or because some extraneous authority has decided to exercise its powers in that behalf. I have also pointed out that the crucial date is the date of the termination of the lease. Once that date has passed, the tenant is no longer in a position to fulfil his covenant, and, if it is shown that before that date arrives the landlord has decided to pull down the building and that this intention is still existing at that date, the requirements of the subsection are, in my opinion, satisfied.

A different view of the meaning of the subsection was taken by HILBERY, J. My grounds for differing from him sufficiently appear, and it is no disrespect on my part if I do not examine his reasons in detail. Counsel for the plaintiff felt himself unable to argue in favour of a construction different from that which I have set out above. He admitted that, if the intention of the plaintiff to pull down the building still prevailed at the termination of the lease, the subsection would apply and that a change of intention at a later date would not assist him. His point was that the intention must, on the facts, be treated as having been abandoned at the outbreak of the war or, at any rate, before Sept. 29. I have given my reasons for rejecting this view.

This is sufficient to dispose of the appeal. It is accordingly unnecessary for me to discuss the two other matters raised on behalf of the defendant. The first was that, even if the intention of the plaintiff had in fact been abandoned before Sept. 29, the plaintiff was precluded from so asserting, since the statement which he had made as to the fate of the building in the letter of Nov. 5, 1937, was left uncorrected until long after the termination of the lease, and the defendant, in reliance on that statement (as he said in evidence), refrained from doing the repairs. The other matter related to the damages awarded. It was said that, if the latter part of sect. 18 (1) does not apply, the damages recoverable under the earlier part of the subsection are to be limited to the diminution in the value of the reversion and that no such diminution is shown by the evidence. I express no opinion on either of these questions. The appeal is allowed with costs here and below.

I wish to add that I have read the judgment about to be delivered by GODDARD, L.J., and I am in agreement with what he says on the subject of the defendant's credibility.

MacKinnon, L.J.: I agree that this appeal should be allowed. The plaintiff sued the defendant for damages for breach of covenants in his lease (*a*) to keep the premises in repair throughout the term, and (*b*) to deliver up the premises at the end of the term in a state of repair. The judge gave the plaintiff £350 damages. That was, in effect, the cost of doing repairs found to be necessary by the plaintiff's surveyors upon a survey made after the end of the term.

There is a simple ground on which I think that the appeal succeeds. The Landlord and Tenant Act, 1927, s. 18 (1) provides that damages for a breach of covenant to keep or put premises into repair during the currency of a lease, or to leave in repair at the end of a tenancy, shall in no case exceed the amount by which the value of the reversion is diminished by such breach. In my opinion, there was no evidence at the trial of any diminution in the value of the reversion by reason of any breach of covenant to repair, or yield up in repair, by the defendant. There was in fact no evidence for the plaintiff of any breach of (*a*) the covenant to keep in repair during the term. No complaint of any such breach had ever been made. The plaintiff's surveyors had inspected the property in July, 1937, but they gave no evidence of finding any breach then. The only evidence as to breach was under (*b*), the covenant to deliver up in repair, upon a survey and schedule of dilapidations made after such delivery up. As to the effect of this breach on the value of the reversion, the first surveyor could only say that the depreciation was "the cost of doing the repairs," but on cross-examination, said "I am not in a position to answer" (as to the depreciation) "because it is a question of the value of the premises, and as a surveyor assessing dilapidations, I was only concerned with the cost of making the repairs." The other surveyor, on being asked what was the depreciation, answered, "I think the cost of the work is the only possible criterion." He also said, in cross-examination, that the only real value of the premises was the site value, and "you would get as much for the site as for the site with the building on it."

On this I am clear that the judge was wrong in that passage of his judgment in which he says, at p. 821:

> I accept the evidence of the plaintiff's witnesses . . . I am satisfied that the cost of making good the want of repair is, as nearly as it can be assessed, the same as the diminution in the value of the reversion resulting from the breaches of covenant to yield up in repair . . .

There was no evidence of any diminution of value in the reversion, and the judgment, if given for the plaintiff, should have been for nominal damages only.

In my view, there should not have been judgment for the plaintiff, even for nominal damages. Two other material provisions of the Act of 1927 are these: (*a*) by sect. 5 the tenant may, subject to certain conditions, apply for a new lease 12 months before the end of his term, and, if it is refused, may apply to the tribunal for the grant of such new lease; and (*b*) by sect. 18 (1):

> . . . no damage shall be recovered for breach of any covenant to leave premises in repair at the termination of a lease, if it be shown that the premises, in whatever state of repair they might be would, at *or* shortly after the term of the tenancy have been *or* be pulled down . . .

The judge thought that this passage was "ungrammatical and inappropriate," and that "either something is omitted or the words have by inadvertence been transposed." He thought the passage should be amended so as to read as follows:

> . . . if it is shown that the premises . . . at or shortly after the termination of the tenancy have been or would be pulled down.

I do not agree with this criticism. The sentence is difficult to construe, because of its succinct condensation. As was pointed out by **Lord Greene, M.R.**, during the argument, the draftsman had to provide for the event of demolition from any cause, e.g., by proceedings taken for a street widening, as well as by the estate policy of the landlord. I think the succinct phrase in the section deals with the two alternatives which are separated by the two ors which I italicised above. If the sentence were written out more at length, it could read as follows:

> . . . if it be shown that the premises . . . would at the termination of the tenancy have been pulled down, or would shortly after the termination of the tenancy be pulled down.

The intention of the legislature is manifest. It is to prevent the recovery of damages for not delivering up in repair if the landlord is not going to relet them, but is going to demolish them, or is constrained to have them demolished. Such a claim for damages can only arise after the lease has expired. At the hearing the tenant might prove one of three things : (*a*) that the premises have been already demolished, in which case *cadit quaestio* ; (*b*) that they remained in existence only because the landlord did not want him to prove (*a*), and that, but for this, they would have been demolished ; (*c*) he might not be able to prove (*b*) because sufficient time had not elapsed, or because a street widening order had not yet become operative, but he could prove that they would shortly be demolished. I think the alternatives in the section are to provide for (*b*) and (*c*). It was obviously unnecessary to provide for (*a*).

In June, 1937, the defendant applied for a renewal of his lease in anticipation of its termination in Sept., 1939. The plaintiff's agents (I feel sure without the knowledge of the plaintiff) made him pay a preliminary fee of 5 guineas for a survey, and I feel no surprise at the defendant's chagrin thereat. On Nov. 5, 1937, the surveyors wrote to the defendant that his lease could not be renewed, since the plaintiff intended to demolish this and the adjoining building and erect a new building on their site. By sect. 5 of the 1927 Act, the plaintiff, if he had a claim for the goodwill under sect. 4, but thought it would not compensate him, might take steps 12 months before the end of his lease to apply to the tribunal for a new lease. He consulted his solicitors, but they advised him that, by reason of sect. 5 (3) (*b*) (ii), any such application must fail, since the premises were going to be pulled down. Whether he could have made such a claim, by reason of sect. 4, I do not know. It may not have been considered. Anyway, there was no evidence about it. In my view, the surveyors' letter of Nov. 5, 1937, not only intimated that he could not have a new lease, it also impliedly intimated two further things : (*a*) it will be no use your applying to the tribunal for a new lease, having regard to sect. 5 (3) (*b*) (ii) ; and (*b*) you need not, having regard to sect. 18, fulfil your covenant to deliver up in repair, or, rather, you will not be liable for any damages if you do not fulfil it.

The intention of the plaintiff to demolish the house in Sept., 1939, remained very active until the outbreak of war on Sept. 3, 1939. The difficulty of doing so, and of rebuilding (though, as Lord Greene, M.R., has pointed out, the legality of doing so remained unaffected for at least a year longer) was apparent, and on Oct. 5, 1939, the plaintiff intimated to his agents that he abandoned the scheme. No intimation of any change from the intention conveyed to the defendant in the letter of Nov. 5, 1937, was ever given to the defendant until after he had vacated the premises, or, indeed, until the present claim was presented to him by a letter from the estate agents of Dec. 5, 1939. I confess I am not surprised that the plaintiff's solicitors wrote to those agents on Oct. 13, 1939 :

> As regards dilapidations we assume that having regard to the provisions of the Act of 1927 no claim can be made in this respect.

If they had said " having regard to the provisions of the Act, and the communications you have made to the tenant, no claim can be made," they would exactly have anticipated what, in my view, should be the headnote of the proper judgment in this case.

It was suggested that by reason of the letter of Nov., 1937, and having regard to the terms of the Act, the plaintiff was estopped from denying that the house was to be pulled down in Sept., 1939. Since there was the evidence that by fulfilling the requirements of sect. 4 of the Act, the defendant could have applied for a new lease under sect. 5, and abstained from doing so because of the letter, I do not think such an estoppel is complete.

In another aspect of the case, and the facts I have set out, it falls within the principle enunciated by Bowen, L.J., in *Birmingham & District Land Co.* v. *London & North Western Ry. Co.* (1), at p. 286:

> If persons who have contractual rights against others induce by their conduct those against whom they have such rights to believe that such rights will either not be enforced or will be kept in abeyance for some particular time, those persons will not be allowed by a court of equity to enforce the rights until such time has elapsed, without at all events placing the parties in the same position as they were before.

The letter of Nov. 5, 1937, uses the phrase " It is the intention of [the plaintiff] to demolish the building." Because of this we were pressed for the plaintiff with *Jorden* v. *Money* (2). In that case the voices of infallibility, by a narrow majority, held that though a misrepresentation of fact may bind a man, a mere falsified statement of his future intention does not. We were told by counsel for the defendant that the Law Reform Committee has had the audacity to propose the legislative abolition of this refinement, but for us it remains binding.

However, the question must be what is the substance of the intimation by the man concerned, not what is the form or language of it. A statement using the words " intend " or " intention " in form, may be, in substance, a representation of fact. If one says " I am growing old ; I do not intend to live long," in form he states an intention, in substance he states a melancholy fact. In substance the communication of Nov., 1937, stated facts. " This house is so old and out of date that any sensible landlord would rebuild it at the end of the term," or, more succinctly, " This house is ripe for re-erection, it is doomed to demolition in Sept., 1939." That being the substance of the statement to the defendant, I do not think that the rule in *Jorden* v. *Money* (2) avails to prevent him from relying on the principle stated by Bowen, L.J., merely because the words of the letter happen to use the word " intention."

Goddard, L.J. : In my opinion the true construction of the material passage in sect. 18 depends on the fact that the word " would " applies both to the words " have been " and to the word " be." " Would have been " refers to " at the termination of the tenancy " and " would be " to " shortly after the termination." I think that it must have been in the draftsman's mind that, where a tenant has to show either of these things, the premises will not have been pulled down at the time when he has to show them. If they have been, *cadit quaestio*. If they are standing, he can say " but for your claim or some other reason either they would have been pulled down when my tenancy ended, or would be shortly after." In any case, the intention of the section is clear. If the premises are going to be demolished, whether by the landlord, a local authority or anyone else, the tenant is not to be liable for dilapidations. The section clearly deals with intention, and the question arises whether the tenant has to show an intention in somebody to demolish existing at the date of the trial, as Hilbery, J., thought was necessary, or an intention existing at the time when the lease expired. In this court both counsel agreed that the latter was the correct view, and, in my opinion, this must be so ; otherwise the landlord could, after the termination of the lease and after (by informing the tenant of his intention) he had in effect told him he did not and could not require him to perform his covenant, give himself a cause of action which did not exist when the lease came to an end. The present case, therefore, becomes one of great simplicity, for the facts are beyond dispute, and it is unnecessary to consider many of the interesting matters that were discussed before us. On Nov. 5, 1937, the defendants were informed in explicit terms that the plaintiff intended to pull down the house at the end of the lease. Lord Salisbury gave evidence at the trial and did not attempt to say that he ever changed his mind before he got his solicitor's letter on Oct. 5. His intention, therefore, subsisted when the lease came to an end on Sept. 29. What conclusion he might have come to had the matter been presented to him earlier is immaterial. He never applied his mind to the question before Oct. 5, and until that date his intention was unchanged, nor was there any enactment or regulation then in force which could have prevented the carrying out of the scheme. Accordingly, the section relieved the defendant from the obligation of the covenant. There is one other matter on which I think it is right to say a word. The judge said that he regretted that he could not accept Mr. Marcel as a reliable witness. I appreciate that he had the opportunity of seeing him in the box, but I can find nothing in his evidence which reflects on his credibility. The judge's stricture apparently arose from answers to certain questions put by him to the witness as to whether he had performed his covenants to maintain the premises during the currency of the lease. Apart from the fact that the trial appears to have been concerned only with whether the section afforded a defence to a claim for dilapidations alleged to have accrued at the end of the lease, no evidence was given that there had been any breach of the covenants during the currency of the lease or that there had ever been any complaint or suggestion to that effect. It is true that in strictness the defendants might have been required to paint the exterior in the autumn of 1937, but that any reasonable landlord would expect this to be done when the premises were to be pulled down in 1939, unless perhaps they were in a shockingly unsightly condition, I cannot believe, nor would any tenant with that information before him think of doing so. Moreover, these questions obviously took Mr. Marcel by surprise, and I should think there are few people who, at a moment's notice and with nothing to refresh their memory, could say when they did such and such a repair to their house or shop. I am sure I could not. I can see nothing in the evidence which in any way reflects on Mr. Marcel, either as an honest witness or a desirable tenant. I agree that the appeal should be allowed.

Solicitors: *Gale & Phelps* (for the appellants); *Nicholson, Freeland & Shepherd* (for the respondents).

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

BENSON *v.* NORTHERN IRELAND ROAD TRANSPORT BOARD.

[HOUSE OF LORDS (Viscount Simon, L.C., Lord Atkin, Lord Wright, Lord Porter), **January 13, 14, 23, February 9, March 4. 1942.**]

Criminal Law—Appeal—Acquittal—No appeal from acquittal unless by express provision—Payment of costs—"Penal or other sum"—"Person aggrieved."

The appellant was summoned before a court of summary jurisdiction for using a vehicle on a public highway for the carriage of merchandise for reward contrary to the Road and Railway Transport Act (Northern Ireland), 1935, s. 15 (1). For contravening the section a fine not exceeding £100 might be imposed. The complaint was dismissed on the ground that the enactment in question was beyond the legislative powers of the Northern Ireland Parliament, and the appellant was ordered to pay the respondents 8 guineas for costs. The respondents appealed to quarter sessions and the appeal was dismissed. At the request of the respondents the recorder stated a case upon the point of law involved, and that case came before the Court of Appeal in Northern Ireland, where the decision of the lower courts was reversed by a majority. The appellant then appealed to the House of Lords. Their Lordships took the objection that the appeal was incompetent as being an appeal from a dismissal on the merits of a criminal charge:—

HELD: (i) since the case was of a criminal nature, no appeal lay from the decision of the court of summary jurisdiction dismissing the complaint, and the whole chain of these appeals was misconceived.

(ii) the sum ordered to be paid for costs was not a penal or other sum within the meaning of the Summary Jurisdiction and Criminal Justice Act (Northern Ireland), 1935, s. 24 (1).

(iii) the respondents were not persons aggrieved by the decision of the court of summary jurisdiction.

(iv) a right of appeal from a decision dismissing a criminal charge can only be given by statute and, in that case, only by words which are clear, express, and free from ambiguity.

[**EDITORIAL NOTE.** Apart from special statutory provisions, there can be no appeal from the dismissal of a criminal charge. The prosecutor can, of course, ask for a case to be stated, but then a case can only be stated upon a point of law. It is true that the point of law may be whether there was any proper evidence to support the decision of the court, and in this way, perhaps, appeals are often concerned with mixed questions of law and fact; but, upon a case stated, the findings of fact in the case are binding upon the appellate court, provided only that there was admissible evidence to support them. The appeal by way of case stated does not allow an appeal on the merits. The respondents in this case explored two other avenues by which such an appeal might conceivably be supported. They suggested that the award of costs against them was an order for the payment of a penal or other sum and that they were persons aggrieved by the decision of the magistrates. These matters are fully dealt with in the opinion of VISCOUNT SIMON, L.C., which was unanimously adopted by the House. The statement of the law no doubt contains nothing which can be called new law, but a review of the position by the House of Lords is of obvious importance, and is the more so since, there being no right of appeal, such matters can seldom be the subject of debate in the highest tribunal.

AS TO APPEAL IN CRIMINAL MATTERS, see HALSBURY, Hailsham Edn., Vol. 9, pp. 263-266; paras. 375-380; and FOR CASES, see DIGEST, Vol. 14, pp. 500-503, Nos. 5513-5528.]

Cases referred to:

(1) *R.* v. *Tyrone County JJ.* (1906), 40 I.L.T. 181.
(2) *R.* v. *Middlesex JJ.* (1812), 16 East 310.
(3) *R.* v. *Tucker* (1824), 5 Dow & Ry. K.B. 434; 16 Digest 330, *1450*; 3 B. & C. 544.
(4) *R.* v. *London County Keepers of the Peace & JJ.* (1890), 25 Q.B.D. 357; 26 Digest 460, *1760*; *sub nom. R.* v. *London JJ., ex p. Fulham Vestry*, 59 L.J.M.C. 146; 63 L.T. 243.
(5) *Cox* v. *Hakes* (1890), 15 App. Cas. 506; 16 Digest 250, *508*; 60 L.J.Q.B. 89; 63 L.T. 392. A
(6) *Norwich Corpn.* v. *Norwich Electric Tramways Co., Ltd.*, [1906] 2 K.B. 119; 38 Digest 57, *337*; 75 L.J.K.B. 636; 95 L.T. 12.

APPEAL by the person accused of an offence under the Road and Railway Transport Act (Northern Ireland), 1935, s. 15 (1), (6) from a decision of the Court of Appeal in Northern Ireland, dated May 9, 1940, reversing by a majority the decision of the Deputy Recorder of Belfast, who had upheld a decision B of the Resident Magistrate sitting at Belfast, dismissing the summons against the appellant. The facts are fully stated in the opinion of VISCOUNT SIMON, L.C., but the decision of the House is that the procedure adopted was misconceived, and the constitutional question discussed in the lower courts is, therefore, not dealt with.

J. M. Whitaker, K.C., and *A. J. Belford* (of the Northern Ireland Bar) for the appellants. C

C. C. R. Romer, K.C., and *E. L. Curran* for the respondents.

VISCOUNT SIMON, L.C.: My Lords, this appeal is brought to your Lordships' House from an order of the Court of Appeal in Northern Ireland which by a majority (ANDREWS, L.C.J., and MURPHY, L.J., BABINGTON, L.J., dissenting) arrived at the conclusion that the Road and Railway Transport Act (Northern Ireland), 1935, s. 15 (1) was not *ultra vires* of the Parliament of Northern Ireland, D and that the decision of the resident magistrate (Mr. W. F. MCCOY, K.C.) dismissing the complaint of the respondent board against the appellant that the appellant had committed a breach of the section should be reversed.

Sect. 15 (1) of the 1935 Act provides as follows:

> A person other than the Board shall not use a motor vehicle on any public highway for the conveyance of passengers or their luggage or the carriage of merchandise for hire or reward, except with the consent in writing of the Board and the approval of the E Ministry of Home Affairs.

Before the resident magistrate, the appellant admitted that he had disregarded the prohibition contained in this section, for he had, after the Act came into force on July 16, 1935, used a motor vehicle on a public highway for the carriage of merchandise for hire and reward, and he had not received the consent for so doing which is referred to in the section. He contended that the section was of no effect, on the ground that this section, read in conjunction with sect. 5 F of the Act, was beyond the legislative power of the Parliament of Northern Ireland to enact, in view of the limitations imposed by the Government of Ireland Act, 1920. The material words of the Road and Railway Transport Act (Northern Ireland), 1935, s. 5 (1) are:

> The Board shall, within a period of six months from the day on which the Act comes into operation . . . acquire every road motor undertaking operated for hire or reward in Northern Ireland . . . In this subsection the expression "operated" means operated G immediately before the passing of this Act and then providing a road transport service which had been commenced before the first day of June, 1934.

The Government of Ireland Act, 1920, s. 5, provides (amongst other things) that the Parliament of Northern Ireland shall not have power to:

> . . . make a law so as either directly or indirectly to . . . take any property without compensation.

The appellant had not begun to operate his road motor undertaking until after H June 1, 1934, and therefore received no compensation from the respondent board. Accordingly, he contended that the effect of the 1935 Act was to "take" property of his, to wit, the goodwill of his business, without compensation. For reasons which will appear, I abstain from any comment on these contentions, or on this conception of the meaning of "goodwill."

The resident magistrate decided in the appellant's favour and accordingly dismissed the complaint "on the merits," and ordered that the respondents should pay him 8 guineas for costs. Thereupon the respondents gave notice of appeal to the general sessions of the peace for the county of the city of Belfast, alleging that they, the complainants in the original proceedings, were "aggrieved by the order of the resident magistrate." When the case came before the deputy recorder of Belfast at quarter sessions, no one took the objection that, in cases of a criminal nature, where a court of summary jurisdiction has discharged the person summoned and has dismissed the complaint, no appeal lies. The deputy recorder heard the appeal out and reached the same conclusion as had the resident magistrate on the constitutional point. On a subsequent application, the deputy recorder was requested to state a case under the Summary Jurisdiction and Criminal Justice Act (Northern Ireland), 1935, s. 26. He did so, and the third of the questions of law raised in the case stated is whether he was right in holding "that the decision of the resident magistrate in dismissing the said summons should be affirmed." The case stated came before the Court of Appeal in Northern Ireland, which had the assistance of the Attorney-General as *amicus curiae*. The constitutional question was elaborately argued, but no other matter was raised, and, in the result, Andrews, L.C.J., and Murphy, L.J., held that the impugned section was *intra vires* of the Parliament of Northern Ireland, while Babington, L.J., took the other view. By its formal order the Court of Appeal declared "that the said dismiss should be reversed," and ordered the present appellant to pay costs. The "dismiss" here referred to must be the resident magistrate's dismissal of the complaint, and the reversal of this dismissal must mean that the present appellant was to be convicted. What was to happen then does not appear, but presumably the order of the Court of Appeal means that the present appellant, who had already been discharged by the resident magistrate, should be brought before him again, either by summons or, if necessary, by arrest, and should then be fined not more than the maximum of £100 for the offence in respect of which he had been discharged, with the liability of distress of goods in default of payment, and the possibility, if the warrant of distress could not be executed, of imprisonment.

Before your Lordships' House the case continued to be conducted as though the only question that could be raised was the constitutional one. After hearing the appellant's counsel, and without calling upon the respondents, the House took time to consider how to express its conclusion. In the course of the hearing, the question was put from the House itself to the parties, how it came about that this chain of appeals could be supported, seeing that the appellant in the first instance was discharged by the resident magistrate from the complaint on which the whole chain depended. The answer at that time offered to the House was that the order of the resident magistrate requiring the respondent board to pay to the appellant 8 guineas costs was an order "for payment of a penal or other sum," within the Summary Jurisdiction and Criminal Justice Act (Northern Ireland), 1935, s. 24 (1). Sect. 24 (1), which has taken the place of sect. 24 of the Petty Sessions (Ireland) Act, 1851, runs as follows:

> Notwithstanding anything in any previous enactment, an appeal shall lie to a court of quarter sessions against an order of a court of summary jurisdiction, in cases of a civil nature by either party whether he is the complainant or defendant, and in other cases by any party against whom an order is made for payment of any penal or other sum, or for any term of imprisonment, or for the estreating of any recognizance to a greater amount than twenty shillings.

It appeared to your Lordships, when further considering the matter, that this explanation was of very dubious validity. The reversal pronounced by the Court of Appeal was not limited to the order to pay costs. It was essentially an order that the appellant should, after all, be convicted. Moreover, the proposition that it is the imposition of costs on the prosecutor that creates his right to appeal would lead to the extraordinary result that in Northern Ireland, when a court of summary jurisdiction dismisses a criminal charge, the prosecution, if dissatisfied, should beg to be ordered to pay costs in order thereby to purchase a right of appeal, and the accused, if he wished to make sure of his acquittal, should be astute not to ask for costs against the prosecution. We accordingly asked for further argument as to the right of appeal from the resident magistrate and put the case in the list again for that purpose, when the same counsel attended. The House also had the advantage of the aid of the Attorney-General for Northern Ireland. The upshot is remarkable. There is now no difference of view at your Lordships' bar, and everybody agrees that there was no right of appeal from the dismissal with costs of the complaint by the resident magistrate. I entirely concur. Rights to appeal exist only by statute. If there were any right of appeal at any stage in this case, the right must be founded upon something contained in sect. 24 (1) above quoted.

It cannot be disputed that the alleged breach of sect. 15 of the Transport Act, for contravention of which a fine of £100 may be imposed, does not constitute a case "of a civil nature." It is a criminal matter. All that remains is to ascertain whether, when the prosecutor fails and is ordered to pay costs, this is "an order . . . for payment of any penal or other sum." This phrase "penal or other sum" is used many times in the Petty Sessions (Ireland) Act, 1851, which is to be read with the Summary Jurisdiction and Criminal Justice Act (Northern Ireland), 1935 (see sect. 65 (1) of the last-named Act and the Interpretation Act, 1889, s. 13 (9)). It is plain that the phrase is abundantly satisfied by provisions for penalties, on the one hand, and by provisions for compensation, damages, amends and the like, on the other. An order for payment of any penal or other sum is enforced by distress (see para. 2 of sect. 22 of the 1851 Act), and, by para. 9 of the same section, an order for costs "shall be recoverable in the same manner as any penal or other sum"—a phrase which at once contradicts the impression that an order for costs is itself an order to pay an "other sum." Under the Act of 1851, costs at petty sessions were not to exceed twenty shillings, and, since, under sect. 24 of that Act, no appeal to quarter sessions was permitted if the order for payment did not exceed twenty shillings, the question whether an unsuccessful prosecutor could found an appeal on an order requiring him to pay costs could not at that date arise. There is now no limit to the amount of costs that may be ordered (see sect. 48 (1) of the 1935 Act), but the phrase "recoverable in the same manner as any penal or other sum" is there repeated, and the conclusion that an appeal cannot be founded on an order making the unsuccessful prosecutor pay costs is reinforced. I have not overlooked the language of the Sched. II to the Act of 1935, which includes a form of appeal from petty sessions and contains in the margin a reference to the dismissal of a complaint with costs. The reference there must be understood to be to the dismissal of a complaint in cases of a civil nature.

The unchallenged and unchallengeable conclusion thus arrived at is really nothing more than an illustration of an extremely important and universally accepted principle of our law, and a principle which has been recognised again and again by the highest authorities, both in England and in Ireland. Thus, in *R.* v. *Tyrone County JJ.* (1) PALLES, L.C.B., in granting *certiorari* to quash a conviction for trespassing in pursuit of game, which was pronounced at quarter sessions on the hearing of an appeal from justices who had dismissed the charge, spoke of the "elementary" principle that

> . . . an acquittal made by a court of competent jurisdiction and made within its jurisdiction, although erroneous in point of fact, cannot as a rule be questioned or brought before any other court.

He went on to point out that the statute 27 Geo. III c. 35, which was then being discussed, could not be construed to give an appeal to the prosecutor in a criminal matter, for it contained no clear express words which provided for a departure from the general rule, and added:

> I therefore, first rest my view on settled principles, that, before you can appeal against an acquittal, the words must be clear, express, and free from any ambiguity.

He then referred to *R.* v. *Middlesex JJ.* (2), where a district surveyor claimed the right to appeal against the dismissal of his complaint as being a "person aggrieved," and observed that in that case LORD ELLENBOROUGH, C.J., held that the surveyor was not a "person aggrieved" within the section. Next PALLES, L.C.B., cited *R.* v. *Tucker* (3), where ABBOTT, C.J., said, at p. 440:

> . . . if there be a proceeding by information for a penalty under statute, and the justices, after hearing the matter, refuse to convict the party, that would be equivalent to an acquittal, and it is perfectly clear that no appeal will lie to the quarter sessions against an acquittal.

The broad proposition is summed up in the judgments of LORD COLERIDGE, L.C.J., and WILLS, J., in *R.* v. *London JJ.* (4). That case arose under the Highway Act, 1835, which imposes a penalty for wilfully obstructing a highway and provides an appeal to quarter sessions by "any person who shall think himself aggrieved by . . . any order, conviction, judgment, or determination made etc." The decision was that, when a summons for wilful obstruction was dismissed by a justice, the informant had no right to appeal. LORD COLERIDGE, L.C.J., said at pp. 360, 361:

> A person is prosecuted for some breach of the law which is to be proved in a particular way. The general principle of law is that, if acquitted, he is not to be a second time vexed . . . Is a person who cannot succeed in getting a conviction against another person "aggrieved"? He may be annoyed at finding that what he thought was a breach of the law is not a breach of the law; but is he "aggrieved" because someone is held not to have done wrong?

A WILLS, J., said at pp. 361, 362:

> Long before the Highway Act of 1835, there were similar statutory provisions and yet no instance can be found in the books of an appeal successfully prosecuted, or even attempted to be brought, after an acquittal.

One other citation may be usefully made from the speech of LORD HALSBURY in *Cox* v. *Hakes* (5), where he insisted upon the need of express legislation before the right of personal freedom can be made subject to the delay and uncertainty B of appeal. His pronouncement is not irrelevant to the present case, for the question whether a disappointed prosecutor, who is ordered to pay costs, has a right of appeal from a magistrate's decision to acquit in Northern Ireland may equally well arise where the punishment on conviction would be imprisonment. The language used by LORD HALSBURY is as follows [p. 522]:

> . . . your Lordships are here determining a question which goes very far indeed beyond the merits of any particular case. It is the right of personal freedom in this country C which is in debate; and I for one should be very slow to believe, except it was done by express legislation, that the policy of centuries has been suddenly reversed and that the right of personal freedom is no longer to be determined summarily and finally, but is to be subject to the delay and uncertainty of ordinary litigation, so that the final determination upon that question may only be arrived at by the last court of appeal.

In the light of the above pronouncements, very clear statutory language would be needed to establish, by way of exception to the general rule, a right of appeal D from a decision dismissing a criminal charge, and nothing contained in sect. 24 of the 1935 Act could establish such an exception.

The conclusion that the dismissal of the complaint is final necessarily leads to the view that the whole of the proceedings from the moment that the resident magistrate discharged the appellant are misconceived. Neither the deputy recorder nor the Court of Appeal in Northern Ireland had any jurisdiction to deal with the matter, and this also applies to the House itself. It is irrelevant E to consider whether, after the appellant's discharge, the constitutional issue might have been raised by case stated by the resident magistrate, or by using the Government of Ireland Act, 1920, s. 51. The circumstance that no objection on the score that no appeal lay was ever taken at any stage until it was taken by the House itself does not mend matters from the respondents' point of view at all. In *Norwich Corpn.* v. *Norwich Electric Tramways Ltd.* (6), where F an objection to the jurisdiction of the High Court was successfully taken in the Court of Appeal, though it had not been raised at an earlier stage, VAUGHAN WILLIAMS, L.J., laid down the true rule when he said, at p. 125:

> If the court in any case is itself satisfied that it has no jurisdiction to entertain the application made, it is its duty, in my opinion, to give effect to that view, taking, if necessary, the initiative upon itself.

The appeal to this House must be allowed and, inasmuch as the appellant G should never have been vexed by proceedings of appeal at all, he must have his costs both before this House and at each stage below.

LORD ATKIN: My Lords, I entirely agree with the opinion which has just been expressed by my noble and learned friend VISCOUNT SIMON, L.C., and with the motion which has been proposed by him. Inasmuch as we are not differing from the Court of Appeal in Northern Ireland on any point which was argued before them or decided by them, I find it quite unnecessary to add any words of H my own.

LORD WRIGHT: My Lords, I also agree and I do not think it necessary to add anything.

LORD PORTER: I concur.

Appeal allowed with costs.

Solicitors: *Williams & Tremayne*, agents for *Wallace, Harris & Robb*, Belfast (for the appellants); *Linklaters & Paines*, agents for *J. Dunville Coates*, Belfast (for the respondents).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

WESTMINSTER BANK, LTD. AND ANOTHER *v.* EDWARDS AND ANOTHER.

[House of Lords (Viscount Simon, L.C., Lord Atkin, Lord Wright, Lord Romer and Lord Porter), **January 26, 29, March 24, 1942.**]

Landlord and Tenant—War Damage—Multiple lease—Disclaimer of part of premises—Reduction in rent—Landlord and Tenant (War Damage) Act, 1939 (*c.* 72), *s.* 15.

Practice—Incompetent proceedings—Objection taken by court itself—Appeal from county court—Fact found upon sufficient evidence.

By a lease dated July 25, 1922, the appellants' predecessors in title demised as a whole certain premises to the respondents for a period of 21 years from Sept. 29, 1922, with an option for renewal. The respondents sublet the premises in three separate portions. On Sept. 8, 1940, the premises were damaged by enemy action, and on Sept. 18 the subtenant of the fourth floor served a notice of disclaimer upon the respondents. On Sept. 26 the respondents served a notice of disclaimer upon the appellants. On Oct. 11 the subtenant of the first, second and third floors served a notice of disclaimer upon the respondents. On Oct. 17 the appellants applied to the county court under the Landlord and Tenant (War Damage) Act, 1939, s. 15, for the determination of the question whether it was equitable to allow the respondents to disclaim their lease, either wholly or as respects one or more of the tenements comprised therein. The county court judge inspected the premises at the request of the parties and embodied in his findings the statement that the lease was a multiple lease. It was common ground between the parties that the lease was a multiple lease. The respondents appealed to the Court of Appeal, and, though neither party raised the issue, that court, of its own motion, took the point that the lease was not a multiple lease and, deciding that it was not, dismissed the appeal on the ground that the proceedings were incompetent.

Held: (i) the proceedings were not incompetent. In the circumstances, the county court judge was entitled to hold that this was a multiple lease and there were no sufficient materials upon which to reverse that finding. There being, therefore, no want of jurisdiction and no collusion between the parties, the Court of Appeal had no ground to dismiss the proceedings as incompetent.

(ii) there was evidence to support the findings of the county court judge as to the extent of the disclaimer and the apportionment of the rent, and these findings must be restored.

(iii) the decision of the Court of Appeal that the relevant date at which to determine whether or not a lease is a multiple lease is the date when the lease is granted must not be regarded as settled law. This question is a question of fact as to use and adaptation, though, if detailed facts are ascertained, it may be a question of law whether those facts support the conclusion drawn from them.

(iv) where only part of the premises comprised in a multiple lease are allowed to be disclaimed, the reduction of the total rent may, in proper circumstances, exceed the rent attributable to the part disclaimed.

Decision of the Court of Appeal ([1941] 2 All E.R. 591) *reversed.*

[**EDITORIAL NOTE.** The Court of Appeal took the view that in this case there was a letting of one single hereditament intended to be used as such and that the fact that subtenancies had been created and a division of the premises had taken place subsequently could not make this a multiple lease. It would appear that the court formed this view upon an inspection of the lease, though they referred to the fact that the premises had been used as one warehouse, but, as to this fact, it now appears they were mistaken. The House of Lords, though not finally deciding the point, have stated a view that, in general, the relevant date at which it must be determined whether or not a lease is a multiple lease is the date of the application. In any case, the question whether a lease is a multiple lease is largely a question of fact dependent on the use or adaptation for use as separate tenements, and, for this reason, it is a matter which must be decided on evidence. Their Lordships, stating that their action is not to be taken as a precedent, have dealt with the merits of the case, and, in doing so, have restored the findings of the county court judge on the ground that there was evidence to support them. The main topic dealt with in the opinions is the staying of proceedings by a court of its own motion on the ground of incompetence.

It is pointed out that, in order that it may do so, in a case like the present, there must be want of jurisdiction or collusive action on the part of the litigants or an abuse of the process of the court. It would appear, therefore, that, had the Court of Appeal been right in its view that the lease could not be a multiple one, there would have been no jurisdiction to entertain the application and the decision of the Court of Appeal to dismiss as incompetent would have been correct. The error, however, arose in not giving effect to the finding that the lease was a multiple one, a finding of fact which there were no facts to contradict, and therefore, binding on the Court of Appeal in a A county court appeal.

FOR THE LANDLORD AND TENANT (WAR DAMAGE) ACT, 1939, s. 15, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 32, p. 996; BUTTERWORTHS EMERGENCY LEGISLATION SERVICE, Statutes Vol., p. 336.]

Cases referred to:

(1) *Herrmann* v. *Metropolitan Leather Co., Ltd.*, [1942] 1 All E.R. 294.

(2) *Norwich Corpn.* v. *Norwich Electric Tramways Co., Ltd.*, [1906] 2 K.B. 119; B 38 Digest 57, *337*; 75 L.J.K.B. 637; 95 L.T. 12.

(3) *Benson* v. *Northern Ireland Road Transport Board*, [1942] 1 All E.R. 465.

(4) *Colonial Bank of Australasia* v. *Willan* (1874), L.R. 5 P.C. 416; 16 Digest 125, *231*; 43 L.J.P.C. 39; 30 L.T. 237.

(5) *London Corpn.* v. *Cox* (1867), L.R. 2 H.L. 239; 16 Digest 101, *23*; 36 L.J.Ex. 225.

(6) *Farquharson* v. *Morgan*, [1894] 1 Q.B. 552; 16 Digest 119, *170*; 63 L.J.Q.B. 474; 70 L.T. 152.

(7) *Simpson* v. *Crowle*, [1921] 3 K.B. 243; 13 Digest 472, *213*; 90 L.J.K.B. 878; C 125 L.T. 607.

(8) *R.* v. *Bolton* (1841), 1 Q.B. 66; 16 Digest 110, *94*; 10 L.J.M.C. 49.

(9) *Smith* v. *Baker & Sons*, [1891] A.C. 325; 13 Digest 527, *789*; 60 L.J.Q.B. 683; 65 L.T. 467.

(10) *R.* v. *Woodhouse*, [1906] 2 K.B. 501; 16 Digest 398, *2421*; 75 L.J.K.B. 745; 95 L.T. 367, 399; *revsd. on other grounds, sub nom. Leeds Corpn.* v. *Ryder*, [1907] A.C. 420.

D APPEAL by the landlords from an order of the Court of Appeal (MACKINNON, GODDARD and DU PARCQ, L.JJ.) dated June 20, 1941, and reported *sub nom. Hazel* v. *Edwards*, [1941] 2 All E.R. 591.

M. Turner-Samuels and *D. J. Turner-Samuels* for the appellants.

Archibald Safford and *A. L. Stevenson* for the respondents.

VISCOUNT SIMON, L.C.: My Lords, this appeal comes before the House in unusual circumstances, for the Court of Appeal reached its conclusion by itself E taking an objection on a matter as to which the parties were not at issue, and which the county court judge had included in his findings of fact.

The appellants are the executors of a lessor named Hazel who, by an indenture of lease made on July 25, 1922, demised to the respondents a block of buildings known as 14-18, Nile Street, London, for a term of 21 years from Sept. 29, 1922. I will, for convenience, call the appellants or their predecessor the lessor F and the respondents the head-lessees. The premises consist of a large rectangular building with a basement, ground floor, and four floors above, together with an annexe with a basement, ground floor and first floor. The head-lessees had sublet the basement and ground floor of the main building and of the annexe to one Tipper; the first, second and third floors of the main building and the top floor of the annexe to Lovell & Co.; and the top floor of the main building to Whiting. There was a common staircase which com- G municated from the ground to all upper floors, and also a lift which served some of the floors.

On Sept. 8, 1940, at a time when all these sub-tenancies were subsisting, the premises were damaged by enemy action. The roof and top storey were almost entirely destroyed and became quite unusable. Some damage, but less serious damage, was done to the other parts of the building. The lift in the main building and the laboratory in the front part of the first floor of the annexe were H destroyed.

On Sept. 26, the head-lessees gave notice to the lessor of disclaimer of their lease under the Landlord and Tenant (War Damage) Act, 1939, together with particulars of the under-leases. The head-lessees had already received from Whiting notice of disclaimer of his sub-lease, and on Oct. 11, Lovell & Co.'s assigns similarly gave notice to the head-lessees of disclaimer of their sublease. It is not in dispute that, if the letting of the basement and ground floor is separately regarded, the damage to this portion of the building does not justify disclaimer of that sublease.

In these circumstances, on Oct. 17, 1940, the lessor applied to His Honour Judge Engelbach in the Shoreditch County Court, under sect. 15 of the Act, for the determination of the question whether it was equitable to allow the head-lease to be disclaimed either wholly or as respects one or more of the respective tenements comprised therein. It is to be noted that, in the particulars attached to the application, it was stated that the premises comprised in the lease "are used or adapted for use as two or more separate tenements." This is the definition of a "multiple lease" in sect. 24 of the Act, and it is to multiple leases alone that sect. 15 applies.

The head-lessees, who were respondents to the application, in no way disputed that this was a multiple lease—they expressly asserted it—and consequently no evidence was called to prove that the demise fell within this definition. On the contrary, as the county court judge's notes show, and as both counsel frankly stated to us (as they had already stated to the Court of Appeal) this was common ground, and the whole argument before the county court judge was conducted on this basis. The county court judge, who had inspected the premises at the request of the parties, embodied in his findings the statement that the buildings comprised in the lease are "used or adapted for use as two or more separate tenements," and that the lease is a multiple lease.

The main question in dispute before the county court judge was whether the only portion of the premises in respect of which it was equitable to allow disclaimer of the head-lease was the top storey occupied by Whiting (this was the contention of the lessor), or whether the part disclaimed should also include the intermediate floors occupied by Lovell & Co.'s assigns (this was the contention of the head-lessees). The county court judge decided this issue in favour of the lessor. The head-lessees appealed to the Court of Appeal, alleging that the county court judge had made errors in law and that there was no evidence upon which he could find that it was not equitable to allow them to disclaim the intermediate tenement. The argument proceeded on these questions until, in the course of the present respondents' reply, the Court of Appeal itself took the objection that the lease of July 25, 1922, was not a multiple lease and, therefore, did not come within sect. 15 of the Act. On this ground, the Court of Appeal has allowed the appeal, directing that the order of the county court judge should be wholly set aside and that the application to him under sect. 15 should be dismissed as incompetent.

With all respect to the Court of Appeal, and to the careful and elaborate judgment of Goddard, L.J., delivered on behalf of the court, I find this way of disposing of the case impossible to accept. The question whether a lease of premises is a multiple lease within the definition is a question of fact as to use and adaptation for use, though no doubt, if the detailed facts are set out, there may sometimes be also a question of law as to whether the facts can support the conclusion. In the recent case of *Herrmann* v. *Metropolitan Leather Co., Ltd.* (1), Uthwatt, J., correctly treated a dispute whether a lease was a multiple lease as a question to be decided on evidence. If the question of fact were in issue between the parties, it would be necessary to have evidence on these matters, and it might be that architects or surveyors would be called as to the nature of the structure and that the series of sub-leases would be produced and examined. None of these things was done at the trial because the whole matter was agreed. The Court of Appeal lays down the proposition at p. 593 that

> . . . the lease of a single hereditament does not become a "multiple lease" within the definition of sect. 24 merely because the tenant, there being no covenant to the contrary in the lease, sub-lets portions of that which was let to him as a whole.

I must not be understood to accept this proposition, but, even if it were correct, where is the ground for saying that this is the reason, and the only reason, why the parties in the present case agreed that they were dealing with a multiple lease? If the premises were "adapted for use" as separate tenements, the lease is rightly regarded as a multiple lease, however the premises were used. The judgment of Goddard, L.J., includes the statement that after the premises were demised to the present respondents they were used by them as a warehouse. No statement to this effect can be found in the county court judge's notes or in his judgment, and both counsel affirmed to us that no such statement or admission was made. Even if the fact were so, this would not prove that this was not a multiple lease. I am forced to the conclusion that there were no sufficient materials before the Court of Appeal to support the ruling that this lease was not a multiple lease.

Moreover, the question was not in issue. There are, of course, cases in which a court should itself take an objection of its own motion, even though the point is not raised by any of the parties before it. A court is not required to entertain a case which is brought before it only by collusion or other abuse of process. To give an absurd instance, a court cannot be required to decide what are necessaries for an infant if the parties collusively agree to treat the purchaser of the goods as under age when he is not under age at all. In the present case, however, there is no collusion or pretence of any kind. Again, a court not only may, but should, take objection where the absence of jurisdiction is apparent on the face of the proceedings. Thus, an appellate court not only may, but must, take the objection that it has no jurisdiction to hear an appeal if it is apparent that no right of appeal exists. In *Norwich Corpn.* v. *Norwich Electric Tramways Co., Ltd.* (2), VAUGHAN WILLIAMS, L.J., formulated the proposition thus, at p. 125 :

> If the court in any case is itself satisfied that it has no jurisdiction to entertain the application made, it is its duty, in my opinion, to give effect to that view, taking, if necessary, the initiative upon itself.

As that case shows, this rule applies even though the objection might have been taken, but was not, by the court below. A very recent example of the application of this principle is provided by the decision of this House in *Benson* v. *Northern Ireland Road Transport Board* (3). It is true that the jurisdiction of the county court judge to make an order under the Landlord and Tenant (War Damage) Act, 1939, s. 15, arises only in relation to a multiple lease, but whether the lease is a multiple lease is (subject to possible appeal on questions of law arising out of facts found) a matter for the county court judge to decide. There are some valuable observations bearing on this subject in the judgment of the Judicial Committee, pronounced by SIR JAMES COLVILE, in *Colonial Bank of Australasia* v. *Willan* (4). That was a case in which the question arose as to whether a writ of *certorari* should issue on the ground of want of jurisdiction in the lower court, and in the judgment the various circumstances in which want of jurisdiction may be said to arise are carefully distinguished. The passage relevant for present purposes is as follows [p. 443] :

> . . . an objection that the judge has erroneously found a fact which, though essential to the validity of his order, he was competent to try, assumes that, having general jurisdiction over the subject-matter, he properly entered upon the inquiry, but miscarried in the course of it. The superior court cannot quash an adjudication upon such an objection without assuming the functions of a court of appeal, and the power to re-try a question which the judge was competent to decide.

Here not only did the parties agree that the lease was a multiple lease, but the county court judge, after inspecting the premises, included among his findings an express decision to this effect.

In this situation your Lordships would be justified in allowing the appeal and remitting the case to the Court of Appeal to be dealt with on the basis that this is a multiple lease. The result, however, would be to inflict on the parties further expense where they cannot be held responsible for the complication which has arisen. I think that the interests of justice and the proper dispatch of business would be better served if we dealt here and now with the issues which counsel for the respondents wished to raise in the court below. However, this must not be taken as a precedent. Looking at the grounds of appeal to the Court of Appeal (which, of course, must be grounds in point of law), the first three grounds are as to the admissibility of evidence as to certain repairs and the like. It does not appear that any such objection was taken before the county court judge, and, in any case, he was, I think, entitled to have before him such evidence, which might well help him to decide what, upon the whole, was the equitable decision to make. There was a further ground of appeal to the effect that the judge had no evidence upon which he could find that it was not equitable to include in the disclaimed tenement the middle block sublet to Lovell & Co. " Equitable " in sect. 15 has no technical sense. It merely means " fair." It is only necessary to look through the county court judge's note of evidence and argument to see that this was the main matter of contention before him and that evidence on either side bore upon this question. It was for the judge to decide. Before this House, counsel for the respondents has sought to raise a further point, viz., that, when the county court judge had decided that it was equitable to allow the head-lease to be disclaimed only as regards the top tenement (in respect of which it was agreed that £200 ought to be taken off the head-rent of £1,700), he was bound, in giving consequential directions as to the apportionment of the "rent," to attribute to the rest of the premises, as between head-lessees and lessor, a rent of £1,500, whereas in fact he fixed for this a maximum figure of £1,350. One answer to this is that, before the county court judge, evidence to support this cutting down of the head-rent attributable to the part of the property not disclaimed was not objected to, though there was difference as to the exact figure. The landlord proposed it, and the tenant naturally did not resist. The reduction presumably reflects the fact that, even after the retained premises have been repaired, the value to the occupier owing to war damage will still be less than it would be if the air-raid had not taken place. Moreover, an offer by the landlord to alter the rent is one of the matters to which the court is to have regard in reaching its conclusion under sect. 15 (3), (4), (5).

The appeal must, therefore, be allowed and the order of the county court judge restored in its entirety. In the course of its judgment the Court of Appeal made some observations of a general kind as to the conditions which must be satisfied before a lease can be regarded as a multiple lease, and as to the date at which these conditions must be satisfied. I should myself have thought that there might be much to be said for the view that the relevant date is, not the date when the lease was granted, but the date when the application to the court was made. This is not a matter which has been argued before us, and I, therefore, do not say more than that the propositions included in the judgment of the Court of Appeal should not be regarded as settled law. It may be necessary to decide them on more mature consideration in a case where they are in issue. The appellants should have their costs here and below.

My Lords, my noble and learned friends, Lord Atkin and Lord Romer, who are not able to be here today, authorise me to say that they concur in this opinion.

Lord Wright: My Lords, as your Lordships are reversing a unanimous judgment of the Court of Appeal, I have thought it right to add a few observations on my own part to what has fallen from my noble and learned friend, Viscount Simon, L.C.

The gist of the judgment under appeal is summed up in the words of Goddard, L.J., speaking for the Court of Appeal. He said, at pp. 593, 594:

> . . . although in the county court both sides accepted the position that this was a case of a multiple lease, on appeal, the court took the point as to whether the whole proceedings were not misconceived, in that, as between these parties, the lease could not be regarded as multiple. . . . The order of the court below is set aside and the application under sect. 15 is dismissed as incompetent.

Now it is clear that a court is not only entitled but bound to put an end to proceedings if at any stage and by any means it becomes manifest that they are incompetent. It can do so on its own initiative, even though the parties have consented to the irregularity, because, as Willes, J., said in *London Corpn.* v. *Cox* (5), in the course of giving the answers of the judges to this House, "mere acquiescence does not give jurisdiction." In *Farquharson* v. *Morgan* (6), Lord Halsbury states the principle thus, at p. 556:

> It has been long settled that, where an objection to the jurisdiction of an inferior court appears on the face of the proceedings, it is immaterial by what means or by whom the court is informed of such objection. The court must protect the prerogative of the Crown and the due course of the administration of justice by prohibiting the inferior court from proceeding in matters as to which it is apparent that it has no jurisdiction.

That was a case of prohibition, but I think the general principle applies equally to the duty of the court to take the objection when it becomes apparent in the course of proceedings before it in an appeal. This was the view of a Divisional Court, composed of Bray and Lush, JJ., in *Simpson* v. *Crowle* (7), and I agree with it. These two authorities last cited were county court cases, but it is clear that the same principle applies on appeals from the High Court or from any court. The broad principle is stated and illustrated by Vaughan Williams, L.J., in *Norwich Corpn.* v. *Norwich Electric Tramways Co., Ltd.* (2), at p. 125, cited by Viscount Simon, L.C., where it was clear, on looking at the record and the Act under which the proceedings were taken, that the court's jurisdiction had been ousted. That was a case of what Willes, J., in *London Corpn.* v. *Cox*, at p. 282, called a patent as distinct from a suggested defect. In the latter case the defect is not apparent from the record, but is something collateral or extrinsic. In *R.* v. *Bolton* (8), a rule for a *certiorari* had been directed to justices for the purpose of impeaching their decision. The rule was discharged. LORD DENMAN, C.J., delivering the judgment of the Court of Queen's Bench, after pointing out that the inquiry was limited to this, whether the magistrates had jurisdiction to inquire and determine, supposing the facts alleged in the information to be true, and after deciding that there was no irregularity shown on the face of the proceedings, refused to consider any question of fact. He said, at p. 76:

> We forbear to express any opinion on that which is not before us, the propriety of the conclusion drawn from the evidence by the magistrates; they and they alone were the competent authority to draw it; and we must not turn ourselves into a Court of Appeal where the statute does not make us such, because it has constituted no other.

To the same effect, it was said in *Colonial Bank of Australia* v. *Willan* (4), at p. 444:

> . . . the question [in such cases] is whether the inferior court had jurisdiction to enter upon the inquiry and not whether there has been miscarriage in the course of the inquiry.

These principles are very pertinent for the consideration of the course adopted by the Court of Appeal. The application in the county court was specifically based on the Landlord and Tenant (War Damage) Act, 1939, s. 15, which is limited to what the Act denominates multiple leases, as defined in sect. 24 of the Act. The particulars under the application alleged the facts relied upon as necessary to satisfy that definition in respect of the premises. The case proceeded on the basis that the premises satisfied the definition of a multiple lease. That was not questioned throughout. As was said by DAVEY, L.J., in *Farquharson* v. *Morgan* (6), though in the county court there is no record, strictly speaking, for the purposes of the rule that in cases of a patent defect of jurisdiction the excess must be apparent on the face of the record, the matter does not depend on the existence of a formal record, but is one of substance whether the defect is apparent or depends on evidence. The proceedings in the county court are for this purpose equivalent to a record.

Now it is clear to my mind that here there was no apparent defect, by which in this context is meant that, on the proved or admitted facts on the record, the defect is clear as a matter of law. It is true that the application was based simply and solely on sect. 15, and that unless the lease was a multiple lease, there was no jurisdiction to proceed under the section. On the face of the proceedings, all conditions requisite to enable or require the court to enter upon the inquiry were satisfied. Whether or not there was a multiple lease was a mixed question of fact and law. If the county court judge found the facts wrongly, that would be a miscarriage in the course of proceedings duly initiated. His finding of fact would be final. An error in law on the part of the county court judge would be appealable if the point had been taken by the appellant before the judge (County Court Act, 1934, s. 105, replacing, with the same effect, the County Court Act, 1888, s. 120, as to which see *Smith* v. *Baker* (9)). These matters, however, which affect an appeal, are not material when considering the intervention of the court on the ground of want of jurisdiction, any more than they would be if the proceedings were for a prohibition. What is here material is that the issue whether or not the lease was a multiple lease could not be reopened without a retrial, which is beyond the competence of the court upon a suggestion of want of jurisdiction. A decision that the lease was or was not a multiple lease depends on fact as well as law. There was a finding here by the judge on the facts that it was a multiple lease, and, indeed, both parties had accepted the proposition that it was. Even if the Court of Appeal was disposed to think that the admission may have been to some extent based upon a particular construction of the statutory definition which, in their judgment, was not justified, the court could not act upon that view without more. The facts would need to be investigated on that footing, and the whole matter reopened. As things stand, such a course would not be admissible. The objection to the jurisdiction could not be taken unless it was patent or apparent on the face of the record. Affidavit evidence is no doubt admissible where it is sought to establish a latent or suggested defect, that is, where, for example, in the words which VISCOUNT SIMON, L.C., has quoted from *Colonial Bank of Australasia* v. *Willan* (4), there are [p. 443]: . . .

> . . . objections founded on the personal incompetency of the judge, or on the nature of the subject matter or on the absence of some essential preliminary . . .

Such and similar objections may, and generally can only, be taken by affidavit, because they are generally extrinsic to the matter impeached. There is nothing of the sort here.

It may be that in some cases there is a narrow line between matter proper for appeal and matter going to the jurisdiction. The narrowness of the line is illustrated by the difference of opinion in *R.* v. *Woodhouse* (10), where Vaughan Williams and Stirling, L.JJ., took one view on this matter, and Fletcher Moulton, L.J., another. In the present case, in my opinion, the line of demarcation is clear. I do not think the Court of Appeal could justify their decision without a complete reconstruction of the facts and evidence in the case, but that is not within their competence. There was no defect of jurisdiction apparent on the face of the proceedings.

The Court of Appeal suggested a construction of the definition of multiple lease contained in sect. 24 of the Act. I agree with Viscount Simon, L.C., in thinking that the relevant date is not the date when the lease was granted, but the date when the application to the court is made. The point has not been argued before us, and I am content, like Viscount Simon, L.C., to say here that the propositions included in the judgment of the Court of Appeal should not be regarded as settled law and I think the point must be treated as open for future decision. I agree that the appeal should be allowed.

Lord Porter: My Lords, I have had an opportunity of reading beforehand the speech delivered by Viscount Simon, L.C., and only add to what he has said in order to show why I find myself unable to accept the views of the Court of Appeal. So far as concerns the substantive matters dealt with by the county court judge and left undetermined by the Court of Appeal, I can find nothing wrong in principle with his decision, and on questions of fact your Lordships, like any other appellate tribunal, are bound by his findings, if they have evidence to support them. Save on one point, however, the Court of Appeal did not deal with his findings in fact or in law. They thought that the lease of the premises which they had to consider was not a multiple lease and that they therefore had no jurisdiction. As I understand their decision, they considered themselves able to deduce from the terms of the lease itself that, at the time at which it was granted, the premises were not used or adapted for use as two or more separate tenements. Accepting, without deciding, the argument that the date when the lease was granted is the proper time to determine whether or not the lease is a multiple lease, I still find myself unable to accede to their views. A multiple lease is in its very nature granted as one, not as a number of leases. To constitute it there must be premises used or adapted for use as two or more tenements, but the lease must be one. There may possibly be leases whose terms are so clear as to show that they cannot be multiple, though I find it difficult to envisage such a result, inasmuch as the buildings comprised in the lease might still be adapted for use as separate tenements, and I do not see how a court could reach a conclusion upon this point without evidence.

In the present case, there appears to be no ground for asserting that the premises were not at the time when the head-lease was granted in fact either used as two or more separate tenements or adapted for such use. Indeed, the county court judge found as a fact that the lease was a multiple one and he had inspected the premises. The Court of Appeal, I think, took the view that the county court judge arrived at his conclusion of fact by considering only the state of the premises when the war damage took place, and thought that, if he had considered the state of affairs on the granting of the lease, he must have arrived at a different conclusion. In this I think they were mistaken. I have been unable to find any evidence other than the wording of the lease, upon which this assumption could be based. The issue was not in controversy. There was no question of a collusive agreement between the parties to represent as a multiple lease that which in fact was not one, and the county court judge was satisfied. I agree that the appeal should be allowed.

Appeal allowed with costs.

Solicitors: *H. C. Morris, Woolsey, Morris & Kennedy* (for the appellants); *Waller, Neal & Houlston* (for the respondents).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

GATWARD *v.* GATWARD.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P.), **February 12, 26, 1942.**]

Divorce—Desertion—Non-cohabitation clause in magistrate's order—Deletion of non-cohabitation clause on application of wife—Application made for purpose of obtaining divorce—Whether desertion reconstituted.

In an undefended petition for divorce on the ground of desertion, it appeared that the petitioner was deserted by her husband in July, 1931, and that she had obtained a maintenance and separation order from magistrates in the following December. The order contained a provision that the petitioner should no longer be required to cohabit with her husband, but, in June, 1938, on an application by the petitioner, the magistrates made an order deleting this clause. At the time of the deletion of the non-cohabitation clause, the petitioner had no intention of returning to her husband, and she applied for its deletion so as to be able to obtain a decree of divorce at the expiration of 3 years. Though served with the proceedings, the husband made no attempt to resume cohabitation. The petitioner contended that the desertion, which ceased to run on the making of the original order, was reconstituted when the non-cohabitation clause was deleted in 1938:—

HELD: desertion was not automatically reconstituted by the deletion of the non-cohabitation clause, and it was necessary for the wife to prove further facts from which the court could infer that desertion had been reconstituted. In the present case, the husband's conduct since the deletion of the clause was sufficient proof that desertion had been reconstituted in 1938.

[**EDITORIAL NOTE.** This decision is in the nature of a warning. Desertion has proved a very difficult matter to define and is one of those things which can only be ascertained by a consideration of all the facts of any particular case. The deletion of a non-cohabitation clause from a magistrate's order, therefore, does not automatically cause the resumption of the desertion which ceased when that order was made. All the facts must be considered and it must be shown that the deserting spouse had no intention of resuming cohabitation at the time when it is suggested that the running of the period of desertion recommenced.

AS TO NON-COHABITATION CLAUSE IN MAGISTRATES' ORDER, see HALSBURY, Hailsham Edn., Vol. 10, p. 659, para. 969; and FOR CASES, see DIGEST, Vol. 27, pp. 319-321, Nos. 2978-2999.]

Cases referred to:

(1) *Cooper* v. *Cooper*, [1940] P. 204; [1940] 3 All E.R. 579; Digest Supp.

(2) *Harriman* v. *Harriman*, [1909] P. 123; 27 Digest 321, *2995*; 78 L.J.P. 62; 100 L.T. 557.

(3) *Boulton* v. *Boulton*, [1922] P. 229; 27 Digest 321, *2999*; 91 L.J.P. 157; 127 L.T. 558.

(4) *Mackenzie* v. *Mackenzie*, [1940] P. 81; [1940] 1 All E.R. 256; Digest Supp.; 109 L.J.Ch. 9; 162 L.T. 228.

(5) *Palmer* v. *Palmer*, [1923] P. 180; 27 Digest 275, *2452*; 92 L.J.P. 129; 129 L.T. 665.

UNDEFENDED PETITION by wife for divorce on the ground of desertion for at least 3 years immediately preceding the presentation of the petition.

C. A. Marshall-Reynolds for the petitioner.

MERRIMAN, P.: The parties were married on July 3, 1926. After the only child was born in 1931, the husband became indifferent and neglectful, and finally left the wife. On Dec. 18, 1931, the Epping justices, on the complaint of the wife, found that on July 27, 1931, the husband had deserted the wife, and that on and before Dec. 11, 1931, he had been guilty of wilful neglect to provide reasonable maintenance for her, both of which findings were fully supported by the wife's evidence before me. The justices ordered that the wife be no longer bound to cohabit with the husband, and that the husband should pay, through the collecting officer of the court on behalf of the wife, the sum of 10*s.* per week. The complaint itself was not produced before me, so I do not know whether or not it contained a prayer for a non-cohabitation order, but the wife herself told me that she did not desire a separation, but only an order for maintenance. She also told me, however, that she was fully aware that a non-cohabitation order had been made. Moreover, on Apr. 22, 1932, this order was varied, at the instance of the wife, and the husband was ordered to pay the sum of £1 10*s.* per week, instead of 10*s.* per week, but no attempt was made at that time to strike out the non-cohabitation clause. The husband was very irregular in making payments under these orders, nor was any attempt made on the part of either spouse to bring about a resumption of cohabitation. In these circumstances, on June 10, 1938, the Epping justices ordered that the non-cohabitation clause in the order of Dec. 18, 1931, "shall be no longer of effect and shall be from henceforth deleted from the said order." It appears on the face of the order of June, 1938, itself, that it was made on the application of the wife on the ground that the husband had, since the making of the 1931 order, at no time resumed, or attempted to resume, cohabitation and that the wife desired that in due course of law she might be enabled to obtain a divorce from the husband at the expiration of 3 years. It was proved that the husband had been served with the proceedings.

The wife, who seemed to me to be a perfectly candid and reliable witness, told me that, although she knew that so long as the original order subsisted, she was not obliged to take her husband back, she would nevertheless have been willing to do so, if he had made any overtures to her before she applied for the amendment of the order in 1938. She said, however, that, after she obtained the original order, she herself never offered to take him back because she "had tried so hard before that." She also said, in answer to a question by me, that the real trouble, as might be supposed, was that there had been another woman in the husband's life from the time of the original desertion, but no more specific evidence on this point was given. She also said that by 1938, when she applied for the amendment of the order, she had no intention of taking him back "after those many years."

On these facts it seemed to me at the hearing that the case required further consideration. It is quite clear, and I so hold, that the husband deserted the wife in 1931. It is equally clear that the desertion ceased to run on the making of the separation and maintenance order in Dec., 1931. It is not suggested that no separation order was in fact made, as in *Cooper* v. *Cooper* (1). It is possible that it was made by inadvertence, in the sense that it was made in disregard of the warning given in *Harriman* v. *Harriman* (2), and in many other similar cases; but this, again, was not the ground put forward for varying the order in 1938. Indeed, it would not have been easy to put forward this contention after the original order had been relied on by the wife for the purpose of obtaining a variation of the maintenance in her favour.

The wife's case before me was based solely upon the ground that the variation of the order in 1938 by deleting the non-cohabitation clause was, of itself, sufficient to reconstitute desertion. After so long an interruption, however, I do not think that the usual presumption of the continuity of desertion arises, and it seems to me that the effect of the deletion of such a clause on the quality of the separation between the spouses must depend on the circumstances of the case, including the length of time during which the separation order has been in force, and the conduct of the parties meanwhile. I should find it difficult to hold that, after a separation order has been in full force and effect for many years, and without any overtures on the wife's part towards a resumption of cohabitation, or any evidence of the husband's conduct to explain her not making any, desertion, while again becoming possible, is automatically reconstituted by the mere deletion of a non-cohabitation clause from the order; more especially when the express object of the variation is, not to facilitate a resumption of cohabitation, but to enable the wife to obtain a divorce after the lapse of a further period of 3 years, a form of application which might tend rather to induce a husband to stay away in the hope of obtaining his freedom than to resume cohabitation.

It is true that in *Boulton* v. *Boulton* (3), Horridge, J., held that a similar procedure enabled a wife to prove desertion which, coupled with adultery, entitled her to a decree of divorce. In that case no reasons were given for the decision, and, since the amendment of the order was made in the husband's presence, it may have been made, at the time, rather with a view to the reconciliation of the parties, who had only been married in the year preceding the original order, than for the sole purpose of reconstituting desertion. In *Mackenzie* v. *Mackenzie* (4), the Court of Appeal, holding that the existence of a separation order during the three years immediately preceding the presentation of the petition precluded the wife from alleging desertion for the statutory period prescribed by the Matrimonial Causes Act, 1937, discussed the possibility of adjourning the petition so that the magistrates might strike out the non-cohabitation clause with retroactive effect. This suggestion was not pursued, but it appears to have been assumed that no difficulty would have arisen if the clause had been struck out before the currency of the statutory period. It was also assumed that the non-cohabitation clause had been left in the order by inadvertence, i.e., in the sense that it was included carelessly, in disregard of the warning in *Harriman* v. *Harriman* (2), and there was nothing in that case comparable to the subsequent ratification of the order which occurred in this case.

On the other hand, the mere fact that, in a certain event, the wife in applying for a variation contemplates the reconstitution of desertion with a view to divorce cannot, of itself, be fatal. The analogy to a suit for the restitution of conjugal rights is not complete, since to entitle a wife to such a decree she must be prepared to satisfy the court that she is genuinely desirous of resuming cohabitation. If so, the fact that she may contemplate founding divorce proceedings in the event of the husband's non-compliance with the order is no answer to a decree for restitution (*Palmer* v. *Palmer* (5)). From the moment when the non-cohabitation clause is deleted from an order, a husband could demand resumption of cohabitation unless there was something in his previous conduct which would justify the wife in refusing to resume cohabitation at all, or to refuse to do so unless she were given reasonable assurance that whatever misconduct, other than mere desertion, had given just cause of complaint, would not be repeated. Manifestly, if there was nothing more than mere desertion, the bare lapse of time would be no bar to the husband's overtures, for that would be accounted for by the existence of the order. In the event, therefore, of a genuine attempt by this husband to resume cohabitation after the deletion of the non-cohabitation clause from the order, the wife would either have been obliged to comply, or to justify her refusal by some grave and weighty reason. One may fairly apply to the variation of the order the observations of SIR HENRY DUKE, P., on a restitution decree in *Palmer* v. *Palmer* (5), at p. 183 :

> The making of the decree if it has its proper legal effect of a return to cohabitation on the part of the husband will be an impediment to her right subsequently to apply for a divorce on any ground now known to her.

In other words, even though she may not have desired it, the wife took the risk of bringing about a state of things in which she might have been obliged to resume cohabitation. Though the husband was served with the proceedings, he has made no attempt to resume cohabitation. Having regard to the fact that I feel myself able to place implicit reliance on the wife's evidence, though, as I have said, it was deficient in particularity, I am prepared to hold that this is not merely because the wife announced her hope of obtaining a divorce, but because there were very good reasons which debarred him from doing so. Therefore, although I think that the case is very near the line, I am prepared to pronounce a decree *nisi*. I hope that I have said enough to make it clear that, in my opinion, a petitioner takes a risk if she relies solely on such a variation of a separation order without being prepared to give evidence of other facts from which the court can infer that, after the variation, desertion has been constituted afresh, and has continued for the statutory period.

Decree nisi granted.

Solicitor : *J. C. L. S. Sharman.*

[*Reported by* D. ARMSTEAD FAIRWEATHER, ESQ., *Barrister-at-Law.*]

Re AMAND.

[Court of Appeal (Lord Greene, M.R., and MacKinnon and Goddard, L.JJ.), **March 9, 19, 1942.**]

Criminal Law—Appeal—Criminal cause or matter—Arrest as deserter from allied forces conscripted in England—Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), *s.* 31.

A Netherlands subject who had resided in England for a number of years was called up for service in the Netherlands army in England. At the expiration of a period of leave, he failed to return to duty and was arrested as a deserter under the Army Act, s. 154, as applied by the Allied Forces Act, 1940, and an order in council made thereunder. He applied for a writ of *habeas corpus* on the ground that his conscription into the Netherlands army, and, therefore, his arrest as a deserter from it, were unlawful. On his appeal against the refusal of this application, the preliminary point was taken that, the appeal being in a criminal cause or matter, the court had no jurisdiction to entertain it by reason of the Supreme Court of Judicature (Consolidation) Act, 1925, s. 31 :—

Held : the appeal related to a criminal cause or matter and was accordingly incompetent under the Supreme Court of Judicature (Consolidation) Act, 1925, s. 31.

[**EDITORIAL NOTE.** In the Divisional Court, this case raised important questions of constitutional law, but, in the Court of Appeal, the matter was stopped *in limine*, since it is held that it is a criminal cause or matter, in which case there is no appeal to the Court of Appeal. It was here said that the appellant's contention was that he never was a member of the Netherlands forces and that, in any event, all that the Netherlands authorities were asking was that the man should be returned to his unit and that they were not asking that he should be punished. This argument is not accepted, and it is shown that the man was liable to be arrested, to be tried before a criminal court, and, if that court found the facts proved, to be remanded to military custody for the purposes of a trial. The whole purpose of the Allied Forces Act is to provide punishment for disciplinary offences.

As to Criminal Cause or Matter, see HALSBURY, Hailsham Edn., Vol. 9, pp. 740, 741, paras. 1261, 1262 ; and for Cases, see DIGEST, Vol. 14, pp. 551-554, Nos. 6271-6298.]

Cases referred to :

(1) *Re Clifford & O'Sullivan*, [1921] 2 A.C. 570 ; 39 Digest 341, *269* ; 90 L.J.P.C. 244 ; 126 L.T. 97.

(2) *Ex p. Woodhall* (1888), 20 Q.B.D. 832 ; 16 Digest 270, *795* ; 57 L.J.M.C. 71 ; 59 L.T. 841.

(3) *Seaman* v. *Burley*, [1896] 2 K.B. 344 ; 14 Digest 553, *6289* ; 65 L.J.M.C. 208 ; 75 L.T. 91.

(4) *Provincial Cinematograph Theatres, Ltd.* v. *Newcastle-upon-Tyne Profiteering Committee* (1921), 90 L.J.K.B. 1064 ; 14 Digest 552, *6284* ; 125 L.T. 651

(5) *R.* v. *Army Council, Ex p. Sandford*, [1940] 1 K.B. 719 ; [1940] 2 All E.R. 372 ; Digest Supp. ; 109 L.J.K.B. 163 ; L.T. 231.

Appeal by Jean Jacques Amand against an order of the Divisional Court (Wrottesley, Croom-Johnson and Cassels, JJ.), dated Jan. 30, 1942, reported [1942] 1 All E.R. 256, refusing his application for a writ of habeas corpus. The facts are fully set out in the report of the hearing in the court below.

Rt. Hon. Sir Patrick Hastings, K.C., G. O. Slade and *Victor Wolff* for the appellant.

C. T. Le Quesne, K.C., and *J. B. McClure* for the respondents, the Netherland Ministry of Defence.

The Attorney-General (*Rt. Hon. Sir Donald Somervell, K.C.*), and *Hon. H. L. Parker* for the Secretary of State for Home Affairs.

The Attorney-General : Under the Supreme Court of Judicature (Consolidation) Act, 1925, s. 31, no appeal, except as there stated, lies in any criminal cause or matter. The terms "cause" and "matter" are defined by sect. 225 of that Act. In *Re Clifford & O'Sullivan* (1) the matter was held not to be a criminal cause or matter and the requirements of a criminal cause or matter are there laid down. In *ex p. Woodhall* (2) a person had been committed to prison under the Extradition Act, 1870, s. 10, and it was held to be a criminal cause or matter. In *Seaman* v. *Burley* (3) an order made by justices to enforce payment of a poor rate was held to be a criminal cause or matter inasmuch

as the proceedings before justices might end in imprisonment of the person in default. In *Provincial Cinematograph Theatres, Ltd.* v. *Newcastle-upon-Tyne Profiteering Committee* (4) the decision of the profiteering committee to institute a prosecution was held to be a step in a criminal cause or matter. In *R.* v. *Army Council, ex p. Sandford* (5), it was held that the Court of Appeal had no jurisdiction to deal with an appeal from an application asking for an order of *mandamus* to perform a duty in a criminal cause or matter. In the
A present case there was a charge to be proved against the applicant who is charged with being a deserter or absentee without leave from the Netherlands Army. By reason of the Allied Forces Act, 1940, that charge is a criminal cause or matter.

Hastings, K.C.: The appellant says that he never was a member of the Netherlands forces and the question is whether or not the court will say that a decision upon that point is a criminal cause or matter. It would be perfectly possible
B for this matter to be decided by other forms of proceedings. An action could be brought for unlawful arrest. That could not be a criminal cause or matter. If the appellant were successful the Netherlands Government would presumably release him. What the Allied Forces Act, 1940, does is to give to the Netherlands authorities certain rights under the Army Act, 1881, s. 154. Nothing in that section deals with punishment. It merely entitles the Netherlands authorities to
C call in aid the civil authorities in England to apprehend somebody at their request. There is nothing to show that a person can be made subject to any penalty whatever. *Re Clifford & O'Sullivan* (1) shows that for a matter to be a criminal cause or matter it must involve a charge of crime. In the present case, there is no evidence that being an absentee from the Netherlands army is a crime. There is nothing upon which the court can say that there is any offence against public law involving the nature of a crime. The Netherlands Govern-
D ment simply asks that the appellant be returned to his unit. According to the law of England any foreign government is entitled to make any law it likes with regard to its own nationals and their property within that government's jurisdiction. The power, however, is limited to its own jurisdiction. An order that a Netherlands subject should report to the colours creates in itself no offence at English law should he fail to report. If the Allied Forces Act, 1940, has created no offence known to English law, it is necessary to see if there is any statutory
E authority which makes what the appellant has done an offence against English law. In order that a thing can be said to be in a criminal cause or matter, it must be a criminal cause or matter within the definition given by VISCOUNT CAVE in *Re Clifford & O'Sullivan* (1) and involve an offence against English law. The Netherlands decree is ineffective in English law. The appellant has committed no offence against English law, unless it is possible to find one in the
F Allied Forces Act, 1940, s. 1. That, however, gave the Netherlands Government no power to make the decree under which the appellant has been conscripted. There is nothing in the Act which does more than empower the Netherlands authorities to enforce their own military law over their own soldiers.

GODDARD, L.J. [delivering the judgment of the court]: By the Allied Forces Act, 1940, s. 1 (1), it is provided, to quote only the relevant words, that when any military forces of any foreign power allied with His Majesty are,
G for the time being, present in the United Kingdom, the military courts and authorities of that power may, subject to the provisions of the Act, exercise within the United Kingdom in relation to members of those forces in matters concerning discipline and internal administration all such powers as are conferred upon them by the law of that power. Sect. 1 (3) provides for the application by order in council of certain sections of the Visiting Forces (British Commonwealth) Act, 1933, to any such forces, subject to such adaptations,
H modifications, and exceptions as the order may provide. Sect. 3 provides for the application by order in council of the Army Act to the forces of such powers, so that authority is given to British courts-martial to try members of those forces, and sect. 3 (2) contains provisions for ensuring that a soldier shall not be punished for the same offence both by a court of the power to which he belongs and by a court-martial established under the Army Act. Clearly, therefore, one object of the Act is to provide for the trial of members of the allied forces by courts-martial, established either under the law of their state or under the Army Act. By the Allied Forces (Application of 23 Geo. 5, c. 6)

(No. 1) Order, 1940, His Majesty was pleased to apply to the forces of the Netherlands, among other powers, certain provisions of the Visiting Forces (British Commonwealth) Act, 1933, including sect. 3, with certain adaptations and modifications. Under that section of the 1933 Act, and subject to its provisions, paras. (1)-(4) and (9) of sect. 154 of the Army Act are applied in relation to a deserter or absentee without leave from any force to which the section applies as they apply to a member of a home military force, and it also provides that no person who is alleged to be a deserter shall be apprehended or dealt with under the section, except in compliance with a general or specific request from his government, and that a person so dealt with shall be handed over to the authorities of that government. We may also mention, as some point was sought to be made of it, that it is provided that a certificate under the hand of the secretary of the Army Council that such a request has been made shall be admissible without proof as evidence of the making of the request, and also that a document purporting to be a certificate of an officer commanding a unit or detachment that a named and described person was at the date of the certificate a deserter or absentee without leave shall be admissible without proof as evidence of the fact so certified. It will be observed that this last-mentioned certificate, no more than the former, is not made conclusive evidence. It is evidence that A.B. is a deserter, but the person apprehended can show by way of defence that he is not the person named in the certificate or that he is not in fact a deserter, or that he was absent on leave or on some particular duty or any other fact that would displace the evidence afforded by the certificate. On Mar. 12, 1941, a certificate was issued under the hand of the secretary of the Army Council that a general request had been made by the officer commanding the Netherlands military forces in the United Kingdom that any person alleged to be a deserter or absentee without leave should be apprehended and dealt with under sect. 3, and on Mar. 13 an officer of the Netherlands army certified that Private J. Amand was a deserter or absentee without leave and requested his arrest, and that he be handed over to a military escort for necessary return to his unit. On Mar. 15, Amand, who had been arrested by a police officer, was brought in custody before the late chief magistrate at Bow Street Police Court, who, on being informed that Amand had already made an application for a writ of *habeas corpus*, remanded him on bail. In the court below the case was argued on the assumption that the applicant was still in the custody of the police officer, and before us the question was raised whether it is open to a person, who has been arrested with a view to being brought immediately before the appropriate court where the question of the legality of his arrest can be heard and determined, to apply for a writ of *habeas corpus* before the court has given its decision, but, since this court has no jurisdiction to entertain an appeal relating to a judgment or order in a criminal cause or matter, we give no opinion on this point. Were we to do so, we should be expressing an opinion on a matter which this court is precluded by statute from entertaining.

At the conclusion of the argument we intimated that, in our opinion, the appeal related to a criminal cause or matter and was accordingly incompetent under the Supreme Court of Judicature (Consolidation) Act, 1925, s. 31, and we will now state our reasons for so holding. The relevant section of the Army Act applicable to the case by the operations of the Acts and order in council, to which we have already referred, is sect. 154, paras. (1)-(4) and (9). Under para. (2) a justice may, on a sworn information, issue a warrant for the apprehension of such a person. By para. (3), where a person is brought before a court of summary jurisdiction, the court may deal with the case in like manner as if he were charged with an indictable offence, and by para. (4) the court, if satisfied by evidence on oath or by confession, that the person is a deserter or absentee, may forthwith deliver him to military custody or commit him to prison or other place of legal custody for the purpose of delivering him to military custody. Para. (9) deals with the special case of a deserter or absentee surrendering himself to the police and is immaterial to the present case. It seems clear, therefore, that, if a person taken into custody, either under para. (1) or para. (2), is brought before a court, he can raise the issue that he is not a deserter or absentee. The court must then proceed under the Indictable Offences Act, 1848, and take depositions. If the court is satisfied, it cannot sentence the prisoner any more than it could sentence a person charged with an offence beyond the jurisdiction of justices to hear and determine. It commits him to military custody for the purpose of his trial by military law, just as a civilian prisoner would be committed to assizes or quarter sessions. Being thus committed the prisoner will be dealt with for the offence by the appropriate military tribunal, whether it be his commanding officer, or a court-martial. It is indeed difficult to see why a matter which begins with an arrest by a constable, with or without warrant, followed by appearance before a criminal court, which can deal with the case under the Indictable Offences Act, 1848, and which may result in the prisoner being remanded to military custody for the purpose of trial, is not a criminal matter. Counsel for the appellant contended that there was no evidence that desertion or absence without leave was an offence in a soldier of the Netherlands, and that all that the military authority of that power had asked was that he be returned to his unit. We do not think that this court is bound to require formal proof that a soldier deserting or absent without leave from his unit in time of war is guilty of an offence against the military law of his country. It would indeed be the height of artificiality to require such proof. The whole purpose of the Allied Forces Act, 1940, is to enable military courts of foreign allied powers, whose troops are in this country, to deal with their soldier nationals for disciplinary purposes. The Act is dealing with military courts, offences and punishments. A foreign military court is empowered to sit and act in this country, and the provisions of the Army Act and the assistance of English courts and procedure are made available to assist them in exercising the jurisdiction thus conferred. Thus, we have the consideration of a crime and a charge preferred before a court exercising criminal jurisdiction. The English court in effect commits the accused person for trial before the foreign court-martial, which is empowered to act in this country, and that court will hear and determine the charge. Thus the requirements as to its being a criminal cause or matter laid down by VISCOUNT CAVE, in *Re Clifford & O'Sullivan* (1) are amply fulfilled. It was laid down by LORD ESHER, M.R., in *ex p. Woodhall* (2), that the words "criminal cause or matter" should receive the widest possible interpretation, and we have no doubt that the order of the Divisional Court on the application for a writ of *habeas corpus* in the circumstances was made in a criminal cause or matter, and consequently no appeal lies to this court from that decision.

Appeal dismissed with costs. Leave to appeal to the House of Lords.

Solicitors: *Gisborne & Co.* (for the appellant); *Stephenson, Harwood & Tatham* (for the Netherlands Ministry of Defence); *Treasury Solicitor* (for the Secretary of State for Home Affairs).

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

DAWSON *v.* MUREX, LTD.

[COURT OF APPEAL (Lord Greene, M.R., and MacKinnon and Goddard, L.JJ.), **February 19, 20, 23, 1942.**]

Factories—Provisions for safety—Lifting tackle—Chain sling—Chains of unequal length—Sprung hooks—Factories Act, 1937 (c. 67), *s.* 23 (1) (*a*).

Negligence—Proof of negligence—Plaintiff not bound to show how accident happened—Reliance on expert evidence.

The appellants, for the purpose of loading a furnace for the refining of raw blister copper, used trays which were hoisted and conveyed from one part of the factory to another by a sling of 4 chains attached to the tray by a hook passing through an eye in a lug at each of the 4 corners of the tray. The men in charge of this work, when such a sling became defective, rigged up a sling out of two others. This sling was defective in that the chains were of unequal length and the hooks were sprung so that they did not hold the trays so tightly as they should. It was used to lift three empty trays, the hooks being passed through the eyes in the lugs of the bottom tray. The top tray slipped out of the sling, fell and injured the respondent. The appellants said that they had provided proper tackle and instructed their workmen to use that proper tackle and to fetch a new four-legged sling from the shop and that, instead of doing that, the workmen negligently and wrongfully made up the makeshift tackle which was used. The appellants contended that, in these circumstances, they had committed no breach of the Factories Act. Neither side called any of the men engaged on the job when the accident happened and the plaintiff and defendants both relied upon expert evidence :—

Held : (i) the Factories Act imposed upon the appellants certain obligations with regard to the provision of safe apparatus, plant, etc., and they could not excuse themselves from the performance of those obligations by saying that the use of inadequate or dangerous plant was due to the fact that a foreman or a supervisor failed in his duty to see that it was not used. A

(ii) in an accident case, the plaintiff is not called upon to prove precisely how the accident happened. Where the plaintiff by competent evidence shows that his explanation of what happened is the more probable one, the judge is entitled to accept his case and find in his favour.

Decision of Hilbery, J. ([1941] 2 All E.R. 784) *affirmed.*

[**EDITORIAL NOTE.** This is a useful case from a practical point of view. Neither side found it possible or practicable to call the men present when the accident happened and the case was tried solely on expert evidence. All the judges agree that the experiments and evidence for the defendants proved too much, for, if taken at their face value, they showed that the accident never happened at all. The balance of probability was, therefore, that the plaintiff's case was the better explanation of what happened, and all the judges have agreed that it must be accepted. The case is, therefore, of much importance to those called upon to advise on evidence where it is not possible to call those present at the time of the accident. It will be noted that the question whether the appellants were liable at common law was not argued on the appeal, but the Court of Appeal seem to have some doubt whether the conclusion that they were not liable would have been upheld. B C

As to Provisions for Securing Safety, see HALSBURY, Hailsham Edn., Vol. 14, paras. 1130-1144 ; and for Cases, see DIGEST, Vol. 24, pp. 908-912, Nos. 62-84.]

Appeal by the defendants from a judgment of Hilbery, J., dated July 7, 1941, reported [1941] 2 All E.R. 784, where the facts are fully stated. D

Russell Vick, K.C. and *R. Marven Everett* for the appellants.

F. A. Sellers, K.C. and *John Thompson* for the respondent.

Lord Greene, M.R. : This is not an easy case. It is made the more difficult by the fact that neither side called the two witnesses, one or other or both of whom could have thrown a great deal of light on the cause of this accident. The circumstance that those witnesses were not called must, I think, tell more hardly against the respondent to the present appeal than against the appellants, because it was for the plaintiff to prove the necessary causal connection between the defect in the plant and the accident. Those were the witnesses who, of their own knowledge, could have spoken of the exact state in which the tackle and the trays were at the moment immediately preceding the accident. Neither of them was called, and this court is left, as Hilbery, J., was left, with the problem of resolving a question of fact of considerable difficulty on nothing but expert evidence. Hilbery, J., after a very careful hearing, reserved his judgment, and his judgment shows, upon the face of it, the very great attention which he paid to the problem before him. He states the facts with lucidity, and I do not propose to repeat them. On a review of the whole of the evidence, he came to the conclusion that the respondent had established a breach of statutory duty and the necessary causal connection between that breach and the accident. This court, of course, can and does review the whole of the evidence, but, speaking for myself, I should not feel justified in a case of this kind in taking a different view from that taken by the judge unless I had a strong conviction that his conclusion was a wrong one. After paying very careful attention to what has been said on both sides and after considering the evidence with care and re-reading the more important passages in it, I have come to the conclusion that this court ought not to interfere with the decision of the judge. Moreover, I think that I should have come unaided to the same conclusion. E F G H

The respondent's case was based on two alternative grounds ; one, a breach of the appellants' duty at common law ; the other, a breach of their obligations under certain provisions of the Factories Act, 1937. The part of the case which deals with the common law claim has not been discussed before us. The judge found that there had been no breach of the common law obligation of the appellants towards their workmen, and he based that on a finding that the negligent use of the tackle in question was mere casual negligence on the part of the employees responsible and not such a breach of duty on the part of the employers as to displace the application of the doctrine of common employment. As that matter has not been argued before us, I propose to express no opinion, one way or the other, as to whether I should agree with the judge's view that it was a case of mere casual negligence. I must, however, refer to that particular finding because counsel for the appellants endeavoured to make use of it in another connection, which will presently appear.

A The provision of the Factories Act, 1937, which comes in question is sect. 23 (1) (*a*), which provides as follows :

> The following provisions shall be complied with as respects every chain, rope or lifting tackle used for the purpose of raising or lowering persons, goods or materials : (*a*) no chain, rope or lifting tackle shall be used unless it is of good construction, sound material, adequate strength, and free from patent defect . . .

The tackle that was used in this case was a makeshift combination of two B pieces of apparatus, the first being what was left of the old four-legged tackle, and the second being a three-legged tackle of larger dimensions and greater weight. The four legs required for lifting the trays were obtained by using four out of an aggregate of five good legs. The necessary adjustments in length were made by knotting the chains in order to make all the legs approximately of equal length. Of the five available hooks, of which, of course, only four would be used in any operation, only one was in a really satisfactory condition, the C other four being sprung. The effect of that springing was described by Walker, the expert called on behalf of the respondent, and the judge was satisfied upon that evidence, that the hooks were in a defective condition. The judge found that the lifting tackle used in this case was not free from patent defect, and, indeed, on the evidence, he could have come to no other conclusion. There is no serious dispute as to that finding, except that counsel for the appellants made D it clear that, so far as the hooks were concerned, he had made and did make no admission.

The great controversy turns on the question whether or not the respondent established the necessary causal connection between the defect in the tackle, which constituted a breach of statutory duty on the part of the defendants, and the accident. In the absence of direct evidence, which could have been given by the witnesses to whom I have referred, the matter becomes in an acute E way a question of probabilities. We start with this circumstance. This particular shop had been in operation for something over six months. The plant in question was working continuously night and day. How many journeys the crane would have made in that time carrying trays backwards and forwards to the platform it is impossible, in the absence of evidence bearing on that matter, to say, but that they must have been extremely numerous is obvious. The makeshift tackle in question had been in use from 9 p.m. on the Friday F until 8 a.m. on the Monday, when the accident happened. Those two facts certainly predispose the mind to find a causal connection between the then quite recent use of this defective tackle and the accident. Taken by itself, it would be much too flimsy a foundation upon which to construct any satisfactory proof, but I mention it because it seems to me, at any rate, to point in one direction. As I have said, the court has to depend on the evidence of expert G witnesses. In the course of the trial, certain experiments took place in the presence of Walker, the respondent's expert, and Blenkinsop, the appellants' manager. There had been earlier experiments conducted by the appellants, but nobody representing the respondent was present. The result of those experiments on the appellants' case really comes to this. Everybody concerned was trying as hard as they could, by making various adjustments and going through a number of different combinations, to cause one of the three trays to H slip out of the sling. This they entirely failed to do, and the experiments, if they really proved anything, would appear rather to prove that this accident never happened at all. However, the accident did happen, and the case as presented by counsel for the appellants, comformably to what the experiments showed, was that the accident took place through bad slinging, with or without bad stowing, the bad slinging consisting of attaching in a proper and secure manner only two of the hooks to the lugs, with the result that at the moment before the accident happened the three trays were held suspended by only two hooks situated diagonally to the load. That theory is one which, as I say, is to a considerable extent in conformity with the result of the experiments, because it was only when only two hooks were in operation, in the way I have described, that a situation could be produced in which a tray nearly slipped out. It did not quite slip out, although, but for a fortuitous circumstance, it would have slipped out. Of course, if the true view is that this accident happened solely because of careless slinging or careless loading or both, and that the state of the tackle formed no element in the causation of the accident, the appellants would be entitled to succeed. However, the experiments appear to me to prove too A much, and I share the feeling which the judge had with regard to the usefulness of those experiments. Inanimate objects have an exasperating way of not doing what you want them to do, and, however carefully and conscientiously human beings may endeavour to reconstruct an accident, it is obviously impossible that the most careful experiments can, in a case of this kind, be sure of reproducing that exact combination of strain and stresses and positions which existed at the moment of the accident. Therefore, although weight must, of course, B be given to what the experiments disclosed, I for one cannot attach to them, in the circumstances of this case and in the light of the other evidence, any such importance as to produce the result for which counsel for the appellants contends.

The experts called on behalf of the appellants had a variety of theories—bad stowage, bad slinging, a combination of the two, a combination of those with a blow against a rail—but they were all quite certain (and I have no doubt, of C course, that they were expressing a perfectly honest opinion) that the defects in the tackle had nothing in the world to do with this accident. Having regard to the length of time during which the proper tackle had been safely used, having regard to the shortness of the time during which the defective tackle had been in use, and having regard to the fact that both the craneman and the loader were admittedly experienced men, I should have approached that evidence given by the appellants' experts with a certain amount of scepticism, particularly D because, as I say, the experiments proved too much. On the other side was the evidence of Walker. In reading that evidence, I was impressed by the lack of dogmatism about it, just as I was impressed by the matter on which he was most insistent—namely, the effect of the difference in length of chains and the springing of the hooks. There was one further matter, to which the judge does not in terms refer, which also impressed me, and that is the circumstance that, in Walker's view, the difference in length of the chains, coupled with the sprung E condition of the hooks, made it more important to give particular care to the loading of these trays. The reason of that was that the chains were of uneven length, and, particularly if the hook of the longest chain slipped out of the hole in the lug, which it might very easily do, a condition of unstable equilibrium would be produced. When a load of this kind is being transported, such a condition is, on the face of it, an element of danger. As I read his evidence, F Walker was really putting before the court the view that the accident probably happened through a combination of those three things: the inequality in the length of the chains, the sprung condition of the hooks, and possibly, but not necessarily, the addition of a lack of particular care in the loading of the trays. If the first two elements formed part of the cause of the accident, the circumstance that a further element, which is no breach of the Factories Act (namely, careless loading) existed would not, of course, relieve the defendants from their G statutory liability. As I have said, Walker visualised the possibility that, when the strain was taken by the crane, the long leg of the tackle would hang loose, that that would very likely cause its hook to come out of the hole, particularly if the hook was sprung, which would alter the position of the centre of gravity in relation to the load, and leave the whole thing in a state of unstable equilibrium. If I read his evidence aright, one further result might be that the hook diagonally opposite to the one which he assumes has come out of its hole H might also come out, particularly if it had not been properly pressed in. In that event, the whole thing would swing about a diagonal, and, in his view, a tray might have slipped out. Counsel for the appellants criticises that view of the possibilities and criticises it in a way which he is perfectly entitled to do. He says that even with these uneven chains, and even when there are only two diagonally opposite chains in operation, the lugs on the top tray will bear on the chains and prevent the tray slipping out. No doubt that would be so if you got the right combination to produce that result; but supposing the trays are not properly stacked, a different result would obviously follow. Indeed, even in the experiment which took place, it was more or less an accident that the chain did bear on the lug. In the picture which Walker presents as a reasonable possibility the state of affairs is brought about not by mere careless loading and careless slinging (which, in the case suggested by counsel for the appellants, would lead to a suspension from two points only), but by the fact that the two-point suspension, if it came about, was due initially to the extra length of one leg which made it much easier for the hook to slip out, particularly if the hook was sprung.

We are, of course, in regions of great doubt and difficulty, but I must confess that, after the most careful consideration that I can give to this case, I have come to the conclusion that the balance of probability is in favour of the respondent's allegation that one of the causes of this accident was the condition of the tackle. In dealing with a case of this kind where, as Walker said (indeed, it is not disputed) the possible combinations are legion, it is not possible for any one to assert with confidence that some particular combination existed which led to the accident, nor is the burden of proof upon the plaintiff in a case of this kind so severe as to require him to establish his case with that degree of exactitude. He points to circumstances, as explained by competent evidence, which point to a probability that his explanation is the more reasonable one. In those circumstances the judge was perfectly entitled to accept that case and, as I said at the beginning of this judgment, I not only do not feel that I could interfere with his conclusion, but it is one to which, after very careful consideration, I myself would come.

I must say a few words with regard to a question of law which was raised by counsel for the appellants. He said that, assuming the question of fact was decided against him, it was his contention that this makeshift tackle was not provided by his clients, that they had provided proper tackle, that they had instructed the workmen to use that proper tackle and to fetch a new four-legged sling from the shop, that the workmen had negligently and wrongfully made up this makeshift tackle, and that in those circumstances there is no breach of the Factories Act by the employers. I am not going to discuss the question to what extent, if any, an employer is relieved from liability for a breach of the Factories Act in the matter of the provision of tackle or apparatus where he has in fact provided proper apparatus but, owing to some stupid or interfering act or careless act by one of the workmen, tackle at some particular moment is in a defective condition without the employer having a chance of knowing it. That case and the present one are not identical, and I say nothing about it. In the present case the tackle was being used under the eye of a supervisor whose job it was to superintend the work in the shop. From 9 p.m. on Friday until 8 a.m. on Monday, when the accident occurred, tackle which did not comply with the provisions of the Factories Act was being used under the eye of the foreman. In those circumstances it seems to me that the Factories Act would be as full of holes as a sieve if the employer could say that he was not responsible for the presence and use in his factory of apparatus or tackle which did not comply with the Act. It was here that counsel for the appellants relied on the judge's finding on the claim at common law to the effect that the negligence which led to the use of this defective tackle being, not merely negligence of the man who rigged it up and used it, but negligence of the foreman who allowed it to be used—was a mere casual piece of negligence for which the employer could not be held responsible at common law. Whatever the true view be of the position at common law, I am quite clearly of opinion that that finding is of no assistance to the appellants when the question is one of compliance with the Factories Act. Under the Factories Act, the employer has certain obligations put upon him with regard to the provision of safe apparatus, plant and so forth, and he cannot excuse himself by saying that the use of inadequate plant or dangerous plant was due to the fact that a foreman or a supervisor failed in his duty in seeing that it was not used. In the result, in my opinion, the appeal must be dismissed.

MACKINNON, L.J.: I agree. The tackle in question in this case was made up from two sets of chains, and this makeshift tackle from these two sets was admittedly defective and did not satisfy the requirements of the Factories Act. When it was being used, a tray fell from the loaded sling and severely injured the respondent. In order that the respondent may recover damages, he must prove that the nature of the apparatus was the cause of the falling of this load. No evidence was called by either the plaintiff or the defendants to show how the chains were attached to the loaded trays, how they were raised by the crane, or whether, when raised by the crane and being transported, they or any part of them hit any obstacle. Neither the man who attached the chains to the trays nor the craneman was called as a witness on either side. The only evidence on these matters on behalf of either of the parties was that of expert witnesses. The expert for the respondent said as a matter of scientific theory that, by reason, first, of the varying lengths of the chain in this makeshift set and, secondly, of the splaying open of one or two of the hooks, a hook might slip out of its lug and this might cause one of the trays to fall. He thought it especially possible that the hook diagonally opposite the one which first slipped out also slipped out, and left the load dependent upon two diagonal chains only. The experts for the appellants disputed these propositions. On this conflict between them it was open to the judge, as it is to us, to prefer one view to the other. If one starts with the admission that the chain apparatus was in breach of the requirements of the Factories Act, I think one is entitled to assume, *prima facie*, that the resulting disaster was the effect of that breach, when the appellants called no evidence to prove the contrary. However, the experts for the appellants, besides disputing the theory of the respondent's expert, gave evidence of a number of experiments, and it is said that these went to prove that the disaster could not have happened by reason of the inequality in the lengths of the chains and the width of the hooks and those other matters, that, if it could not have so happened, it must have been the result of another cause, and that other cause, they said, could only have been the inefficient and improper way in which the man making up the load attached or failed to attach the hooks to the lugs. Although the appellants called neither this man nor any other man to prove that he had so erred or failed, they ask for a conclusion that he did so err or fail by reason of this uncontradicted evidence of the experiments. As regards those experiments, I am not impressed, nor am I impressed by this reasoning. I think I am entitled to infer that the condition of the load which caused the fall of this loaded tray is one which is very rare and one not likely to be reproduced by a very great number of experiments. There were not a very great number in this case. No doubt the experts did honestly try to the extent to which they did make a number of experiments to produce the desired result. I do not think the experiments of the appellants' experts disprove the theory of the respondent's expert—namely, that the condition of the chains might have caused the fall, even if the man doing the loading did his best to use the defective apparatus with all reasonable care. If that be so, then, first, the chains being admittedly in breach of the requirements of the Act, and, secondly, there being some evidence of the respondent's expert that this inadequacy could cause the disaster, I think that the judge was justified in holding that the respondent had proved his case. I think that not only was the judge justified in coming to that conclusion, but that he was right in doing so.

Goddard, L.J.: I am quite satisfied that the judgment of Hilbery, J., was right, and I find myself in agreement with the reasoning expressed by Lord Greene, M.R. I would like to emphasise, however, that this court is not expressing any opinion upon the point which Hilbery, J., decided in favour of the appellants—namely, that there was no common law liability. We have not had any argument put before us on that matter, and it was not necessary to give a decision upon it, but I am by no means satisfied that on that point the judge was right.

Appeal dismissed.

Solicitors: *E. P. Rugg* (for the appellants); *Rowley, Ashworth & Co.* (for the respondent).

[*Reported by* W. K. Scrivener, Esq., *Barrister-at-Law.*]

MORGAN *v.* AYLEN.

[KING'S BENCH DIVISION (Cassels, J.), **February 28, 1942.**]

Negligence—Contributory negligence—Act in emergency—Person escorting child running into highway to save child from danger.

The plaintiff was escorting a child of 3½ years back to his home. She had done this on a number of previous occasions, and, when they approached the place where they were accustomed to cross a certain road, which was near the junction of that road with two other roads, the child, who was a little way ahead of the plaintiff, began to cross the road by himself. The defendant was then driving towards the road junction on his motorcycle at a speed of over 20 m.p.h., and was about five yards from the child when the child began to cross the road. The plaintiff ran into the road to rescue the child and was struck by the motorcycle and injured. The defendant alleged that the plaintiff was guilty of contributory negligence:—

HELD: the plaintiff was not guilty of contributory negligence. In the emergency it was natural and proper for the plaintiff to go to the rescue of the child.

[**EDITORIAL NOTE.** "The maxim [*volenti non fit injuria*] has no application where the defendant, by his misconduct, places a third person in imminent peril from which the plaintiff, acting like a reasonably courageous person, endeavours to rescue him and is injured in consequence." Professor WINFIELD, in the second edition of his CASES ON THE LAW OF TORT, published last year, thus states the principle of the decision in *Haynes* v. *Harwood* (1). The American rule was stated some years ago by Professor GOODHART and is quoted in the judgment herein, and, indeed, it was the basis of the judgment in *Haynes* v. *Harwood* (1). In that case a policeman seized a runaway horse at great peril to himself in order to save a woman and many children who were in danger of injury. The present case is rather different, since the rider of the motorcycle, even if he was travelling at too great a speed in the circumstances, had control of the machine and might—in fact it was proved that he would—have avoided colliding with the child, though in doing so he collided with the rescuer. There is a distinction between the danger from animals whose movements are uncontrolled and that from a machine under control, where the intervention of a third person might increase the defendant's difficulties. That distinction, however, is not one that affects the principle. The question is the same in all cases of negligence: Was the defendant's act the real cause of the injury? It is held that plaintiff's act in going to the rescue of the child was a reasonable and proper one in the circumstances and, once that is decided, there is only the defendant's wrongful act as the cause of the injury. There must, of course, be a wrongful act on the part of the defendant and, if he can show he was not negligent in any way, the plaintiff, despite his or her courageous act, would not be entitled to recover.

AS TO ACTS IN AN EMERGENCY, see HALSBURY, Hailsham Edn., Vol. 23, p. 683, para. 966; and FOR CASES, see DIGEST, Vol. 36, pp. 118-120, Nos. 791-802.]

Cases referred to:

(1) *Haynes* v. *Harwood*, [1935] 1 K.B. 146; Digest Supp.; 104 L.J.K.B. 63; 152 L.T. 21.

(2) *The Gusty and The Daniel M.*, [1940] P. 159; Digest Supp.; 190 L.J.P. 71.

(3) *Brandon* v. *Osborne, Garrett & Co.*, [1924] 1 K.B. 548; 36 Digest 119, *793*; 93 L.J.K.B. 304; 130 L.T. 67.

ACTION for damages for negligence, the material question being whether the plaintiff was guilty of contributory negligence in attempting to save a child from injury at some risk to her own safety. The facts are fully set out in the judgment.

Russell Vick, K.C., and *Horace Fenton* for the plaintiff.

John Flowers, K.C., and *T. F. Davis* for the defendant.

CASSELS, J.: On Aug. 12, 1940, in the evening, but during daylight, the plaintiff suffered injury while upon the highway. She alleges that that injury was caused through the negligence of the defendant, who was riding a motorcycle and collided with her. The defendant, by his defence, denies negligence and alleges contributory negligence on the part of the plaintiff. The particulars of the plaintiff's contributory negligence are as follows:

Without regard for her own safety and without heeding the traffic and in particular the defendant's motor bicycle the plaintiff ran into the road after a child whom the plaintiff so negligently controlled that the plaintiff allowed the said child to run into the road in front of the defendant's motor bicycle. The defendant avoided colliding with the said child but the plaintiff clutched or attempted to clutch the said child in such a manner as to lose her balance and fall against the defendant's motor bicycle. The plaintiff ran into the road suddenly and without warning and gave the defendant no or no reasonable opportunity of avoiding the plaintiff.

The accident occurred in Farnley Road, at or near the junction of the cross roads known as Rothesey Road and Charnwood Road. The plaintiff lives with her parents in a turning off Rothesey Road, and on Aug. 12, a child named Dennis, a friend of the family, aged 3½, had been visiting her home and the plaintiff was taking him back to his own home, as she usually did when he had paid such a visit. Her way would take her along Rothesey Road and into and across Farnley Road, and on this occasion they reached the corner of Rothesey Road and Farnley Road, the child being a little way in front of her. That was the usual place for them to cross the road, and the child ran forward and began to cross the road. The defendant at that moment was coming along on his motorcycle, and he was about 7 ft. from his near-side of the road, which would be the side from which the child had begun to cross the road. According to his own evidence, he was about seven yards from the corner when the child ran into the road. The plaintiff, by reason of her injuries, remembers nothing of the accident itself, but she does remember the child running into the road to cross it and that she looked and saw the motorcycle coming.

I am satisfied that the defendant was travelling towards these cross roads at a negligently fast speed. The defendant admitted in evidence that he was approaching at 23 miles per hour and shut his engine off because he was going to pull up at his own home further along Farnley Road and past the point where Rothesey Road joins it. The position, therefore, was that, when the plaintiff saw him approaching, his speed was such that he would cover 23 yards in two seconds. The child, of whom the plaintiff had charge, ran into the road when the defendant was about 5 yards away, and it was then that she ran out to save the child from the danger of being struck by the motorcycle. She said that she thought she had time to get him across the road with her, and, therefore, out of harm's way. I do not accept the defendant's evidence that the boy fell or that the plaintiff stooped to pick him up, but I accept his evidence that he cleared the boy by about 1 ft., and that the collision between the defendant and the plaintiff took place about two-thirds of the way over the near-side half of the road. The defendant had the rest of the road along which he could have travelled, because there was no traffic coming in the opposite direction, and the road was 24 ft. wide. I therefore find that he was negligent in driving at too fast a speed, in failing to pull up or to swerve so as to avoid the plaintiff, and in failing to give any warning of his approach.

The question remains: Was there contributory negligence on the part of the plaintiff? If the plaintiff had been alone and had attempted to cross the road in front of the defendant, when she ought reasonably to have realised that it was unsafe for her to do so, contributory negligence might have been successfully pleaded against her. Here the circumstances were different. I follow the case of *Haynes* v. *Harwood* (1), where, at p. 157, GREER, L.J., cited with approval, and said that it represented the law of England, the following passage from an article by Professor GOODHART in the CAMBRIDGE LAW JOURNAL, vol. 5, at p. 196:

> The American rule is that the doctrine of the assumption of risk does not apply where the plaintiff has, under an exigency caused by the defendant's wrongful misconduct, consciously and deliberately faced a risk, even of death, to rescue another from imminent danger of personal injury or death, whether the person endangered is one to whom he owes a duty of protection, as a member of his family, or is a mere stranger to whom he owes no such special duty.

In *The Gusty and The Daniel M.* (2), BUCKNILL, J., followed the same principle, citing the passage quoted above. In *Brandon* v. *Osborne, Garrett & Co.* (3) the wife tried to save her husband from danger from a skylight which was broken by the defendant's negligence, and she herself was injured. Giving judgment for the wife, SWIFT, J., said, at p. 555:

> . . . it seems to me that where a person sustains injury through a combination of acts, some done by the defendants and some by himself, it is for the jury to say, having regard to the whole of the circumstances, whether (i) the injury is the natural and probable consequence of the defendants' act, and (ii) whether the plaintiff has been guilty of contributory negligence. If in this case the female plaintiff . . . had time to think

what was the wisest thing to do, it might possibly be said she was guilty of negligence by going into danger; but having regard to the place she was in and the frightening nature of the accident . . . I think that she did nothing wrong or anything that can be called contributory negligence.

I have come to the conclusion that what the plaintiff did here was, in the circumstances, natural and proper. The initial wrongful act was on the part of the defendant, who was approaching the cross roads at too great a speed. The plaintiff saw the danger and ran out to save the child, which was a natural and proper thing to do, and there was no contributory negligence on her part. The defendant was in law solely responsible for the accident, and the plaintiff is therefore entitled to damages.

Judgment for the plaintiff for £750 and special damage and costs.

Solicitors: *Elwell & Binford Hole*, agents for *Copley Singleton & Billson* Croydon (for the plaintiff); *C. Howe Browne* (for the defendant).

[*Reported by* D. K. BELCHER, *Barrister-at-Law.*]

CENTURY INSURANCE CO., LTD., *v.* NORTHERN IRELAND ROAD TRANSPORT BOARD.

[HOUSE OF LORDS (Viscount Simon, L.C., Lord Wright, Lord Romer, Lord Porter). **January 19, 22, 23, February 4, 1942.**]

Master and Servant—Loan of servant—Servant to obey all orders of third party and wear prescribed uniform.

Master and Servant—Course of employment—Servant delivering petrol at garage—Servant throwing away lighted match after lighting cigarette.

A lorry belonging to the respondents and driven by one of their employees, was delivering petrol in bulk from the Larne depot of H. & Co. to a garage in Belfast. While the petrol was flowing from the lorry to the tank at the garage, the driver lit a cigarette and threw away the lighted match. A fire was caused forthwith, and an explosion, which effected considerable damage, resulted. It was admitted that the act of the lorry driver was negligent. The petrol was being delivered under a standing agreement, one of the clauses of which provided that all the respondents' employees engaged in or about such delivery should accept and obey the orders of H. & Co. There followed a proviso that nothing contained in the clause should imply that such employees were in any way the employees of H. & Co. The appellants had insured the respondents against liability to third parties, and in answer to claims based upon this policy they contended (i) that at the material time the lorry driver was the servant of H. & Co., and not of the respondents, and (ii) that the lorry driver's act of negligence was not done in the course of his employment so as to make his master responsible:—

HELD: (i) the respondents were in the position of independent contractors who had undertaken, by the use of their own vehicles and the activities of their own servants, to effect the deliveries of petrol, since the lorry driver was subject to the orders of H. & Co. only so far as was necessary to enable the respondents to carry out their contract, and the terms of the contract, taken as a whole, did not involve his transfer to the service of H. & Co.

(ii) the negligent act of the lorry driver was done in the course of his employment by the respondents. They would be liable for his negligence and, therefore, were entitled to claim from the appellants under the terms of the policy.

[**EDITORIAL NOTE.** The first point turns almost entirely on the construction of the clause in the contract between the respondents' predecessors in title and the suppliers of the petrol. It will be remembered that one of the characteristics of the relationship of master and servant is that the employer has control over the servant. Under the terms of the clause in question the men employed were to accept and obey the orders of H. & Co., and, if they failed to accept and obey such orders, they were to be dismissed from their employment, if H. & Co., so requested. This certainly has the appearance of giving control to H. & Co., but the House of Lords have pointed out that the great test is whether there is a transfer of the servant, or only of the use and benefit of his work—a criterion adopted by BOWEN, L.J., in *Moore* v. *Palmer* (2). On the facts in this case they have upheld the decision that there was only a transfer of the use and benefit of his work. The treatment of the second point will probably cause disappointment to some, for a matter which has been the subject of considerable discussion is dismissed quite shortly. It is necessary first to say that the point before the House on this matter was a question formulated in a special case by an arbitrator, which asked whether in lighting the cigarette and throwing the match on the floor of the garage the employee was acting in the course of his employment. The question did not ask whether, if it was in the course of his employment, it was also within the scope of his employment. The decision in *Jefferson* v. *Derbyshire Farmers, Ltd.* (3) has been criticised on the ground that the act of the servant was not incidental to something which he was employed to do, and logically this criticism appears sound; but, as the cases have been decided, it would seem that whether an act is incidental to the employment concerns the scope of the employment and is to be distinguished from the question whether the act is in the course of his employment. Acts not in the course of employment have been said to be those which take place when the servant is engaged not on his master's business but on his own. Clearly, on this definition, the act here in question was in the course of the employment; but it is equally clear that logically the act of the lighting the cigarette and throwing away the lighted match was not an act incidental to the employment. If, therefore, it is necessary that the act shall be both in the course of the employment and within the scope of the employment—and on this point it must be admitted that in the cases on the subject these expressions are often used as though they were interchangeable—it would have been helpful if this criticism of the *Jefferson* case (3) could have been dealt with in a little more detail, although, as the matter arose in this case, it may very well have been unnecessary to deal with the point. As the matter now stands, the House have definitely approved the minority decision in *Williams* v. *Jones* (4) and the decision of the Court of Appeal in *Jefferson* v. *Derbyshire Farmers, Ltd.* (3), and these decisions now state the law on the point.

As to Liability of Master in Tort for Acts of Servant, see HALSBURY, Hailsham Edn., Vol. 22, pp. 225-227, paras. 403-405; and for Cases, see DIGEST, Vol. 34, pp. 127-131, Nos. 981-1006, and p. 144, Nos. 1132-1136.

As to Liability for Servants of Independent Contractors, see HALSBURY, Hailsham Edn., Vol. 22, pp. 241-243, paras. 421, 422; and for Cases, see DIGEST, Vol. 34, p.p. 22-28, Nos. 23-63.]

Cases referred to:

(1) *Donovan* v. *Laing, Wharton & Down Construction Syndicate*, [1893] 1 Q.B. 629; 34 Digest 26, *49*; 63 L.J.Q.B. 25; 68 L.T. 512.

(2) *Moore* v. *Palmer* (1886), 2 T.L.R. 781; 51 J.P. 196; 34 Digest 26, *47*.

(3) *Jefferson* v. *Derbyshire Farmers, Ltd.*, [1921] 2 K.B. 281; 34 Digest 144, *1134*; 90 L.J.K.B. 1361; 124 L.T. 775.

(4) *Williams* v. *Jones* (1865), 3 H. & C. 602; 34 Digest 138, *1077*; 13 L.T. 300.

(5) *M'Cartan* v. *Belfast Harbour Commissioners*, [1911] 2 I.R. 143.

(6) *Bain* v. *Central Vermont Ry. Co.*, [1921] 2 A.C. 412; 34 Digest 27, *54*; 90 L.J.P.C. 221.

(7) *Quarman* v. *Burnett* (1840), 6 M. & W. 499; 34 Digest 23, *29*; 9 L.J.Ex. 308.

(8) *Cameron* v. *Nystrom*, [1893] A.C. 308; 34 Digest 27, *61*; 62 L.J.P.C. 85; 68 L.T. 772.

(9) *Lloyd* v. *Grace, Smith & Co.*, [1912] A.C. 716; 34 Digest 129, *991*; 81 L.J.K.B. 1140; 107 L.T. 531.

Appeal from an order of the Court of Appeal in Northern Ireland (Andrews, L.C.J., Babington and Murphy, L.JJ.), dated Oct. 23, 1940, reversing an order of Brown, J. The clause of the contract between the respondents' predecessors and Holmes, Mullin & Dunn, Ltd., was as follows:

> All the employees of the said Irish Road Transport Co., Ltd., engaged in or about the said delivery shall accept and obey the orders of the said Holmes Mullins & Dunn, Ltd., or their representatives regarding such delivery the payment of accounts and all matters incidental thereto and the said Irish Road Transport Co., Ltd., shall dismiss any employee of theirs disregarding or failing to obey such orders. Provided always that the said Irish Road Transport Co., Ltd., shall indemnify the said Holmes Mullin & Dunn, Ltd., against all claims actions and demands arising out of or on account of such dismissal and provided always that nothing herein contained shall be taken as meaning or implying that such employees of the said Irish Road Transport Co., Ltd., are in any way the employees of the said Holmes Mullin & Dunn, Ltd.

N. L. C. Macaskie, K.C. and *W. F. Patton* for the appellants.

J. M. Whitaker, K.C., *Bernard Fox, K.C.* and *E. L. Curran* (all of the Northern Irish Bar) for the respondents.

Viscount Simon, L.C.: My Lords, in this appeal I should be well content to adopt the unanimous judgments delivered in the Court of Appeal in Northern Ireland, which appear to me to provide a conclusive answer to the argument for the appellants. The material facts giving rise to the litigation are conveniently set out in the judgment of ANDREWS, L.C.J. They may be summarised as follows.

The respondents were insured by the appellant company against liability to third parties arising from damage to property caused by the use by them of a petrol tanker belonging to the respondents. On Aug. 2, 1937, this tanker, which was being driven by their employee, one Davison, had taken on board a consignment of 300 gallons of petrol at the Larne depot of Holmes, Mullin & Dunn, Ltd., for delivery into the storage tank of one Catherwood, a garage proprietor, of Belfast. Davison drove the tanker to Belfast, backed it into Catherwood's garage, inserted the nozzle of the delivery hosepipe into the manhole of Catherwood's tank and turned on the stopcock at the side of the tanker. While the petrol was flowing from the tanker into the tank, Davison lighted a cigarette and threw away the lighted match. The match ignited some material on the floor of the garage and a fire was caused forthwith where the nozzle of the delivery hose was discharging into the tank. Catherwood seized a fire extinguisher and started to play it on the fire, which appeared at the manhole, at the same time shouting to Davison to turn off the stopcock. Davison did not do so, or attempt to do so, but started up the tanker and drove it out of the garage until the fore wheels had about reached the water channel in the street. Davison then stopped the tanker and jumped down to the ground. The fire, although extinguished at the manhole by Catherwood, pursued the trailing hose and the escaping petrol, and Davison had barely reached the ground when a very violent explosion occurred. The explosion destroyed the tanker, a motor car belonging to Catherwood, which was parked in the street, and also damaged several houses which were the property of other parties. The claims in respect of the motor and houses were settled for £1,001 16*s.* 7*d.*, which was paid by the appellants without prejudice to their ultimate rights.

One of the grounds on which the appellants resisted the claim of the respondents under the policy was that, in view of the terms of an agreement of Oct. 11, 1934, between the respondents or their predecessors and Messrs. Holmes, Mullin & Dunn, Ltd., the liability for the damage did not rest upon the respondents at all. By cl. 1 of this agreement, the respondents, when requested to do so by Holmes & Co., were bound to deliver petroleum spirit which Holmes & Co. had for disposal to any destination within Northern Ireland. The delivery was to be by tank lorries at an agreed scale of freights. The lorries were to be loaded at the installation of Holmes & Co at Larne, and the respondents were to keep sufficient tank lorries at Larne to transport all the spirit which might be given to them for delivery. The respondents were to keep the spirit insured against fire and spillage while in transit, and were to dress all their employees engaged in such delivery in such uniforms as Holmes & Co. might direct. The respondents undertook to effect all necessary insurances under the Workman's Compensation Acts and to be accountable to Holmes & Co. for the product entrusted to them for delivery. The clause of the agreement mainly relied upon by the appellants as establishing that, at the time of the accident, Davison was the servant, not of the respondents, but of Holmes & Co., is cl. 9. It provided that all the employees of the respondents engaged in or about such delivery should accept and obey the orders of Holmes & Co. regarding such delivery, the payments of accounts and all matters incidental thereto, and that the respondents should dismiss any employee disregarding or failing to obey such orders. There followed a proviso that nothing contained in the clause should be taken as implying that such employees were in any way the employees of Holmes & Co.

The dispute as to whether, in these circumstances, the appellants were liable under the policy was referred to the arbitration of Mr. Lowry, K.C., and the arbitrator stated his award in the form of a special case. Of the questions formulated in the special case, only two are now in issue, viz. (i) Was Davison at the time of the accident acting as the servant of the respondents or of Holmes & Co.? (ii) Was the admittedly careless act of Davison in lighting a cigarette and throwing the match on the floor of the garage an act done in the course of his employment as such servant, for the consequences of which his master was responsible?

The arbitrator himself, subject to the special case, answered the first question by saying that Davison was at the time of the accident acting as the servant of the respondents, and the second question in the affirmative. BROWN, J., before whom the special case came, was of a different opinion as regards the first question and held that Davison was, at the relevant moment, the servant of Holmes & Co. He agreed with the arbitrator as to the answer to the second question. The Court of Appeal in Northern Ireland (ANDREWS, L.C.J., and BABINGTON and MURPHY, L.JJ.), unanimously reversed BROWN, J., on the first question and affirmed the answers arrived at by the arbitrator. As I have already indicated, I think that the conclusion reached by the Court of Appeal was right. In view of the full and careful argument presented to this House by counsel for the appellants, I add the following observations.

Before this House, the appellants limited themselves to arguing the two questions set out above. As to the first question, no one disputes the proposition that a man may be in the general employment of X and yet at the relevant moment, as the result of arrangements made between X and a third party, may be the servant of the third party so as to make the third party and not X responsible for his negligence. I agree that the test to be applied is the test formulated by BOWEN, L.J., in *Donovan* v. *Laing, etc., Syndicate* (1), at pp. 633, 634:

> . . . in whose employment the man was at the time when the acts complained of were done, in this sense, that by the employer is meant the person who has the right at the moment to control the doing of the act.

If it were true that the effect of the written agreement under which the Board's petrol tanker was to carry and deliver Holmes & Co.'s petroleum spirit to its destination was to lend the vehicle and its driver to Holmes & Co., it might well be that while making delivery at the garage Davison was not acting as the servant of the respondents, but as the servant of Holmes & Co. In *Moore* v. *Palmer* (2), BOWEN, L.J., emphasised, at p. 782, that

> the great test was this—whether the servant was transferred, or only the use and benefit of his work.

As ANDREWS, L.C.J., observes, the provisions of the agreement point irresistibly to the conclusion that the agreement was one of carriage and delivery to be performed by the predecessors of the respondents with their own servants. It was not a contract for the hiring out of lorries and men, or of lending them to Holmes & Co. to enable them to effect delivery. Cl. 9 of the agreement does not, in my opinion, run counter to this view. The provision that the Board's employees shall accept and obey the orders of Holmes & Co. regarding delivery means that they shall carry out delivery orders, not that at some moment of the transit and delivery (counsel for the appellants prefers to fix the moment no later than the time when they take on their load of spirit at Larne) they became servants of Holmes & Co. In truth, the position of the respondents under the contract is not that of people who lend vehicles and drivers for the hirers to direct, but of independent contractors who undertake by the use of their own vehicles and by the activities of their own servants to produce the results, i.e., the deliveries, as ordered by Holmes & Co. The decision of the Court of Appeal, overruling BROWN, J., on this matter, cannot be successfully impeached.

On the second question, every judge who has had to consider the matter in Northern Ireland agrees with the arbitrator in holding that Davison's careless act which caused the conflagration and explosion was an act done in the course of his employment. Admittedly, he was serving his master when he put the nozzle into the tank and turned on the tap. Admittedly, he would be serving his master when he turned off the tap and withdrew the nozzle from the tank. In the interval, spirit was flowing from the tanker to the tank, and this was the very delivery which the respondents were required under their contract to effect. Davison's duty was to watch over the delivery of the spirit into the tank, to see that it did not overflow, and to turn off the tap when the proper quantity had passed from the tanker. In circumstances like these, " they also serve who only stand and wait." He was presumably close to the apparatus, and his negligence in starting smoking and in throwing away a lighted match at that moment is plainly negligence in the discharge of the duties upon which he was employed by the respondents. This conclusion is reached on principle and on the evidence, and does not depend upon finding a decided case which closely resembles the present facts. The decision of the English Court of Appeal twenty years ago in *Jefferson* v. *Derbyshire Farmers, Ltd.* (3), provides a very close parallel. As for the majority decision of the Exchequer Chamber in

Williams v. *Jones* (4), nearly 60 years before, it may be possible to draw distinctions, as the court in *Jefferson* v. *Derbyshire Farmers, Ltd.* (3) sought to do. However, this House is free to review the earlier decision, and for my part I prefer the view expressed in that case by the minority, which consisted of BLACKBURN and MELLOR, JJ. The second question must also be answered adversely to the appellants.

My Lords, I am authorised by my noble and learned friend, LORD ROMER, A who is not able to be present this morning, to say that he concurs in this opinion. I move that the appeal be dismissed with costs.

LORD WRIGHT: My Lords, the main issue in this case is whether the respondents were liable for the rash and careless act of their lorry driver, Davison, in striking a match to light his cigarette, and throwing it on the floor of the garage, while he was engaged in the process of transferring from the tank lorry B a consignment of petrol into the underground tank at Catherwood's garage at Belfast. The respondents' case is that they were liable, and on this they based their claim to recover under the policy of insurance issued to them by the appellants, sect. II of which deals with liability to third parties. There was a separate claim, not here material, by the respondents for the destruction of their lorry. The questions in debate in regard to the third party liability were (i) whether at the material time Davison was the servant of the respondents or of Holmes, C Mullin & Dunn, Ltd., with whom the respondents had a running contract for the carriage and delivery of petrol in their tank lorries; (ii) whether, if Davison was the servant of the respondents, his act in lighting his cigarette was, in the circumstances, an act of negligence in the course of his employment in the respondents' service, involving the liability of the respondents to compensate the various parties whose property was injured by the explosion which resulted from D Davison's rash act, including Catherwood, whose garage was damaged and whose car was destroyed, and the owners of adjoining premises affected by the accident. I am only referring to the claims under sect. II of the policy.

The dispute came in the first instance before an arbitrator, who stated his award in the form of a special case for the opinion of the court. His own decision on both points was in favour of the respondents. The question thus is whether the arbitrator was, on the facts stated in the award, wrong in law in so deciding. E His award was set aside by BROWN, J., on the ground that Davison was the servant of Holmes, Mullin & Dunn, Ltd., at the material time, so that the respondents were not liable for his act. The judge agreed that, if he was then the servant of the respondents, his act in lighting his cigarette was in the circumstances an act done in the course of his employment. The judgment of BROWN, J., was unanimously reversed by the Court of Appeal, who upheld the arbitrator's award. The appellant company appeals.

F My noble and learned friend, VISCOUNT SIMON, L.C., has fully stated the facts. I agree with his reasoning and conclusions, and I may add with the judgments of the members of the Court of Appeal in Northern Ireland. I should be content simply to express my concurrence with the convincing judgment of ANDREWS, L.C.J. I add a few words merely on the two questions of law.

First of all comes the question in whose employment Davison was. This G problem and its decision have produced a good many reported cases in the books. In *M'Cartan* v. *Belfast Harbour Commissioners* (5), this House emphatically stated that it is a question of fact how the maxim *respondeat superior* is to be applied in any particular case of this character. The problem is to determine who is the "superior" in the particular instance. LORD DUNEDIN said categorically that the facts of one case can never rule another case and are only useful so far as similarity of facts (for identity, the word so often H used, is really a convenient misnomer) are a help and guide to decision. All the same, it has been sought to find some general idea, or perhaps a mere catchword, which may serve as a clue to solve the problem, and for this purpose the idea or the word "control" has been introduced. Thus, in *Bain* v. *Central Vermont Ry. Co.* (6), at p. 416, LORD DUNEDIN quotes the following language of BOWEN, L.J., in *Donovan* v. *Laing Syndicate* (1), at pp. 633, 634:

> We have only to consider in whose employment the man was at the time when the acts complained of were done, in this sense, that by the employer is meant the person who has a right at the moment to control the doing of the act.

If that were a complete statement of what Bowen, L.J., said, I should be driven to question whether it was not too vague and indeterminate to afford any useful guidance. Bowen, L.J., did not stop there. Indeed, Lord Dunedin merely gives the quotation as the first sentence of what Bowen, L.J., said. Andrews, L.C.J., in the present case quotes the remainder of the passage and this indicates that the word "control" needs explanation and gives some notion of what is necessary before one man's servant becomes *pro hac vice* the servant of another man. It seems to be assumed in all these cases, no doubt rightly, that the man acquiesces in the temporary change of master, though that may have consequences to him in regard to wages, workmen's compensation, common employment and the like. Bowen, L.J., completes his statement thus [p. 634]:

> There are two ways in which a contractor may employ his men and his machines. He may contract to do the work and, the end being prescribed, the means of arriving at it may be left to him. Or he may contract in a different manner, and, not doing the work himself, may place his servants and plant under the control of another—that is, he may lend them—and in that case he does not retain control over the work.

It was held on the facts of that case, that the latter description applied. In his judgment in *Moore* v. *Palmer* (2) Bowen, L.J., states a more concise criterion, at p. 782:

> The great test was this—whether the servant was transferred or only the use and benefit of his work.

Control is not here taken as the test. There are many transactions and relationships in which a person's servant is controlled by another person in the sense that he is required to obey the latter's directions. Such was the case of *Quarman* v. *Burnett* (7). Its authority has never been questioned. The defendants there were sued for the negligent driving of a coachman employed by a jobmaster, who had contracted with the defendants, who were two ladies, to send horses and a driver for their coach. It is clear that the ladies were intended to direct the time when and the places to and from which they took their drives. That was certainly a measure of control, but what, it was held, was there transferred was the use and benefit of the coachman's work. The coachman did not become the servant of the defendants. Instances of this sort are common. In *M'Cartan* v. *Belfast Harbour Commissioners* (5) the use and benefit of the harbour company's crane and its driver were transferred. The driver of necessity had to obey the directions as to lowering and hoisting given by those conducting the operation, but it was held that there was no transfer of employment. Another illustration is afforded by *Cameron* v. *Nystrom* (8). The question there was whether stevedores could plead the defence of common employment against a servant of the shipowner whose vessel they were discharging. The plaintiff had been injured by the negligence of one of the shipowner's servants. It was held that there was no common employment because the negligent employee had not become the shipowner's servant. No doubt he had in many respects to obey the directions of the shipowners. Lord Herschell, L.C., however, summed up the position thus, at p. 312:

> There was no express agreement with regard to the extent to which the master and mate should have control over them [the stevedore's servants]. That control is only to be implied from the circumstances in which they were employed. The relation of stevedore to shipowner is a well-known relation, involving no doubt the right of the master of the vessel to control the order in which the cargo should be discharged, and various other incidents of the discharge, but in no way putting the servants of the stevedores so completely under the control and at the disposition of the master as to make them the servants of the shipowner, who neither pays them, nor selects them, nor could discharge them, nor stands in any other relation to them than this, that they are servants of a contractor employed on behalf of the ship to do a particular work.

The point emphasised by Lord Herschell is that it is the extent of control which is material to be considered. He also stresses the other elements which make up the relationship of master and servant and which have to be considered before it can be held that there has been a transfer of the man's service from his general employer to the other who is said to be his temporary employer. It is, I think, clear that the presumption is all against there being such a transfer. Most cases can be explained on the basis of there being an understanding that the man is to obey the directions of the person with whom the employer has a contract, so far as is necessary or convenient for the purpose of carrying out the contract. Where that is the position, the man who receives directions from the other person does not receive them as a servant of that person, but receives them as servant of his employer. Where the contract is a running contract, for the rendering of certain services over a period of time, the places where, and the times at which, the services are to be performed being left to the discretion (subject to any contractual limitations) of the other contracting party, there must be someone who is to receive the directions as to performance from the other party, and they are given to the employer, whether he receives them personally or by a clerk or by the servant who is actually sent to do the work. That I think is the position here. The contract is of a character very common between the owner of lorries or other vehicles and one who wants to hire them for the conveyance of his goods. In principle the facts here are indistinguishable from those in *Quarman* v. *Burnett* (7). Davison was subject to the control of Holmes Mullin & Dunn, Ltd., only so far as was necessary to enable the respondents to carry out their contract. In doing so he remained the respondents' servant. They paid him and alone could dismiss him. Even in acting on the directions of Holmes Mullin & Dunn, Ltd., he was bound to have regard to paramount directions given by the respondents and was to safeguard their paramount interests. This appears from the course of business followed, and is confirmed by the agreement dated Oct. 11, 1934, made between Holmes, Mullin & Dunn, Ltd., and the respondents' predecessor in title, in whose shoes it is admitted that the respondents stand. It is a contract which was intended to remain in force and has remained in force over a period of years and provided for the carriage of petrol or like products to any destination within Northern Ireland at the request of Holmes Mullin & Dunn, Ltd. Cl. 9 provides that the employees of the respondents or their predecessors engaged in the delivery should accept the orders of Holmes Mullin & Dunn, Ltd., "regarding such delivery the payment of accounts and all matters incidental thereto." These are just the matters in respect of which, for the convenient performance of the contract, the lorrymen employed would naturally be required to obey the wishes of those for whom the petrol was being carried. I do not find anything in the rest of the agreement to lead to any other conclusion. It is not, however, necessary to make any nice examination of its terms. A question of this sort must be decided on the broad effect of the contract. I do not attach any decisive effect to the proviso to cl. 9 that nothing in the agreement is to be construed to mean that the respondents' employees are to be taken as employees of Holmes Mullin & Dunn, Ltd., because it could not bind third parties. I think that, on the whole, the agreement goes to support the view that the parties did not contemplate that what the agreement stipulated should involve any transference of servants, as contrasted with transference of service.

Each case of this character must be decided on its particular facts. I therefore do not think it necessary to refer to any other of the cases which have been cited. In the great majority the conclusion has been against the servants being transferred from the general employee. Nor do I consider the cases where a man has been held to have become the servant of someone who was not otherwise his employer by voluntarily doing work for him.

On the other question, namely, whether Davison's negligence was in the course of his employment, all the decisions below have been against the appellants. I agree with them and need add little.

The act of a workman in lighting his pipe or cigarette is an act done for his own comfort and convenience and at least, generally speaking, not for his employer's benefit. That last condition, however, is no longer essential to fix liability on the employer (*Lloyd* v. *Grace Smith & Co.* (9)). Nor is such an act *prima facie* negligent. It is in itself both innocent and harmless. The negligence is to be found by considering the time when and the circumstances in which the match is struck and thrown down. The duty of the workman to his employer is so to conduct himself in doing his work as not negligently to cause damage either to the employer himself or his property or to third persons or their property, and thus to impose the same liability on the employer as if he had been doing the work himself and committed the negligent act. This may seem too obvious as a matter of common sense to require either argument or authority. I think that what plausibility the contrary argument might seem to possess results from treating the act of lighting the cigarette in abstraction from the circumstances as a separate act. This was the line taken by the majority judgment in *Williams* v. *Jones* (4), from which Mellor and Blackburn, JJ., as I think, rightly dissented. I also agree with the decision of the Court of Appeal in *Jefferson* v. *Derbyshire Farmers, Ltd.* (3), which is in substance indistinguishable on the facts from the present case.

In my judgment the appeal should be dismissed.

Lord Porter: My lords, I agree with the speeches just delivered by the noble and learned lords who have preceded me, and would dismiss the appeal.

Appeal dismissed with costs.

Solicitors: *Berrymans*, agents for *George L. Maclaine & Co.*, Belfast (for the appellants); *Blyth, Dutton, Hartley & Blyth*, agents for *J. C. W. Rea & Son*, Belfast (for the respondents).

[*Reported by* C. St. John Nicholson, Esq., *Barrister-at-Law.*]

ROBINSON *v.* BAILEY.

[Chancery Division (Simonds, J.), **February 24, 1942.**]

Judgments—Charging order—Order made in respect of debt not immediately payable—Value of property charged must bear a reasonable proportion to the amount of the debt.

A judgment dated Feb. 25, 1941, ordered, *inter alia*, that the defendant should pay to the plaintiff such annual sum as after deduction of income tax at the standard rate for the time being in force would leave the clear sum of £50, such annual sum to be paid by quarterly instalments. This annuity was to be paid until the execution by the defendant of certain documents mentioned in the schedule to the order, and both parties agreed that it was payable only during the plaintiff's lifetime. There was delay in performing a number of obligations imposed by the order and in Dec. 1941, £275 was owing by the defendant to the plaintiff for damages and costs. On Dec. 13, the plaintiff obtained a charging order *nisi* for the payment of this sum on £3,333 Local Loans Stock belonging to the defendant. The debt in respect of which this charging order was made was paid off shortly afterwards. On Jan. 13, 1942, the plaintiff obtained a second charging order *nisi* charging the stock with the payment of the annuity. On that date no instalment of the annuity was due. The defendant applied to have the order *nisi* discharged:—

Held: (i) the court had jurisdiction to make the charging order notwithstanding that the debt was not immediately payable.

(ii) the jurisdiction to make a charging order in respect of a future debt was to be exercised very guardedly, and it would not be a proper exercise of the court's discretion to make a charging order on £3,333 stock in respect of the annuity of £50. Accordingly, the order *nisi* must be discharged.

[**EDITORIAL NOTE.** In holding that a charging order can be made in respect of a debt not immediately payable, the court has followed the decision in *Bagnall* v. *Carlton* (1) but, apparently, with some reluctance. The reasons given for that decision are certainly unsatisfactory, but it has stood unquestioned for so long that it was felt that a court of first instance should not depart from a precedent so long established. It is, however, held that, in the case of a charging order, the amount of the property made subject to the order should bear some reasonable proportion to the amount of the debt.

As to Charging Orders on Stocks and Shares, see HALSBURY, Hailsham Edn., Vol. 14, pp. 120-122, paras. 189-191; and for Cases, see DIGEST, Vol. 21, pp. 647-650, Nos. 2267-2283.]

Cases referred to:

(1) *Bagnall* v. *Carlton* (1877), 6 Ch.D. 130; 21 Digest 648, *2271*; 47 L.J.Ch. 51; 36 L.T. 730.

(2) *Younghusband* v. *Gisborne* (1847), 1 De G. & Sm. 209; 30 Digest 159, *303*.

Application by the defendant in the action to have a charging order *nisi* discharged. The facts are fully set out in the judgment.

F. C. Watmough for the applicant.

M. G. Hewins for the respondent.

SIMONDS, J.: The plaintiff obtained judgment against the defendant on Feb. 25, 1941. I must refer in some detail to the form of judgment. It opens with a declaration that a certain oral agreement "in the pleadings mentioned for the settlement of the two actions therein also mentioned ought to be specifically performed with the modifications which are embodied in the said agreement" set out in the schedule. It then proceeds to order that the plaintiff and the defendant should respectively execute such deeds and other documents as were to be executed by them respectively under the agreement, such deeds and other documents to be settled by the judge in case the parties differed. Then there is a recital that the defendant by his counsel admits "that he is liable in damages to the plaintiff for his delay in performing the said agreement." The next paragraph in the order, although it does not appear upon its face to be a consent order, was, I understand, agreed by counsel in order to avoid the necessity of an inquiry as to damages. It is in this form:

> It is ordered that the defendant Bailey do pay to the plaintiff by way of damages the sum of £72 1*s.* 5*d.* and during the period from the date of this order until the execution by the defendant of the documents referred to in para. 5 of the schedule hereto such an annual sum as after deduction of income tax at the standard rate for the time being in force will leave a clear sum of £50 such annual sum to be paid by equal quarterly instalments on Jan. 25, Apr. 25, July 25 and Oct. 25 in every year the first of such instalments or an apportioned part thereof to be paid on Apr. 25, 1941.

Let me interpose this observation at this stage in my reading of the order. It appears upon the face of it that that was an unconditional and unqualified obligation to pay that sum in those instalments on those quarter-days; but it is conceded at the bar that in fact it was subject to the condition or qualification that the sums in question should only be paid if and so long as the plaintiff was living. The order then proceeds to order the defendant to pay to the plaintiff the taxed costs of the action, and the parties were to be at liberty to apply.

The schedule embodied with modifications the agreement which the parties were to carry out. It provided in the first place that the defendant was:

> . . . to enter into a covenant to pay to the plaintiff during her life such a sum as after deduction of income tax at the standard rate for the time being in force shall leave a clear sum of £150 per annum.

Then, secondly, as security for such payment 3½ per cent. war loan was to be purchased with moneys supplied by the first defendant in the names of certain persons, sufficient to provide the sum of £110 per annum, with power to resort to the capital thereof if the clear sum of £150 per annum shall not be duly paid. Then the appointment of trustees was provided for.

It was provided that the defendant was to arrange by bankers' order for the payment of the difference between the amount of the interest on the said 3½ per cent. War Loan, which was to be purchased under para. 2, and the clear sum of £150 per annum. By para. 4 it was provided that the plaintiff was to return to the defendant a certain memorandum of deposit which was mentioned in the pleadings together with certain other documents and a certain bond. By para. 5 it was provided that the clear sum of £150 per annum was to be paid as from the execution of the documents required for the purpose of carrying out these arrangements. There was to be a certain letter written, giving an undertaking, and a certain indemnity was to be provided. That was the order that was made on Feb. 25, 1941, providing for certain payments to be at once made by the defendants, and for certain things to be done by both parties. The defendant was bound to enter into a covenant and to provide certain security. Upon that being done, the plaintiff was bound to return certain documents of title.

Owing to the defendant being absent on war service in Greece, and it may be for other reasons, there was delay in carrying out the terms of the agreement scheduled to the order; and there was a failure on the defendant's part to observe his obligation to pay the sums which he was expressly ordered to pay until the documents therein referred to had been executed. In the result, there was due to the plaintiff under the terms of the order in the month of Dec., 1941, a sum of £275 13s., made up of the sum of damages expressly referred to and certain other payments which have become due and the costs of action. On Dec. 15, 1941, leave had been given under the Courts (Emergency Powers) Act, 1939, to enforce the judgment.

On Dec. 23, 1941, the plaintiff obtained a charging order upon the sum of £3,333 Local Loans stock to which the defendant had in the meantime become entitled. The charging order is in the form common in this Division. It was ordered that that sum of Local Loans stock should stand :

> . . . charged with the payment of the sum of £275 13*s*. being the amount up to Dec. 23, 1941, of the assessed damages referred to in the said order together with the plaintiff's taxed costs of this action . . . together with interest thereon or on some part thereof at the rate of £4 per cent. per annum from Dec. 23, 1941, until payment

unless the defendant should, within six months after service upon him of the order, show to the court good cause to the contrary. That order was obtained in respect of a sum ascertained and then presently due.

Within a short time that sum of £275 13s. in respect of which the charging order had been made was paid off ; but the documents had not yet been executed. The security provided for by the agreement scheduled to the order had not yet been provided. Accordingly, there would have been, on Jan. 25, 1942, the sum of £12 10s. due to the plaintiff under the order of Feb. 25, 1941, being the quarterly instalment of the sum of £50 payable on that date. On Jan. 13, 1942, before that or any other sum had become due and payable. the plaintiff obtained *ex parte* a second charging order. That charging order was in this form. It was ordered that the sum of Local Loans stock to which I have referred, or, if sold, the proceeds of sale, should until the execution by the defendant of the documents referred to in para. 5 of the judgment dated Feb. 25, 1941, stand charged with payment to the plaintiff of such a sum as after deduction of income tax at the standard rate for the time being in force will leave a clear sum of £50 per annum unless the defendant and certain other gentlemen should show good cause to the contrary.

That charging order was made on Jan. 13, 1942, and on Jan. 25, 1942, the £12 10s., quarterly instalment due on that date was duly paid. Taking advantage of the usual provision in the order *nisi*, the defendant shows cause here why it should not be made absolute. I have to determine whether this is a case in which such a charging order should be made. It is to be observed that this order was made in respect not of any ascertained sum then presently due, it was made in respect of sums which might from time to time fall due under the terms of the order. I say advisedly " might from time to time fall due," because they were conditional upon the continued survivorship of the plaintiff. Therefore, it could not be with certainty predicted of any sum that it would at any time become due. It is not strictly accurate to say of these sums that they are even *debitum in presenti solvendum in futuro ;* for the debt would never mature unless the creditor lived to the date of payment.

I should be bound, I think, upon the old authority of *Bagnall* v. *Carlton* (1), to hold that the court has jurisdiction to make a charging order in respect of a sum which is *debitum in presenti* though it is only *solvendum in futuro*. In that case Bacon, V.-C., expressed himself upon that very question thus on p. 132 :

> I entertain no doubt on this question. When the words of the statute [Judgments Act, 1838] are considered, to say that it was the intention of the legislature, after an order had been made for payment, that the debtor should be allowed in the meantime to do what he pleased with the property which, in the eye of the law, was the property of the creditor, would, in my opinion, be against the plain enactment of the Act of Parliament and nothing could be more opposed to common sense. I think the matter too plain for discussion, and that there is no ground for this application, that being an application in which cause was shown against the order. *Younghusband* v. *Gisborne* (2) is a plain authority that there may be a charging order in respect of a judgment debt made payable on a future day.

If I may say so with the greatest respect to Bacon, V.-C., I cannot help thinking that the language which he uses is open to some criticism, for I find it difficult to suppose that it is an accurate statement of the law to say that, where A has recovered judgment against B, the property of B, in the eye of the law, is to be regarded as the property of the judgment creditor. However that may be, and although, with deference, I doubt whether *Younghusband* v. *Gisborne* (2) has quite the force which Bacon, V.-C., gives to it, I must, in view of the time that has elapsed and in view of the fact that that judgment has not yet been overruled or criticised, assume that the court has jurisdiction to make a charging order, notwithstanding that the judgment debt is not yet immediately payable; but, though the court has such jurisdiction, it is clearly a jurisdiction which must be exercised only with the greatest care, for this at least is clear, that a charging order of this kind is a form of execution. I know of no other execution which is available in respect of a debt, judgment or otherwise, which is not immediately payable.

Assuming then that I have jurisdiction, but nevertheless must be guarded in exercising it in such a case, I have to consider whether I should exercise it here. It is conceded as it must be upon the terms of the statute, that the court has a discretion in this matter. I do not suppose that it would be a proper exercise of jurisdiction to make a charging order in respect of a small amount of no more than £50 payable by quarterly instalments on a sum of Local Loans stock mounting to over £3,000. I cannot conceive that it would be proper for the court, by reason of an apprehended failure of the defendant to satisfy the terms of the judgment, to lock up his property, and certainly not to lock up so disproportionate an amount of his property, to satisfy so small a debt. It is said, however, that in this case there are special circumstances arising out of the fact that the obligation to pay this sum is one which is bound up with other terms and conditions embodied in the schedule to the order. I do not take that view. I think it may be fairly said that the plaintiff is here attempting to use this agreement in order to get a lever to force the defendant to comply with his obligation. That, as it appears to me, is not the way in which the plaintiff should proceed. She has her rights under the order. She can apply under the liberty reserved by the order itself for the enforcement of its terms. Even at the date when this charging order was applied for and made by the master, there was correspondence going on between the parties in regard to the implementing of the defendant's obligation. It is quite true that he has expressed his doubts—it may be that he had gone further and asserted his inability—to fulfil the terms of the charge. Nevertheless, the matter was in negotiation. The plaintiff had her right; and I see no reason why, in exercise of the discretion which I admittedly have in this matter, I should lock up what appears to be one, if not the only one, of the defendant's substantial assets in order that at some future date, if he fails to pay the £12 10s. due from him by way of quarterly instalments, there should be available to the plaintiff this security. It may be that, upon the authority of the decision of BACON, V.-C., that the court has jurisdiction to make the order which I am asked to make; but this at least I am clear about, that that is a jurisdiction which in such circumstances must be exercised very guardedly, particularly where, as I have already pointed out, the payment is conditional upon the continued life of the judgment creditor.

The charging order will be discharged and the applicant, the defendant, will have the costs of this application.

Solicitors: *Zeffertt Heard & Morley Lawson* (for the applicant); *C. Grobel, Son & Co.* (for the respondent).

[*Reported by* IRENE G. R. MOSES, *Barrister-at-Law.*]

Re ARNOLD, CALVERT *v.* WHELAN.

[CHANCERY DIVISION (Simonds, J.), **February 25, 26, 1942.**]

Executors—Administration—Retention of assets to meet future liabilities—Annuities covenanted to be paid—Only contingency the survivorship of the annuitants.

During his lifetime the testator covenanted to pay certain annuities. His executors asked the court whether they should distribute the estate without retaining any part of the assets to meet liabilities in respect of these annuities:—

HELD: the trustees ought not to distribute the estate without retaining a sum sufficient to produce the amount of the annuities.

[**EDITORIAL NOTE.** The practice of the court has been to grant leave to distribute the estate where the future liabilities are purely contingent. The practice was, it is said, carried to its extreme limit in *Re Johnson* (2), where the liabilities were not only possible liabilities, but very probable ones. It is thought that this decision can be explained by reason of the fact that the residuary legatee was obviously a solvent party and easily accessible. In the case of annual sums covenanted to be paid and where the only doubtful matter is how long certain beneficiaries may live, assets sufficient to meet these sums must be retained.

As to Provision for Contingent Liabilities, see HALSBURY, Hailsham Edn., Vol. 14, pp. 330-332, paras. 615, 616 ; and for Cases, see DIGEST, Vol. 24, pp. 606-608, Nos. 6370-6386.]

Cases referred to :

(1) *Re King, Mellor* v. *South Australian Land, Mortgage & Agency Co.*, [1907] 1 Ch. 72 ; 24 Digest 608, *6385* ; 76 L.J.Ch. 44 ; 95 L.T. 724.

(2) *Re Johnson, Johnson* v. *King Edward Hospital Fund for London*, [1940] W.N. 195 ; Digest Supp.

Summons to determine whether the executors might be permitted to distribute the estate of a testator without making provision for the payment of certain annuities which he had covenanted to pay.

The testator, Franck Thomas Arnold, had, in 1936 and 1938, entered into certain deeds of covenant to pay annuities in favour of Winifred Elizabeth Whelan, Freda Marie Kirmse and Christopher Whelan, the annuities being payable to the first two annuitants for the term of their natural lives respectively, and then, subject to certain conditions, to the survivor of them. The testator died on Sept. 24, 1940, and his will was proved on Feb. 3, 1941. His executors took out the present summons on July 29, 1941, asking, *inter alia*, whether they should complete the administration of the testator's estate and the execution of the trusts of his will without retaining any part thereof to meet any liabilities or possible liabilities of the testator's estate in respect of the said annuities.

E. M. Winterbotham for the plaintiffs, the executors.

H. O. Danckwerts for the first two defendants, annuitants under the deed of covenant.

S. Pascoe Hayward (for *Wilfrid M. Hunt*) for the third defendant, an annuitant under the will.

A. G. N. Cross for the fourth defendant, a legatee under the will.

A. Guest Mathews for the fifth defendant, the tenant for life of residue.

Simonds, J. : In this case the question is whether, in the administration of the estate of the testator, it would be proper for the estate to be distributed without provision being made for the payment of certain annuities. Such a course would be the cause of much confusion to the estate. It is true that, as a rule, the court will allow distribution without making provision for future contingent liabilities. That principle was stated and explained by Neville, J., in *Re King* (1), and the practice was carried to its extreme limit in *Re Johnson* (2), where Crossman, J., authorised the distribution of an estate without making provision for a possible future liability, though it was not only possible, but very probable. That case was only reported in the Weekly Notes as a " Chamber Summons (reported by leave of the judge)." There was no argument on behalf of the creditor, and I cannot help thinking that the judge may have been influenced by the fact that the residuary legatee was the King Edward Hospital Fund for London, which could be presumed to be easily accessible and able to recoup any future liability. However that may be, I am satisfied that it would not be consistent with the practice of the court to adopt that procedure where there are covenanted sums, the payment of which at a future date is not dependent on any contingency except the survivorship of the annuitants. It would be wrong to leave creditors of an ascertained sum at a future date to recover from one or more of a number of legatees, who might be called on to make good the deficiency, the sum which might be then due from the estate. The proper course is to direct the trustees not to distribute the estate without retaining such a sum as, when invested, would produce the amount of the annuities which the testator covenanted to pay.

Declaration accordingly.

Solicitors : *Sharpe, Pritchard & Co.*, agents for *Foster, Calvert & Marriott*, Norwich (for the plaintiffs and the fourth and fifth defendants) ; *Woodcock, Ryland & Co.* (for the first two defendants) ; *Withers & Co.* (for the third defendant.)

[*Reported by* Irene G. R. Moses, *Barrister-at-Law.*]

Re AN ARBITRATION BETWEEN SEA AND LAND SECURITIES, LTD. AND WILLIAM DICKINSON & CO., LTD. THE ALRESFORD.

[COURT OF APPEAL (MacKinnon, Goddard and du Parcq, L.JJ.), **March 30, 1942.**]

Shipping—Charterparty—Time charter—Hire—Cesser of hire—Period occupied in fitting degaussing apparatus.

A ship was chartered for a period of six months. During that period the ship put into Blyth to load coal, and, there being a likelihood of some delay in loading, the charterers suggested to the owners that the opportunity should be taken to have the ship equipped with degaussing apparatus. They did not, however, enter into any agreement as to the continuation of the hire while this was being done. The fitting of the apparatus was not at that time compulsory. The ship spent nearly 9 days having the apparatus fitted before her turn to load came, and a further 1½ days after she had been loaded. The charterers withheld from the owners a proportion of the hire appropriate to the period occupied in fitting the degaussing apparatus on the ground that the ship had been deliberately withheld from their use, with a consequential failure of consideration, for that period. The owners contended that the hire was payable throughout the whole contract period except in so far as excused by the express terms of the charterparty. Cl. 12 of the charterparty provided for cesser of hire in the event of deficiency of crew or accidents preventing the working of the ship, except where the damage occurred through the charterers having chosen rivers or ports which caused danger to the ship. There was no other provision for cesser of hire:—

HELD: there was no cesser of hire for the period occupied in fitting the degaussing apparatus, since the employment of the ship for that purpose did not come within the terms of cl. 12 of the charterparty, nor did it constitute a breach of contract by the owners. The fact that the owners had the degaussing apparatus fitted while the ship was waiting to load her cargo did not result in her being withdrawn from the use of the charterers, and the completion of the operation after the ship had loaded was not a breach of contract, since the charterers themselves had suggested that the apparatus be fitted.

Decision of ATKINSON, J. ([1942] 1 All E.R. 88) *reversed.*

[**EDITORIAL NOTE.** The Court of Appeal, in reversing the decision of ATKINSON, J., have taken a different view of the facts as found by the umpire in the arbitration. The award is rather obscure at the point material to this decision, but the Court of Appeal are unanimous in their view that it is found as a fact that the charterers consented to the ship going into drydock to be fitted with degaussing apparatus, and that, therefore, nothing which the shipowners did was in any way a breach of the contract contained in the charterparty. For the greater part of the time occupied by this operation, the ship would in any event have been waiting her turn to load. In these circumstances, the legal points discussed by ATKINSON, J., did not arise on the appeal.

AS TO LIABILITY FOR HIRE UNDER TIME CHARTER, see HALSBURY, Hailsham Edn., Vol. 30, pp. 308-312, para. 500; and FOR CASES, see DIGEST, Vol. 41, pp. 358-363, Nos. 2074-2114.]

APPEAL by the shipowners from a decision of ATKINSON, J., dated Dec. 8, 1941, and reported [1942] 1 All E.R. 88. The facts are fully set out in the judgment of MACKINNON, L.J.

Sir Robert Aske, K.C. and *A. W. Roskill* for the appellants (the owners).

A. J. Hodgson for the respondents.

MACKINNON, L.J.: The respective rights and obligations of the two parties to this time charterparty must depend upon its written terms, for there is no special law applicable to the particular form of contract known as a time charterparty. A time charterparty is, in fact, a document which is of a very misleading nature, because the real nature of what is undertaken by the shipowner is disguised by the use of language dating from a century or more ago—language which was then appropriate to a contract of a totally different character. A century ago a time charterparty, then known as a demise charterparty, was an agreement under which the charterer was handed over the possession of the ship of the shipowner to put his servants and crew upon her and to sail her for his own benefit.. That form of charterparty, which, as I say, was called a demise charterparty, has long since been obsolete. The modern form of time charterparty is, in essence, one under which the shipowner agrees with the time charterer that, during a certain named period, the shipowner will render service as a carrier by his servants and crew to carry the goods which are put on board his ship by the time charterer. Certain phrases surviving in the printed form now A used are only pertinent to the older form of demise charterparty. Those phrases are, as in the present case, " The owners agree to let the steamer " and " The charterers agree to hire the steamer." There is no " letting " or " hiring " of the steamer, or anything of the sort, here. Then, at the end of the period, it was solemnly provided that the vessel should be redelivered by the time charterers to the shipowners. " Redelivery " is only a pertinent expression if there has been a delivery or handing over by the shipowners to the B charterers. There never has been anything of that sort here. The ship has at all times been in the possession of the shipowners, and they simply undertook to do services with their crew in carrying the goods of the charterers. As I ventured to suggest in the course of the argument, in the two forms of contract there is all the difference between hiring a boat in which to row yourself about, in which case the boat is handed over to you, and contracting with a man on the beach that he shall take you for a row, in which case he merely renders C services to you in rowing you about. Now, having that in mind, the essential nature of this contract is that the shipowners, during a certain period of time, agree to perform certain services for the charterers.

One has to consider the express terms of the contract, and the material ones are these. The shipowners are to carry in their ship such goods as are loaded by the charterers to such destinations as are directed by the charterers D during a named period of time. During that period of time, in return for the services rendered by the shipowners, the charterers shall pay so much a month and so much for a part of a month to the shipowners. Under that form of charterparty, during the named period until what is called " redelivery," which really means until the agreed period has expired, the charterers have, during each month and each part of a month, to pay to the shipowners the agreed sum, and their continuous and unbroken liability to pay that sum is, I think, E only interrupted if there is a provision in the contract by which it is agreed that, notwithstanding the other terms of the charterparty, there shall be some period during which there is to be no payment. Such a clause appears in this very contract, and is cl. 12, which says:

> That in the event of loss of time from deficiency of men or owners' stores, breakdown of machinery, or damage to hull or other accident preventing the working of the steamer, and lasting more than 24 consecutive hours, the hire shall cease from the commencement of such loss of time until she be again in an efficient state to resume her service. F

That is the only occasion, I think, where, under the terms of the contract, there is any interruption of the obligation of the charterers to pay the agreed time hire. Of course, this contract, like every other contract, would be subject to this incident, that, if the shipowners during any particular period of time fail to G render to the charterers the services which they have agreed to render, that is to say, if they commit a breach of their contract during a certain period of time, the charterers would be entitled to damages for that breach, and the damages for that breach would be, at any rate, the amount of hire which the charterers, under the terms of the contract, have to pay for the agreed services of the shipowners, there being default by reason of the breach on the part of the shipowners. They might even get a greater amount of damages than the H amount of the hire, but, at any rate, the amount of the hire during the period when the shipowners were failing to perform the agreed services would be at least the amount of the damages which the charterers could claim.

In this particular case the charterers claim that, during a certain period of time, notwithstanding the term in the contract that they shall pay so much hire for every month and so much hire for every part of a month, they need not pay, because, they say, they have a cross-claim for a certain amount. Can the charterers establish that claim? Under the terms of the contract, as I have already suggested, they can do so only if there is something in the contract which provides that in a certain event, which has happened, they are not to pay. It is impossible for the charterers to point to any such provision in this charterparty. There is none. The only provision for cessation of hire in this charterparty is in cl. 12, and what happened in this case does not come under cl. 12. Therefore, if the charterers are to be able to say: "We need not pay hire for this period," their contention must be based upon an allegation that there has been a breach by the shipowners in the rendering of the services they promised to render, and, upon the facts of this case, I am unable to find that there was any such breach.

In order to justify that view it is necessary, quite briefly, to refer to the facts. The facts are that, under the directions of the charterers, the vessel was to go to Blyth and there load a cargo of coal to be transported, I understand, to Norway. Apparently, it was inevitable that, when she arrived at Blyth, she would have to wait her turn for at least a week, and perhaps more, before she could get a place at the tips in order to get loaded. It is apparent, although found somewhat obscurely by the umpire, that there was some communication between the charterers and the owners and that, just before or when the vessel was arriving at Blyth, the charterers said to the owners: "Do you not think this would be a good time, while the ship is waiting for her cargo, for you to get the degaussing apparatus put on board?" I say it is "apparent," because it is stated, somewhat obscurely, by the umpire thus:

> Whilst it was admitted that the time charterers had suggested to the owners that the opportunity should be taken to fit the said apparatus at Blyth, there was no agreement or understanding that the vessel should continue on hire whilst this was being done, or otherwise.

I understand that to mean, and it can only mean, that, before the vessel got to Blyth, the charterers said that, since she would have to wait for her cargo there, that would be a good opportunity to get the degaussing apparatus on board, and that the owners accepted that suggestion. When the vessel arrived at Blyth she was sent to the wharf of the Blyth Drydocks & Shipbuilding Co., Ltd., where the work of fitting the degaussing apparatus was commenced. The vessel remained at that wharf for 8 days and 21 hours—until Mar. 28—having the degaussing apparatus fitted, and during that period she was waiting for her cargo. Then, apparently, her turn to load under the tips came. The fitting of the degaussing apparatus was then interrupted and she went and loaded her cargo, and, having loaded her cargo, she came back to have the degaussing apparatus fitting completed, which went on from 9 p.m. on Apr. 2 to 10 a.m. on Apr. 4—a period of 1 day and 13 hours. The question is whether the charterers can refuse to pay hire during that total period of 10 days, 10 hours, 45 minutes.

The judge has followed, I think too literally, a statement made by the umpire, which comes just after the passage in his award which I have read, in which he says:

> The vessel was therefore not at the disposal of the time charterers whilst the apparatus was being fitted.

The judge throughout his judgment used phrases of which the following are typical:

> The time charterers were deprived of the use of the ship . . . The ship was deliberately withdrawn from the use of the charterers . . . They were deliberately deprived of the use of the ship . . . The use of the ship was withdrawn from the use and the service of the charterers.

Such phrases occur constantly in the judgment. What is the real question which we have to consider in regard to the matter? For that one must go back and see what is the nature of this contract. Under this contract the shipowners agree to render certain services and do work and labour for the charterers by the agency of their servants and crew. While the ship is waiting at Blyth for her cargo, she is doing everything that the shipowners need do for the charterers. The charterers had said: "You have to load this cargo at Blyth and it is necessary for the vessel to wait for her cargo and whilst waiting for her cargo she is doing the service which you, the shipowners, have promised that she shall perform." I think it is a misuse of language to use such phrases as "the withdrawal of the ship from the use of the charterers" and "deliberately withdrawn from the use of the charterers " merely because during that period the shipowners were doing some work of their own and doing that work of their own at the very suggestion of the charterers themselves. As I suggested during the course of the argument, if, when the vessel is necessarily waiting for her cargo, the shipowners turned the crew off to chip rusty plates or do some painting, or something of that sort, the charterers could not object and say : " If the ship was loaded she ought to be sailing the seas instead of being chipped, or painted, here." The fact is that the ship could not be sailing the seas, because she was where she was in enforced idleness, and it does not matter one-halfpenny to the charterers how the shipowners choose to employ their servants at a time when they cannot be carrying out what they promised to carry out for the charterers, namely, to carry their goods across the sea and to deliver them. For that reason it seems to me to be hopeless for the charterers to claim that during the first period of waiting at Blyth, that is, the first 8 days and 21 hours, they are not liable to pay hire.

The second period, the 1 day and 13 hours which was occupied to complete the fitting of the degaussing apparatus after the cargo was loaded, I think rests on a rather different basis ; and it is not so obviously manifest that, in regard to that time, the charterers are not entitled to refuse to pay hire. I think they also fail in their claim there to be relieved from paying hire in respect of that period. Their obligation to pay hire during the period of this time charterparty is unabated unless, first, there is a clause in the charterparty giving them a right to stop payment during any particular period—and there is none with regard to this period—or, secondly, they may be entitled to set up their claim for damages on the ground that, during this particular period, the shipowners were not carrying out their part of the contract. I do not think it is open to them to make that suggestion and to claim damages in respect of this period of 1 day, 13 hours, because, as I say, it is manifest that the shipowners during that time were only doing that which the charterers had themselves suggested they should do. The charterers suggested that the shipowners should take the opportunity whilst the vessel was necessarily waiting at Blyth to have the degaussing apparatus put in. Of course, the putting in of that apparatus would have to be completed. Another opportunity was taken to complete that operation, and, in taking that opportunity, I do not see that there was any breach of contract on the part of the shipowners—because they were only doing that which the charterers had suggested that they should do, and was something which the charterers had, therefore, entirely approved of their doing.

In those circumstances, I think the claim of the time charterers to be relieved from paying hire during either or both of these periods entirely fails, and that the award in their favour, which was upheld by the judge, should be set aside, and the alternative award should be substituted for it.

Goddard, L.J. : I agree. I do not find it necessary to consider the cases to which **Atkinson, J.**, refers in his judgment or any of the other interesting points which he raised, because, with all respect to him, I think he overlooked the plain facts of the case. If the facts had been that, when the ship arrived at Blyth, it was found she could not load immediately from some cause or another and the shipowners had said " We are going now to fit degaussing apparatus on the ship," and the time charterers had said " No, we do not want you to do that ; since we cannot load our cargo immediately, we want to send the vessel on another voyage," different considerations would arise. That is not what happened. The ship arrived at Blyth to take on board a cargo, but for some reason or another she could not take that cargo on board immediately. The time charterers thereupon suggested to the shipowners that it would be a good thing to occupy the time during which the ship was detained by fitting degaussing apparatus to her, and with that suggestion the shipowners agreed and had that work done. How in those circumstances it can be said that the shipowners committed any breach of their contract to the time charterers I cannot understand. The shipowners were entitled to receive hire for their ship unless they failed to render the services to the time charterers which they contracted to render to them, as they would do if they deprived the time charterers of the use of the ship for purposes of their own. Otherwise the shipowners were entitled to receive the hire provided for by the charterparty. I can see nothing in this case which entitles the time charterers to say they were deprived of the use of the ship at any time. What was done was in fact done at their suggestion and with their consent. In those circumstances I can see no ground whatever for saying that the shipowners are to be deprived of part of the hire for the time during which this work was done.

DU PARCQ, L.J.: I agree. I think it is impossible, when one looks at para. 9 of the case, to make any different order here to that which has been mentioned by MACKINNON, L.J.

Appeal allowed with costs.

Solicitors: *Sinclair, Roche & Temperley*, agents for *Botterell, Roche & Temperley* Newcastle-upon-Tyne (for the appellants); *William A. Crump & Son* (for the respondents).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

R. *v.* KEELING.

[COURT OF CRIMINAL APPEAL (Humphreys, Asquith and Hallett, JJ.), **March 9, 10, 1942.**]

Criminal Law—Evidence—Corroboration—What amounts to corroboration—Prisoner's silence or inadequate answers when charged with the crime—Prisoner's stating he wished to say nothing when asked by magistrates if he had anything to say—Prisoner electing not to give evidence.

The appellant was convicted on a charge of having unlawful carnal knowledge of a girl aged 8 years. On account of her age the girl was not sworn as a witness, and, by reason of the Children and Young Persons Act, 1933, s. 38 (1), it became essential as a matter of law that her evidence should be corroborated. The judge directed the jury that such corroboration could be found in the conduct of the appellant when the accusation in question was made against him. The conduct referred to consisted of the appellant's answers at three stages in the proceedings, preliminary to his trial. When he was cautioned and told of the charge by the police officer who arrested him, he said: "I know what you mean, but not likely . . ." After the warrant had been read over to him, he said: "I have got you—nothing to say." When he had been cautioned by the magistrate, he said: "I am not guilty. I am going to say nothing." It was further said that the fact that, both before the magistrates and at the trial, he elected to give no evidence, should be taken into consideration by the jury in deciding whether these matters amounted to corroboration:—

HELD: the appellant's conduct did not afford the corroboration which was necessary in law. His answer to the committing magistrates could not be regarded as constituting corroboration, and, since it was impossible to say whether that part, if any, of the material which was corroboration in law would have been sufficient to satisfy the jury, the conviction must be quashed.

[**EDITORIAL NOTE.** The cases on the subject here discussed include the decision in *R.* v. *Feigenbaum* (1), a case a little out of line with later decisions. The court has not seen its way to say definitely that this case is no longer of any authority, but it is clear that *R.* v. *Whitehead* (3) must be now treated as stating the better view of the law on the subject, and *R.* v. *Parker* (6) must be treated as a decision upon its own facts.

AS TO EVIDENCE OF SEXUAL OFFENCES, see HALSBURY, Hailsham Edn., Vol. 9, p. 224, para. 314; and FOR CASES, see DIGEST, Vol. 14, pp. 535-537, Nos. 6056-6078.]

Cases referred to:

(1) *R.* v. *Feigenbaum*, [1919] 1 K.B. 431; 14 Digest 395, *4151*; 88 L.J.K.B. 551; 120 L.T. 572; 26 Cox C.C. 387; 14 Cr. App. Rep. 1.

(2) *R.* v. *Christie*, [1914] A.C. 545; 14 Digest 360, *3811*; *sub nom. Public Prosecutions Director* v. *Christie*, 83 L.J.K.B. 1097; 111 L.T. 220; 24 Cox C.C. 249; 10 Cr. App. Rep. 141.

(3) *R.* v. *Whitehead*, [1929] 1 K.B. 99; Digest Supp.; 98 L.J.K.B. 67; 139 L.T. 640; 28 Cox C.C. 547; 21 Cr. App. Rep. 23.

(4) *R.* v. *Charavanmuttu* (1930), 22 Cr. App. Rep. 1; Digest Supp.

(5) *R.* v. *Naylor*, [1933] 1 K.B. 685; Digest Supp.; 102 L.J.K.B. 561; 147 L.T. 159; 23 Cr. App. Rep. 177; 29 Cox C.C. 493.

(6) *R.* v. *Parker*, [1933] 1 K.B. 850; Digest Supp.; 102 L.J.K.B. 766; 147 L.T. 502; 24 Cr. App. Rep. 2; 29 Cox C.C. 550.

Appeal against a conviction at Leicester Assizes upon a charge of having unlawful carnal knowledge of a girl aged 8 years. The facts are fully set out in the judgment of the court delivered by Hallett, J.

Guy H. Dixon for the appellant.

A. P. Marshall for the Crown.

Hallett, J. [delivering the judgment of the court]: Unfortunately, having regard to the medical evidence, there was no possible doubt, and, indeed, it was not disputed by counsel for the appellant at the trial, that someone committed A the offence in question upon this little girl at or about the time when, according to her evidence, it was committed upon her by the appellant. Having regard to her age, the little girl was not sworn, and accordingly the proviso to sect. 38 of the Children and Young Persons Act, 1933, rendered it not merely desirable, as in most sexual cases, but absolutely essential as a matter of law, that her evidence should be corroborated by some other material evidence implicating B the appellant.

At the close of the case for the crown, counsel for the appellant submitted to the judge that there was no evidence available which the jury might regard as affording the necessary corroboration. However, after some discussion, that submission was overruled by the judge, and when he came to direct the jury, after giving them certain directions as to the necessity for corroboration, directions to which no exception has been or could be taken, he directed them C that there was in fact the necessary corroboration to be found, if they thought proper to take that view, in the conduct of the appellant from first to last when the accusation in question was made against him.

The conduct of the appellant falls to be considered at four stages, and the circumstances at each stage are somewhat different. In the first place, on Nov. 28, 1941, Inspector Haywood of the Leicester police force saw the appellant in a certain street and cautioned him in the usual way. He told him that he was D not bound to make any statement, and then told him that a warrant was in the possession of the inspector for his arrest for having had carnal knowledge of Doreen Patricia Keefe, aged 8 years, on or about Nov. 13. To that the appellant replied:

> I know what you mean, but not likely. She plays with the Sawbridge girl.

That was another little girl, who had given evidence which carried the matter E no further. It was not suggested by counsel for the crown, either here or in the court below, nor indeed was it suggested by the judge, that the reply then made by the appellant amounted to an admission. What was suggested by the judge was that the form which the denial took was inadequate having regard to the gravity of the charge which was being made. The judge thought that the jury might take the view that the words "not likely" were to be F regarded in their ordinary sense, and he said:

> It is not at all likely that anybody would do such a thing, but that is what he says.

Of course, another view of the words "not likely" would be that they were a colloquial way of giving an emphatic denial. However that may be, no one suggested that the words amounted to an admission, as distinct from what might be regarded as a weak and inadequate denial. G

The next stage of the matter was on the same evening, when once more the warrant was read over to the appellant by the inspector, once more he was cautioned, and on that occasion, having been told that he need say nothing, his answer was:

> I have got you—nothing to say.

In other words, he availed himself of the information that he was under no H obligation to say anything.

The third stage of the matter was before the magistrates. At the hearing before the magistrates the appellant was of course cautioned in the manner which is provided by statute, in other words, he was addressed in the following terms, or to the like effect:

> Do you wish to say anything in answer to the charge? You are not obliged to say anything unless you desire to do so, but whatever you say will be taken down in writing and may be given in evidence upon your trial.

Having been told that he was not obliged to say anything unless he desired to do so, his answer before the magistrates was as follows :

> I am not guilty. I am going to say nothing.

At the trial before the judge, being represented by counsel and having the advantage no doubt, of counsel's advice, he did not go into the witness-box to give evidence.

A Those are the matters to which the judge refers when he draws the attention of the jury to the prisoner's conduct. Each stage which I have mentioned was also mentioned by the judge, and, in particular, he referred to the failure of the prisoner to make any further statement before the magistrates, and his failure to go into the witness-box at the trial.

Counsel has referred the court to four cases. In the first—namely, *R.* v. *Feigenbaum* (1)—AVORY, J., referred to *R.* v. *Christie* (2), a decision of the B House of Lords, where some observations of great authority were made as to the circumstances in which the conduct of an accused person in the face of an accusation may become admissible as evidence against him. In *R.* v. *Feigenbaum* (1) the police officer had described to the appellant in some detail certain allegations which were being made, and the appellant had made no reply. It was held that the evidence of the constable, if accepted, might be regarded as affording some corroboration of the evidence given against the C appellant by the actual thieves, who were, of course, his accomplices.

In *R.* v. *Whitehead* (3), it was held that the fact that the accused made no denial when charged and cautioned did not constitute corroboration. It is necessary in the present case to consider whether an insufficiently strenuous denial can afford more corroboration as against the prisoner than the absence of any denial at all.

Two later cases were mentioned by counsel—namely, *R.* v. *Charavanmuttu* (4) D and *R.* v. *Naylor* (5). In the last-mentioned case LORD HEWART, L.C.J., in delivering the judgment of the court, said this at p. 687 :

> When one looks at the words of the caution in the Criminal Justice Act, 1925, s. 12 (2), which must be taken to have been framed deliberately, it is quite obvious that they were intended to convey to the prisoner the belief that he is not obliged to say anything unless he desires to do so. We do not think that the words of the caution can properly be construed in the sense that after being cautioned the prisoner remains silent at his peril and may E find his silence made a strong point against him at his trial.

It may be that, on some future occasion, this court will think it necessary or desirable to consider the question whether, and, if so, upon what grounds, *R.* v. *Feigenbaum* (1) can be reconciled with the three later cases to which I have referred, or whether, having regard to those later cases, it must now be considered as being overruled. For the purpose of deciding this case, it is F sufficient to say that, from the time when it was decided, the court has preferred the decision in *R.* v. *Whitehead* (3), the decision in *R.* v. *Parker* (6) being clearly distinguishable.

In the present case we all think quite clearly that some at least of the conduct to which the judge referred in his direction to the jury, and most obviously the conduct of the prisoner when addressed by the committing justices in not making any denial of the charge beyond saying that he was not guilty, cannot G in point of law be regarded as affording corroborative material for the jury. It is impossible to say whether that part, if any, of the material which was admissible would have been sufficient to satisfy the jury. The judge told the jury that they could look at the prisoner's conduct from first to last in failing adequately to deny the charge as affording the necessary corroboration. In our opinion that conduct did not in point of law afford such material. Accordingly, H the conviction cannot stand and must be quashed, and this appeal is allowed.

Appeal allowed.

Solicitors : *Registrar of Court of Criminal Appeal* (for the appellant) ; *Director of Public Prosecutions* (for the Crown).

[*Reported by* IRENE G. R. MOSES, *Barrister-at-Law.*]

WALLROCK *v.* EQUITY AND LAW LIFE ASSURANCE SOCIETY.

[Court of Appeal (Lord Greene, M.R., and Luxmoore, L.J. and Asquith, J.), **March 23, 31, 1942.**]

Emergency Legislation—Landlord and tenant—Rent owing by lessee—Notice to sublessees to pay rent to head-lessors—Whether notice can be served without leave of the court—" Taking of possession of property "—Law of Distress Amendment Act, 1908 (*c.* 53), *s.* 6—*Courts* (*Emergency Powers*) *Act,* 1939 (*c.* 67), *s.* 1 (2).

The appellants owned the reversion of certain premises held on lease by the respondent. The respondent had sublet part of the premises. He defaulted in payment of the rent, and on July 28, 1941, the appellants obtained judgment for possession, arrears of rent and mesne profits. On Oct. 15, 1941, the appellants obtained leave under the Courts (Emergency Powers) Act, 1939, to proceed under their judgment, such leave being suspended on terms, and the summons was to be restored to the list in six months. On Jan. 19, 1942, the appellants served upon the subtenants a notice under the Law of Distress Amendment Act, 1908, s. 6, requiring them to make future payments of rent to the appellants until all arrears of rent which had accrued due from the respondent subsequently to July 28, 1941, had been paid off. The respondent claimed an injunction to restrain such payments being made on the ground that the service of the notice was a taking possession of property within the Courts (Emergency Powers) Act, 1939, s. 1 (2) (*a*) (ii) :—

Held : the effect of the service of a notice under the Law of Distress Amendment Act, s. 6, was to vest in the head-lessor the lessee's right to recover the rent payable by the subtenant. The words " taking of possession " in the Courts (Emergency Powers) Act, 1939, s. 1 (2) (*a*) (ii) could not be regarded as covering the statutory acquisition of this right ; nor did they apply to the actual receipt of the rent from the subtenant. Accordingly, the appellants were entitled to serve the notice without leave under the Courts (Emergency Powers) Act, 1939.

[**EDITORIAL NOTE.** It will be remembered that the Courts (Emergency Powers) Act, 1939, s. 1 (2) (*a*), deals with remedies by way of self-help. One of the most useful of such remedies available to a landlord is the service of a notice under the Law of Distress Amendment Act, 1908, s. 6, whereby a subtenant is required to pay his rent direct to the landlord in liquidation of arrears of rent due from the tenant. The question here is whether the service of such a notice is affected by that part of the 1939 Act. In short, is it a " taking of possession of any property " within sect. 1 (2) (*a*) (ii) of that Act ? The Court of Appeal has held that, in order that it should be such a taking of possession, it is necessary to construe the word " possession " as including a statutory assignment of a chose in action, and for this construction the court has been unable to find any legal justification. The effect in law of the service of such a notice is to vest in the head-lessor a right to receive the rent due from the subtenant, and the head-lessor receives such rent as money due to him under that right. It is impossible, therefore, to describe the receipt of such rent as the " taking possession of any property." The exercise of the right by the head-lessor, however, substantially affects the financial position of the tenant and must be taken into consideration when any order is made under the 1939 Act allowing the tenant to retain possession on part payment of the rent or arrears of rent.

For the Courts (Emergency Powers) Act, 1939, s. 1 (2) (*a*), see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 32, p. 947, and BUTTERWORTHS EMERGENCY LEGISLATION, Statutes Volume, p. 207.

Appeal of the defendants from an order of Birkett, J., dated Jan. 27, 1942. The facts are fully set out in the judgment.

J. D. Casswell, K.C., and *J. Scott Henderson* for the appellants.

Robert Fortune for the respondent.

Casswell, K.C. : Distress is a right to seize personal chattels by way of pledge. Acting under the provisions of the Law of Distress Amendment Act, 1908, s. 6, is not a taking of chattels in pledge. It is a taking of money and that is not allowed to be taken under the law relating to distress. The right given by the Law of Distress Amendment Act, 1908, is a statutory right and, if the legislature had intended by the Courts (Emergency Powers) Acts to take that right away, the matter would have been expressly mentioned, as, for instance, the Companies Act, 1929, s. 169, is mentioned. It would be a straining of language to say that the service of a notice under sect. 6 of the 1908 Act was a taking of possession of property.

Fortune : The object of the Courts (Emergency Powers) Act, 1939, is to assist people who find themselves in the position in which the respondent found himself. If relief is given to a debtor, the creditors must suffer. In the present case the serving of the notice was a taking of property. A part of the tenant's property is his right to collect rent due from a subtenant. If a notice is given of which the effect is to transfer to the head-landlord the right to receive that rent, the notice is a transfer of a right of property. The respondent could charge the rent becoming due to him. Therefore, it is a right of property of which possession can be taken, and the notice given by the head-landlord is a taking of possession of property within the terms of the Courts (Emergency Powers) Act, 1939. The landlord could not serve a notice under sect. 6 of the 1908 Act except on the footing that he had a right to distrain.

Casswell, K.C., in reply.

Lord Greene, M.R. [delivering the judgment of the court] : The respondent is the holder of a lease of certain premises in the Strand and adjoining premises. The reversion expectant upon the termination of the lease is vested in the appellants. The term of the lease is for 90 years from June 24, 1904, and the rent is £1,200 a year, payable quarterly. Part of the premises is sublet to the Great Western Railway at a rent of £1,600 a year. The respondent made default in payment of the rent, and on July 28, 1941, the appellants obtained against him judgment for possession and for £355 arrears of rent, and for £161 1s. 9d., mesne profits from June 10, 1941, the date of the issue of the writ, down to the date of the judgment.

On Oct. 15, 1941, leave was given to the appellants under the Courts (Emergency Powers) Act, 1939, to proceed under their judgment, but such leave was suspended provided that the respondent paid to the appellants the sum of £35 within seven days from the date of the order. The summons was to be restored to the list in six months. An appeal from this order was dismissed by Lewis, J., on Oct. 24, 1941. By virtue of the Courts (Emergency Powers) Act, 1940, s. 1 (2), the effect of this order suspending leave to proceed was that the lease must be deemed not to have been forfeited, and it continues in force so long as the judgment of July 26, 1941, remains unenforceable. The result, therefore, is that, notwithstanding the issue of the writ in the action for possession and the judgment in that action, the lease remains on foot and rent is payable under it.

On Jan. 19, 1942, the appellants served on the Great Western Railway a notice under the Law of Distress Amendment Act, 1908, s. 6, stating that £438 18*s.* 3*d.* arrears of rent were due from the respondent to the appellants and requiring that all future payments of rent by the Great Western Railway be made direct to the appellants until such arrears should have been duly paid. Pursuant to this notice the Great Western Railway paid to the appellants the sum of £400. The arrears of rent mentioned in the notice had accrued due subsequently to the judgment of July 28, 1941.

On Jan. 5, 1942, the respondent issued the writ in the present action, claiming a declaration that the appellants were not entitled to serve the notice on the Great Western Railway, an injunction to restrain the appellants from acting on the notice or requesting or receiving payment under it, and damages. On Jan. 19, 1942, the respondent issued a summons for an injunction in the terms of the writ, and on Jan. 27, Birkett, J., granted the injunction asked for. The appellants now appeal from this order.

The order of Birkett, J. in effect deals with the whole substance of the action. Before us counsel agreed that the hearing before him should be treated as the trial of the action, and that the hearing before us should accordingly be treated as a final appeal against judgment in the action. It is worth pointing out that, in any event, an injunction was not the appropriate interlocutory relief. It had the effect, not of keeping matters *in statu quo*, but of depriving the appellants of the subject-matter of the litigation. If relief was to be granted, it ought to have been the appointment of a receiver. The question for us, however, is the final determination of the issues raised in the action.

The Law of Distress Amendment Act, 1908, s. 6, empowers a superior landlord, where rent is in arrear, to serve notice on an undertenant requiring him to pay all future rent direct to the superior landlord until the arrears have been duly paid. The concluding words of the section are as follows :

> And such notice shall operate to transfer to the superior landlord the right to recover, receive, and give a discharge for such rent.

One of the arguments put forward on behalf of the respondent was to the effect that the service of a notice under this section was the exercising by the superior landlord of a remedy " by way of the levying of distress," and was, therefore, prohibited by the Courts (Emergency Powers) Act, 1939, s. 1 (2) (*a*) (i), except with the leave of the court. This argument is clearly inadmissible, since, by no stretch of language, can the special right conferred by sect. 6 of the 1908 Act be described as a right of distress.

A more attractive argument was based on the Courts (Emergency Powers) Act, 1939, s. 1 (2) (*a*) (ii), which prohibits " the taking of possession of any property " except with the leave of the court. The effect of the service of a notice under the Law of Distress Amendment Act, 1908, s. 6, is to vest in the superior landlord the lessee's right to receive the rent payable by the undertenant ; that is to say, it brings about a statutory assignment of a chose in action under which the superior landlord becomes entitled to obtain payment of the rent by the undertenant. It is truly a case of self-help ; and the superior landlord becomes entitled to exercise the right by reason of a default on the part of his tenant. In this sense, therefore, the case may be said to be analogous to the cases of self-help against which the Courts (Emergency Powers) Act, 1939, gives protection. The question is not to be answered by finding an analogy. Its answer depends on the language of the Courts (Emergency Powers) Act, 1939. Can it be said that the service of the notice is " the taking of possession of any property ? " So far as the words " any property " are concerned, they are, taken by themselves, wide enough to include a chose in action, and in the later words of the paragraph—" the appointment of a receiver of any property "—they do, we think, clearly include that class of property. The difficulty is caused by the words " taking of possession." We were invited to say that these words can, by a liberal construction, be regarded as covering the statutory acquisition of the right to receive the rent from the undertenant. On consideration, we have come to the conclusion that this construction is not legitimate. In the absence of a clear context, the words " take possession " are suitable only for the case of physical things, and are entirely unsuitable to describe the legal operation which takes place under the Law of Distress Amendment Act, 1908, s. 6. If the word " possession " were intended by the legislature to apply to the statutory assignment of a chose in action which takes place under that section, they could not have chosen a more inappropriate word. We have searched in vain in legal literature for any justification for such a misuse of language and we have found none ; nor could counsel refer us to any. It may be that the existence of sect. 6 of the 1908 Act escaped the notice of the legislature when it enacted the Courts (Emergency Powers) Act. It may be that the legislature had the section in mind and deliberately intended to exclude it from the scope of the Act, taking the view that it would be unjust to allow a tenant to receive rent from his subtenant, while making default in payment of his own rent to his lessor. However this may be, the legislature has not, in our opinion, used language which can, on any principle of interpretation, be strained to cover the case. It was suggested that, although the words " take possession " are not apt to describe the serving of the notice and the consequential statutory assignment to the head-lessor of the right to receive the rent from the subtenant, they do apply to the actual receipt of the rent when it is paid. Here again, the acceptance of payment of a debt which, by force of the statute has become vested in the head-lessor, cannot, in our opinion, by any stretch of language be described as the " taking possession of property " within the meaning of the Courts (Emergency Powers) Act, 1939. The head-lessor receives the payment as being the person in whom the right to receive payment is vested. He receives it by virtue of that right, and the payment is nothing more nor less than a discharge of the obligation.

Lastly, it was said that the service of the notice on the Great Western Railway was in some way or another illegitimate, as being an evasion of the Courts (Emergency Powers) Act, 1939, or a circumvention of the order made thereunder.

We do not follow this argument. The arrears of rent referred to in the notice had accrued due subsequently to July 28, 1941, and it was only with arrears of rent and mesne profits down to that date that the order under the Courts (Emergency Powers) Act dealt. The existence of the right conferred by sect. 6 of the 1908 Act is a matter which affects the financial position of the respondent, and due weight must be given to it in any future review of that position under the Courts (Emergency Powers) Act. However, this cannot have any bearing on the present question.

The appeal is allowed with costs, and the action is accordingly dismissed with costs.

Appeal allowed with costs. Leave to appeal to the House of Lords refused.

Solicitors: *Rooper & Whately* (for the appellants); *Finnis, Downey, Linnell & Price* (for the respondent).

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

Re WARD, HAMMOND & SON *v.* THE OFFICIAL RECEIVER AND THE DEBTOR.

[CHANCERY DIVISION (Farwell, J.), **March 23, 1942.**]

Bankruptcy—Surplus assets—Payment in full of all proving creditors—Other creditors not proving—Right of bankrupt to surplus assets—Charging order in favour of non-proving creditor—"Creditor"—Bankruptcy Act, 1914 (*c.* 59), *s.* 69.

After all the creditors who had proved in a bankruptcy had been paid in full, a surplus remained in the hands of the Official Receiver. A creditor who had not proved in the bankruptcy obtained judgment against the bankrupt for £59 and asked for a charging order against the surplus in respect of that amount. The question was whether the surplus was held by the Official Receiver in trust for the bankrupt on the ground that the word "creditors" in the Bankruptcy Act, 1914, s. 69, (which entitles the bankrupt to any surplus after payment of the creditors in full) was confined to those creditors who had proved in the bankruptcy; or whether it ought to be held in trust for creditors who had not proved but whose existence had been admitted by the bankrupt:—

HELD: the word "creditors" in sect. 69 was to be read as meaning creditors who had proved in the bankruptcy. Accordingly, the surplus was held in trust for the bankrupt and might properly be the subject-matter of a charging order.

[**EDITORIAL NOTE.** This decision covers a point which was not covered by the decision of the Court of Appeal in *Re Prior, ex p. Prior* (1). The distinction between the two cases is that, in the present case, in addition to the creditors who had proved in the bankruptcy, there were a number of creditors who had not proved and their debts had been admitted by the bankrupt. The decision turns on the meaning to be given to the word "creditors" in the Bankruptcy Act, 1914, s. 69, and whether it is to be confined to the creditors who have proved or to be extended to include all the creditors of the bankrupt. The judge has decided in favour of the former view, and the result is that the surplus after paying in full all the creditors who have proved is held in trust for the bankrupt and a charging order can be validly made against it.

AS TO BANKRUPT'S RIGHT TO SURPLUS ASSETS, see HALSBURY, Hailsham Edn., Vol. 2, p. 319, para. 431; and FOR CASES, see DIGEST, Vol. 4, pp. 500, 501, Nos. 4500-4508.]

Case referred to:

(1) *Re Prior, Ex p. Prior,* [1921] 3 K.B. 333; 21 Digest 648, *2266*; 90 L.J.K.B. 1222.

MOTION by a judgment creditor for a charging order on assets in the hands of the Official Receiver. The facts are fully set out in the judgment.

H. D. Baskerville for the applicant, the judgment creditor.

V. R. Aronson for the respondent, the Official Receiver.

FARWELL, J.: This is an application by a judgment creditor for a charging order on a sum of money in the hands of the Official Receiver in the bankruptcy of Mrs. Emblyn Ward. She was adjudicated bankrupt in 1929. Since then the trustee has paid in full all the debts of the creditors who have come in and proved their debts. The judgment creditor has since then obtained judgment for a sum of £59 odd against the bankrupt, and he desires that a charging order should be made to that extent against the money in the hands of the Official Receiver which amounts to something like £275. The question is whether the court ought to make such an order.

The Court of Appeal, in *Re Prior* (1), have decided, and, of course, that decision is binding upon me, that, where a debtor against whom a receiving order had been made paid money into court to satisfy his debts in full, and the receiving order was then rescinded by an order which directed the Official Receiver, after paying the debts and deducting his costs, charges and expenses, to pay the balance in his hands to the debtor, there was jurisdiction in the registrar in bankruptcy to make a charging order in favour of a judgment creditor against the money in the hands of the Official Receiver. The Court of Appeal considered the matter, and they held that not only had they power to make the order, but that the registrar in bankruptcy also had power. Therefore, there is now no doubt that a charging order is an order which the registrar in bankruptcy can make in a case where the whole of the debts of the debtor have been paid in full.

It is said that that decision applies in the case which is before me to-day. The case before me today differs from that which was before the Court of Appeal, because in this case the creditors who have proved in the bankruptcy have been paid in full, but it appears from the debtor's own statement that there are or were other creditors who have never come in and proved their debts, and whose debts, therefore, have not been satisfied by payment. The question is whether, in those circumstances, the surplus which remains in the hands of the Official Receiver, after paying in full the whole of the creditors who have proved in the bankruptcy, with interest and costs, charges and expenses, belongs to the bankrupt or whether the sum in the hands of the Official Receiver should be retained by him or dealt with in some other way so as to provide, if necessary, for the debts of those creditors who have not come in and proved. The decision, therefore, of the Court of Appeal does not cover this case, although it does show plainly—and it is not disputed I think—that, if all the debts had been paid in full, there would have been ample jurisdiction in the registrar to have made the charging order in question.

The Bankruptcy Act, 1914, s. 65, provides:

> Any creditor who has not proved his debt before the declaration of any dividend or dividends shall be entitled to be paid out of any money for the time being in the hands of the trustee any dividend or dividends he may have failed to receive before that money is applied to the payment of any future dividend or dividends, but he shall not be entitled to disturb the distribution of any dividend declared before his debt was proved by reason that he has not participated therein.

That section provides that a creditor who has not proved his debt before a dividend is declared and paid may yet come in and claim to participate in any future dividend which may be payable although he cannot disturb any dividend which has already been paid. In my judgment the words "any creditor" there must mean any creditor who has at some time come in and proved his debt. It does not apply to a person who claims to be a creditor but who has never satisfied the bankruptcy court that he is a creditor by proving his debt. In my judgment "any creditor" in that section means that any creditor is not debarred from participating in a dividend if he comes in and proves his debt, although he comes in late and after a dividend has already been declared. He cannot upset what has been done, but, once he has proved his debt, he is not precluded from claiming in any surplus. Sect. 67 provides:

> (1) When the trustee has realised all the property of the bankrupt, or so much thereof as can, in the joint opinion of himself and of the committee of inspection, be realised without needlessly protracting the trusteeship, he shall declare a final dividend, but before so doing he shall give notice in manner prescribed to the persons whose claims to be creditors have been notified to him, but not established to his satisfaction, that if they do not establish their claims to the satisfaction of the court within a time limited by the notice, he will proceed to make a final dividend, without regard to their claims. (2) After the expiration of the time so limited, or, if the court on application by any such claiman grants him further time for establishing his claim, then on the expiration of such furth

> time, the property of the bankrupt shall be divided among the creditors who have proved their debts, without regard to the claims of any other persons.

That section provides that when the trustee has got in all the property of the bankrupt, or all such property of the bankrupt as he can obtain, he is to declare a final dividend, but before doing so he has to give notice to all persons whose claims to be creditors have been notified to him, but not established to his satisfaction. That means, in my judgment, that in the case of creditors who have put in claims but whose claims have not been admitted to proof by the trustee and are disputed by him, leaving the matter so that the creditors are still claiming to be creditors although they have not been admitted as such by the trustee in bankruptcy, the trustee is to notify those creditors and give them an opportunity to come in and establish, if they can, their debts as debts which ought to be admitted to proof, and, if they do not come in within the time limit, or cannot establish their proof within the time limit, then the trustee is directed to declare a final dividend without regard to those claims. After the expiration of the time so limited, the property of the bankrupt is to be divided among the creditors who have proved their debts without regard to the claims of any other persons.

Sect. 69, upon which the question turns, is in these terms:

> The bankrupt shall be entitled to any surplus remaining after payment in full of his creditors, with interest, as by this Act provided, and of the costs, charges, and expenses of the proceedings under the bankruptcy petition.

If that section means that the bankrupt shall be entitled to any surplus remaining after the creditors who have proved in the bankruptcy have been paid in full with interest, together with costs, charges and expenses, then there can be no ground for refusing the charging order asked for here, and that is an order which can properly be made having regard to the decision of the Court of Appeal to which I have referred. If, on the other hand, the word "creditors" means everybody who claims to be a creditor of the bankrupt, without regard to whether they have proved or not, and the section is, therefore, to be construed to mean that all such creditors have to be paid in full, then, in this case, there being creditors who have never proved, and who the bankrupt has stated to be creditors, the surplus cannot belong to the bankrupt, because the only right which the bankrupt has to call upon the trustee to pay over the surplus to him is under this section. If the trustee can say, or the court is satisfied, that there are creditors who have not proved in the bankruptcy but who may yet have claims and, therefore, may yet be creditors, and those persons have not been paid in full, then there can be no right in the bankrupt to claim that the surplus belongs to him.

Throughout the Act it will be found that the word "creditor" is used both as meaning persons who have claims against the debtor and persons who have proved in the bankruptcy. It is not at all easy to ascertain which meaning should be attributed to the word in this section. On the whole, I have come to the conclusion that the word "creditors" in sect. 69 must be read as meaning creditors who have proved in the bankruptcy so as not to include those persons who have not proved in the bankruptcy and have not established any claims to the satisfaction of the court, and who, therefore, under sect. 67 are prevented from receiving any part of the final dividend which may be declared. In my judgment this portion of the Act contemplates that there shall be finality, and, if notice is given to the persons who the debtor says are his creditors, and any of those persons do not choose to come in and prove their debts in the bankruptcy, then those persons are not treated as creditors within the meaning of this section. Therefore, on all the creditors who have proved in the bankruptcy being paid in full with interest and costs, the position is that the balance in the hands of the trustee is a balance which he holds in trust for the bankrupt and consequently is a fund in respect of which a charging order can properly be made.

Charging order granted. Costs of both parties to be taxed and paid out of the fund in hand in priority to the charging order.

Solicitors: *Lindus & Hortin* (for the applicant); *The Solicitor, the Board of Trade* (for the Official Receiver).

[*Reported by* IRENE G. R. MOSES, *Barrister-at-Law.*]

TRUSTEE IN BANKRUPTCY OF BOWRING-HANBURY *v.* BOWRING-HANBURY.

[Chancery Division (Bennett, J.), **March 11, 12, 1942.**]

Limitation of Actions—Acknowledgment—Executor—Debt due to executor mentioned in inland revenue affidavit—Debt mentioned in statement to trustee in bankruptcy of creditor.

The defendant advanced £10,000 to his wife in Dec., 1924, of which she repaid £1,000 in June, 1929. She died in 1931, having by her will appointed the defendant her sole executor. For the purpose of obtaining a grant of probate, the defendant, in May, 1931, swore an inland revenue affidavit in which the debts listed as due from the wife included the debt of £9,000 due to him upon the loan. He was adjudicated a bankrupt in 1935, and in June, 1936, the solicitors who acted for him in the executorship sent a copy of the executor's cash account to his trustee in bankruptcy in which they referred to a possible claim by the defendant against the estate in respect of the £9,000. This action was commenced in July, 1936, by the trustee in bankruptcy of the defendant. It was contended that, although six years had elapsed from the accrual of the cause of action, the debt sued upon was not barred by the Limitation Act, 1623, because the statements in the affidavit and the solicitors' letter constituted acknowledgments of the debt by the defendant sufficient to take it out of the operation of the statute :—

Held : the debt was statute-barred. Neither the affidavit nor the solicitors' letter constituted an acknowledgment of the debt, for neither was made to the creditor or his agent, nor was either made in such circumstances that a promise to pay the debt could be inferred.

[**EDITORIAL NOTE.** The allegation that this debt was not statute-barred failed on two points. First, the acknowledgment was not made to the creditor, and, secondly, there were no circumstances from which an implied promise to pay could be implied. The latter, had it been argued at length, would have been a point of some interest, involving the question whether there can be an implied promise from a person in his personal capacity to himself as executor of a deceased person. The first is not so difficult a point, but, even here, it will be noticed that the creditor was the deponent of the inland revenue affidavit and the bankrupt in the statement of the position given to the trustee in bankruptcy.

As to Acknowledgments, see HALSBURY, Hailsham Edn., Vol. 20, pp. 628-636, paras. 796-805 ; and for Cases, see DIGEST, Vol. 32, pp. 355, 356, Nos. 373-386.]

Case referred to :

(1) *Re Beavan, Davies, Bankes & Co.* v. *Beavan*, [1912] 1 Ch. 196 ; 23 Digest 360, *4273* ; 81 L.J.Ch. 113 ; 105 L.T. 784.

Action by the trustee in bankruptcy of Victor Henry Bowring-Hanbury against the bankrupt himself, sued as the executor of his wife, to recover a sum of £8,570 15*s.* 10*d.*, the balance remaining unpaid of a loan made by the bankrupt to his wife of £10,000, £6,000 of which had been lent on Dec. 13, 1924, and the balance of £4,000 on Dec. 29 in the same year.

H. B. Vaisey, K.C., and *Sir G. W. H. Jones* for the plaintiff.

H. Wynn Parry, K.C., and *H. Malone* for the defendant.

Bennett, J. : To the plaintiff's claim the defendant has pleaded the Limitation Act, 1623. To take the case out of the statute, the plaintiff sets up an alleged acknowledgment of the debt made by the defendant, and the question is whether the acknowledgment relied upon is an acknowledgment sufficient to take the case out of the statute and to avoid the plea of the statute.

The relevant facts are these. In June, 1929, Mrs. Bowring-Hanbury repaid, out of the £10,000 lent to her, the sum of £1,000. She died on Mar. 17, 1931, having, by her will dated Oct. 16, 1918, appointed the defendant her sole executor, and, after giving certain specific legacies and a pecuniary legacy, devised all the residue of her real and personal estate to the defendant absolutely.

For the purpose of obtaining a grant of probate, the defendant, on May 4, 1931, swore the usual inland revenue affidavit in which he gave particulars of the estate possessed by the deceased. Para. 4 of the affidavit is as follows :

> The first part of the schedule No. 1 hereto annexed contains a true and particular list of the debts due and owing from the deceased at the time of her death to persons

resident within Great Britain or due to persons resident out of Great Britain, but contracted to be paid in Great Britain or charged on property situate within Great Britain, with the names and addresses of the several persons to whom the same are respectively due and the descriptions and amounts of such debts.

There is annexed to the affidavit a statement "C" which contains a list of the debts owing by the deceased, and the second one is said to be a balance due to Mr. Bowring-Hanbury of loans made by him of £9,000, that sum being A included amongst the debts which are deducted from the gross value of the estate of the testatrix for the purpose of calculating the duty payable to the Crown upon the occasion of the lady's death.

Probate of the will was granted to the defendant on May 20, 1931, and on Mar. 14, 1935, he was adjudicated a bankrupt. Thereupon this debt due to him from his wife, which had not then been paid, vested in the plaintiff under the provisions of the Bankruptcy Act, 1914.

B In June, 1936, Messrs. Hopgood, Mills & Lonsdale, who were acting as the defendant's solicitors in his capacity as his wife's executor wrote a letter to the plaintiff (the trustee in bankruptcy) in which they enclosed a "copy of the executor's cash account of the receipts and payments to date and an estimate of the outstanding assets and liabilities." At the foot of the latter document is this note:

> C In addition to the above outstanding liabilities there is a possible claim by Mr. Bowring-Hanbury for £9,000, the balance of a loan of £10,000 he made to the deceased in 1924 for the purposes of the colliery.

The colliery referred to is one in which the defendant's wife had been interested.

The writ in this action was issued on July 25, 1936. In answer to the claim endorsed on the writ the defendant pleads that the debt which is sued upon was and is barred by the Limitation Act, 1623. The question which arises for D determination in this action is whether either the oath of the deponent (the defendant) to the inland revenue affidavit, in which he included the debt due to himself from his wife as one of his wife's debts, he being his wife's executor, or the note at the foot of the estimate of outstanding assets and liabilities sent by the executor's solicitors to the trustee in bankruptcy in June, 1936, is an acknowledgment of the debt sufficient to take the case out of and to defeat the plea of the statute of limitations.

E It is now settled law that an acknowledgment sufficient to take the debt out of the statute—which, under the Statute of Frauds Amendment Act, 1828, must be in writing—must be a clean acknowledgment, and from such an acknowledgment the law will imply a promise by the debtor to pay. The question here, so far as the acknowledgment in the inland revenue affidavit is concerned, is whether it can be regarded as an acknowledgment at all, it having F been made, not to the creditor, or indeed to anyone, but being simply a statement made in an inland revenue affidavit for the purpose of obtaining a grant of probate.

It seems to me that the decision of NEVILLE, J., in *Re Beavan* (1) is an authority in favour of the defendant, unless it can be said that a man can make a promise to himself. In that case NEVILLE, J., decided that an affidavit made by two executors in which they included, as one of the debts of the deceased, G a debt which was statute barred was not a sufficient acknowledgment, since the acknowledgment was made to the court and to nobody else, whereas the law required an acknowledgment to be made to the creditor or to the creditor's agent.

It is argued that, because in the present case the defendant, who was the creditor, was also the executor of his wife who was the debtor, he must be taken, in his capacity as executor of his wife, as having made a promise to himself as H creditor of his wife's estate to pay this outstanding debt. The answer to that appears to me to be that, when he was making the inland revenue affidavit, the defendant had no intention of making any promise to anyone about anything. He was simply making a statement for the purpose of obtaining from the court a grant of probate; and a statement made in those circumstances is not one in which, in my judgment, it is possible in law to imply a promise at all.

For these reasons the inland revenue affidavit is not, in my view, a sufficient acknowledgment (or, indeed, an acknowledgment at all) for the purpose of defeating the operation of the statute of limitations. So far as the note to the estimate of outstanding assets and liabilities is concerned, that, too, fails as an acknowledgment because it is not made to the creditor. The document was sent by the solicitors for the executor to the trustee in bankruptcy, the plaintiff, for the sole purpose of informing the trustee in bankruptcy of the position of the estate of the defendant's wife and, when the note was appended to the foot of the statement, it is quite plain that there was no intention to be gathered from the words used of acknowledging the existence of a debt.

For these reasons, it seems to me that the defence of the statute of limitations has been established, and the action fails.

Action dismissed with costs.

Solicitors: *Woolfe & Woolfe* (for the plaintiff); *Hopgood, Mills & Lonsdale* (for the defendant).

[*Reported by* Irene G. R. Moses, *Barrister-at-Law.*]

COPPIN AND OTHERS *v.* BUSH.

[Court of Appeal (Lord Clauson, Goddard and du Parcq, L.JJ.), **March 23, 1942.**]

Practice—Stay of action—Serving soldier—Defendant's witnesses out of jurisdiction—Whether case must stand out till return of witnesses within the jurisdiction.

The defendant, an Army driver, collided with the plaintiff's car in April, 1939. The plaintiff, in Oct., 1939, issued a writ against him, but was unable to serve it since the defendant's exact whereabouts were unknown. After protracted correspondence with the Army authorities and the Treasury Solicitor, the latter agreed to accept service on the defendant's behalf. It then appeared that the defendant and an essential witness had been sent overseas, and the Treasury Solicitor obtained an order from the master that the case should stay out of the list until he notified the plaintiff's solicitors that the defendant and the witness had returned within the jurisdiction. The plaintiffs offered that certain statements made by the defendant and persons who had witnessed the accident should be put in and treated as sworn depositions, and contended that the master's order would entail such a delay as would amount to a denial of justice :—

Held : the delay which must necessarily be caused by awaiting the return of the defendant and his witnesses to England was not justified and the case must come on in its proper order in the list.

[**EDITORIAL NOTE.** War naturally makes it difficult to secure the attendance of all material witnesses at the trial of an action. This, however, is not a sufficient reason for the postponement of an action indefinitely, for the postponement may result in the fact that witnesses now available will die or remove from the jurisdiction and the plaintiff may be deprived of his remedy for want of evidence. A delay amounting to a denial of justice ought not to be allowed and, in such a case, the action must be tried upon the material available. This case is a further consideration of the matter discussed in a general way in *Bell* v. *Walker*, [1941] 1 All E.R. 307 ; Digest Supp.

As to Stay of Proceedings, see HALSBURY, Hailsham Edn., Vol. 26, pp. 69-71, paras. 113-115 ; and for Cases, see DIGEST, Practice, pp. 975-985, Nos. 5091-5142. See also YEARLY PRACTICE OF THE SUPREME COURT, pp. 599-601.]

Appeal by the plaintiffs from an order of Asquith, J., dismissing an appeal from an order of the master. The master ordered the trial of the action to stand over generally, the Treasury Solicitor undertaking to inform the plaintiffs' solicitors of the return of the witnesses concerned to the jurisdiction. The facts are fully stated in the judgments.

A. T. Denning, K.C. and *Stuart Horner* for the appellants.

Hon. H. L. Parker for the respondent.

Lord Clauson : This case involves a claim by the plaintiffs for personal injuries against one Bush, who was an Army driver in charge of a lorry. Under circumstances which will, no doubt, be clarified at the trial, on Apr. 20, 1939, the lorry, driven by the defendant, collided with a car belonging to one of the plaintiffs and which carried Coppin and some friends or relatives who were with him. The action is one by Coppin and the other persons who were in the car, claiming damages for personal injuries. There was also a claim by the owner of the car for damage to the car. That seems to have been settled, and I say no more about it.

This claim having been put forward, correspondence ensued with the Army authorities in the first place, and afterwards with the Treasury Solicitor. I do not propose to attempt to comment upon or appraise that correspondence. It may be that various topics arising out of it and various suggestions made upon it may be material at the trial. With that, of course, we have nothing to do. The writ, which the plaintiffs had issued within six months of the accident, was eventually sent to the Treasury Solicitor, and the Treasury Solicitor entered an A appearance on behalf of the defendant. There are, of course, difficulties, which very often occur, especially during war-time, in cases of this kind. It would appear that Bush and an officer, who was an eye-witness of the occurrence, are both absent from England. It appears that they left this country some time ago, at all events towards the end of last year. The application made on behalf of the defendant, which was acceded to by the master, was that the trial of the action should stand over generally to await, in substance, the return B to England, whenever that happens, of the defendant and the other material witness.

In order to get over the difficulty, the plaintiffs made, and make now, an offer which is to be found in the second paragraph of their letter of Jan. 19, 1942. It is in these terms :

> The plaintiffs are willing that you [the defendant's advisers] should put in as evidence the statements referred to in Mr. Lawton's affidavit in para. 8 as if these had been C depositions taken on sworn examination, subject, of course, to our clients' right to comment on them and to all the statements being put in and copies supplied to us.

This seems to me to be a case in which, if the order made by the master and affirmed by the judge stands, there is a danger of grave injustice to the plaintiffs. If one takes the order literally, it would appear that the action could not go on if the defendant and his witness failed to return to this country. Of course, it does not mean that, but it is obvious that such a long delay will be a serious D danger to the plaintiffs. All sorts of things may happen to the plaintiffs and to their witnesses, and it would be a grievous injustice to them if they are deprived indefinitely of the right to bring the action on. It is perfectly true, as counsel for the defendant has pointed out, that one must consider whether some method can be found of reconciling the position of the plaintiffs with the position of the defendant. Having regard to the plaintiffs' offer, I feel quite unable to see how E the defendant will suffer any substantial injustice if the trial takes place on the footing of the undertaking I have mentioned. It will be open to the plaintiffs to comment on the evidence which will be admitted in pursuance of that undertaking and to compare it with such evidence as will be given by the plaintiffs. I do not myself feel that that course will occasion any injustice at all to the defendant. I am perfectly clear in my own mind that, if the trial takes place under those circumstances, while the plaintiffs will be to some extent tying their F hands behind their backs, in that there will be no cross-examination, there is every prospect that the truth will out.

I do not propose to pause to say much about the suggestion that the plaintiffs' claim, having regard to the lapse of time, is really one which is to be regarded with the greatest suspicion. It would be wrong to begin to form any opinion upon a matter of that kind as it stands now. We are bound to assume, and, for myself, I am prepared to assume, that the plaintiffs have some case in which G they honestly believe, and it appears to me that it would be a grievous injustice to them if they are not able to bring that forward and as soon as may be.

GODDARD, L.J. : I agree. It seems to me that the plaintiffs cannot be accused of any undue delay in this matter. The position was that from Oct., 1939, to Mar., 1940, they were trying to get the Southern Command to do something and to get the papers to the Treasury Solicitor. All that they got out of H the Southern Command were statements by the assistant adjutant-general that, from the very clear evidence in the possession of the department, it was quite clear that the Army driver was in no way to blame. The letter says :

> A full report of the accident in question has been submitted to this headquarters by the unit concerned. From the evidence in our possession it is clear that the War Department vehicle was being driven with due care and attention and that the War Department driver was in no way to blame.

That is dated Oct. 18, 1939. In the letter of Nov. 1, 1939, the assistant adjutant-general says :

> Although it may be the custom of insurance companies to automatically repudiate

liability, our repudiation is based on the very clear evidence we have on the case, which was most carefully investigated before a decision was conveyed to you.

The plaintiffs' solicitors did not lose heart altogether; they went on as hard as they could. At last, on Mar. 20, 1940, they wrote to the Southern Command and said that unless something was done there would be a question asked in the House of Commons. As frequently happens, that did cause someone to do something, and, after a delay of six months, the papers were sent to the Treasury Solicitor. They reached him some time before Apr. 2, 1940, on which date he wrote to the plaintiffs' solicitors and said he was going into the matter. Then he took up the position that the Public Authorities Protection Act barred the claim, and he stuck to that for some time. Under the circumstances what could the plaintiffs do? They had issued a writ, but they did not know where to serve it. Units of the British Army move about from place to place. They could not chase the defendant all over England, and, for reasons which I cannot appreciate, many months elapsed before the Treasury Solicitor agreed to accept service. If he thought that he had a complete defence to the action, that was all the more reason for accepting service and then setting up at once the Public Authorities Protection Act.

In these circumstances I think it would be a grave injustice to the plaintiffs if this action was to be held up indefinitely. An offer has been made which, in the circumstances of this particular case, is a generous offer—namely, that these statements, which, I imagine, are the statements which enabled the assistant adjutant-general of the Southern Command to write the letters to which I have referred, can be read at the trial. That is a fair offer, and I agree with Lord Clauson that this appeal should be allowed and that this action should proceed to trial.

du Parcq, L.J.: I am of the same opinion and for the same reasons.

Appeal allowed and order of the master discharged, the plaintiffs agreeing to the terms of the second paragraph of the letter of Jan. 19, 1942. *Costs to be the plaintiffs' in any event.*

Solicitors: *Elwell & Binford Hole*, agents for *Copley, Singleton & Billson*, Croydon (for the appellants); *The Treasury Solicitor* (for the respondent).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

Re DENNIS' SETTLEMENT TRUSTS, DENNIS *v.* DENNIS AND OTHERS.

Applied. Re Haynes' Will Trusts. [1948] 2 All E.R. 423.

[Chancery Division (Farwell, J.), **March 20, 1942**.]

Settlements—Construction—Forfeiture clause—Variation of settlement—Principal beneficiary given contingent interest in part of income—Whether "any part of the income becomes vested in any other person."

Under the terms of a settlement the income of the trust funds was given to R. H. D. for life "until any such act or event shall happen . . . whereby the income of the trust funds would, if belonging to . . . R. H. D. absolutely become vested in or charged in favour of some other person or persons . . ." Twelve years after the date of the settlement the settlor and R. H. D. executed a supplementary deed of release and confirmation under which the trustees were to pay to R. H. D. £1,000 per annum, instead of the whole of the income of the trust funds. They were to accumulate and reinvest the remainder and after the lapse of 6 years were to transfer it to R. H. D. if he should then be living and no forfeiture should have been incurred:—

Held: the forfeiture clause in the settlement took effect if any part of the income of the trust funds became vested in another person. R.H.D.'s interest in that part of the income which was to be accumulated under the supplemental deed was by the supplemental deed made contingent upon his being alive when the accumulations were to be transferred to him and on none of the events specified in the forfeiture clause having taken place. To that extent of that contingency, part of the income of the trust funds had become vested in another person, and accordingly there had been a forfeiture of the life interest of R. H. D.

[**EDITORIAL NOTE.** The usual event actually envisaged by a forfeiture clause is the bankruptcy of the principal beneficiary or the creation of a charge upon his interest. It has long been appreciated that many other events will have the effect of producing a forfeiture and the facts of this case add a further illustration to that list. In readjusting the interests under the settlement in the light of events which had happened, the parties gave the principal beneficiary £1,000 per annum and the right to receive the accumulated income after a period of 6 years if he were then alive and no forfeiture had been incurred. This, upon its proper construction, gave the principal beneficiary only a contingent interest in the excess of the income over £1,000, and, if the contingency happened and his right was defeated, the accumulations would have passed to some other person. For this reason it is held that this is a vesting of part of the income in some other person.

As to Protected Life Interests, see HALSBURY, Hailsham Edn., Vol. 29, pp. 597-600, para. 870 ; and for Cases, see DIGEST, Vol. 5, pp. 659-669, Nos. 5871-5936; Vol. 40, pp. 558-562, Nos. 987-1009.]

Case referred to :

(1) *Re Brewer's Settlement, Morton* v. *Blackmore*, [1896] 2 Ch. 503 ; 5 Digest 656, *5855* ; 65 L.J.Ch. 821 ; 75 L.T. 177.

Summons to determine whether an interest under a settlement was forfeited by the provisions of a deed supplemental thereto. All the facts are fully set out in the judgment.

Wilfrid M. Hunt for the plaintiffs.

A. H. Droop for the first defendant.

S. Pascoe Hayward (for *Harold Brown*) for the remaining defendants.

Farwell, J. : This summons raises a question as to whether or not there has been a forfeiture of a life interest given by a settlement of Feb. 28, 1923, to the son of the settlor, Robert Howard Dennis. The question, I think, turns entirely upon the true construction of the settlement and of a subsequent deed.

The settlement was made between the settlor, who was the father of the first beneficiary, of the one part, and John William Dennis, and Frank Whitworth Dennis and Howard George Frank, called the trustees, of the second part. It recites that the settlor, being possessed of certain stocks, funds and securities, had caused the same to be placed in the name of the son Robert Howard Dennis as trustee, and was desirous of declaring the trusts in relation thereto thereinafter contained. After a provision for the investment of the securities, cl. 2 provides :

> The trustees shall stand possessed of the capital and income of the trust funds upon trust to pay the income thereof to or to apply the same for the said Robert Howard Dennis during his life until any act or event shall happen, either before or after the death of the settlor whereby the income of the trust funds would if belonging to the said Robert Howard Dennis absolutely become vested in or charged in favour of some other person or persons or corporation and thereupon the trustees shall retain the said income during the remainder of the life of the said Robert Howard Dennis upon trust during such period or periods either continuous or discontinuous as they in their discretion think fit to pay all or any part of such income to or apply the same for the maintenance and personal support and benefit of the said Robert Howard Dennis, and any person or persons who, if the said Robert Howard Dennis had been dead, would be entitled to receive the same under the trusts of these presents, or any such person or persons to the exclusion of the others or other of them or any part thereof may be retained by the said trustees and invested in any of the investments herein authorised for the investment of trust funds, and so much of the said income as shall not be applied or disposed of by the trustees under the discretionary power lastly hereinbefore contained and the income of any part of the same as shall be invested shall be held by the trustees upon the like trusts as with regard to the capital of the trust funds hereinafter declared, and subject thereto the trustees shall stand possessed of the trust funds and the income thereof in trust for such of the children of the said Robert Howard Dennis who being male shall attain the age of 21 years, or being female shall attain that age or marry under that age, in such shares and with such trusts for their respective benefit and such provisions for their respective advancement after the death of the said Robert Howard Dennis and maintenance and education at the discretion of the trustees or of any other person or persons as the said Robert Howard Dennis by any deed or deeds revocable or irrevocable, or by his last will or codicil shall appoint, and in default of and subject to any such appointment in trust for all or any the children or child of the said Robert Howard Dennis who being male shall attain the age of 21 years, or being female shall attain that age or marry under that age.

There is a hotchpot clause, and in cl. 3 there is this provision :

> If there shall be no child of the said Robert Howard Dennis who shall attain a vested interest in the trust funds, then, subject to the trusts, powers and provisions hereinafter

> declared and contained and to the powers by law vested in the trustees and to every exercise of such respective powers, the trustees shall stand possessed of the trust funds in trust to pay the income thereof to and apply the same for the benefit of Gwendoline Joan Dennis, daughter of the said Thomas Edward Dennis if she shall be living at the time for the ascertainment of the disposition of the same hereinafter called "that time," and if at that time no act or event shall have happened.

There follows a forfeiture clause in the same terms as the earlier forfeiture clause. Then there is a trust, subject to the lady's life interest, on failure of the trust fund by forfeiture, for the benefit of her children and an ultimate trust in favour of the settlor, if there are no children either of the son or daughter.

Robert, the son of the settlor, has attained the age of 21 years and is a bachelor, but his sister has married and has infant children. On July 7, 1935, the settlor and Robert entered into a "deed of release and confirmation of settlement," which was supplemental to the principal settlement. The object of that supplemental deed was partly to provide for including in the original settled funds an additional investment, which is mentioned in the deed, and partly to provide for the payment to the son of certain accumulations. I must read part of that deed. It commences with recitals that it is to be read as supplemental to the original settlement, that new trustees have been appointed, and that the beneficiary, the son, attained the age of 21 years on Feb. 18, 1935. It then proceeds as follows:

> And whereas in fact the original trustees paid or applied part of the income of the trust fund for the maintenance education and benefit of the beneficiary, but acting as it was believed by them in their discretion accumulated and invested the remainder of the said income and the resulting income thereof, and the trustees acting in a similar belief never applied or paid any part of the income of the trust fund to or for the beneficiary or his maintenance and have accumulated and invested the same and the resulting income thereof as opportunity and occasion arose And whereas doubts have arisen whether, on the true construction of the principal indenture the beneficiary is or is not entitled to receive the said accumulations of income now that he has attained 21 years, and it is desired to resolve such doubts by the execution of these presents by the parties hereto.
>
> And whereas the total of the trust funds and the said accumulations is represented by the investments and sums of money set out in the schedule hereto and the trustees have exhibited to the beneficiary their accounts of capital and the income thereof and the beneficiary has examined and approved the same And whereas the settlor some time since invested moneys in the joint names of himself and the beneficiary [in Conversion Loan] and the settlor and the beneficiary desire that that be included in the settlement Now This Deed Witnesseth and it is hereby agreed and declared by the settlor that [the sum of Conversion Loan] shall immediately after the transfer as aforesaid be held by the trustees on the trusts of the principal indenture as varied and otherwise confirmed by these presents.

Para. 2 reads as follows:

> The beneficiary hereby releases and discharges the trustees from all if any claim which he might have but for this deed to or to receive the said income of the trust fund so far as the same has not been received by him or applied for his benefit up to Feb. 8 1935 and the accumulations thereof and the investments thereof and every part thereof, and from any breach of trust which may have been unwittingly committed by the trustees in exercising their discretion as aforesaid And all the parties hereto agree and declare that the whole of the stocks, shares securities and cash set out in the schedule hereto are and are to be deemed and applied as capital moneys held by the trustees under the trusts and provisions of the principal indenture as varied hereby.

Para. 3 reads thus:

> As and from Feb. 8, 1935, until Feb. 8, 1941, the trustees shall not, according to the provisions contained in the principal indenture, pay to the beneficiary, if he shall so long live and no act or event shall have happened as mentioned in the principal indenture the whole of the income of the trust fund set out in the schedule hereto or the investments for the time being representing the same, but in lieu thereof shall pay to him according to the same conditions as aforesaid the yearly sum or amount of £1,000 by equal quarterly payments . . . the first of such instalments to be paid him on the execution hereof and the trustees shall accumulate and reinvest the remainder of the income [and the income of the additional Conversion Loan] and the income of all investments thereof respectively, all of which income is hereinafter called for brevity "such remainder" in the investments authorised by the principal indenture, and shall on Feb. 8, 1941, pay and transfer to the beneficiary absolutely if he shall be then living, and no such act or event as aforesaid shall have happened the said sum [of Conversion Loan] or any moneys or investments representing the same and the whole of such remainder, including all

accumulations thereof [And subject thereto shall hold such remainder of and the Conversion Loan] upon like trusts as are provided respectively by the principal indenture with regard to the capital and income of the trust funds in the event of the death of the beneficiary or the happening of any such act or event as aforesaid as the case may be.

Then there is a provision to enable the trustees, with the consent of the settlor, if he shall be living, or, if he shall not be living, with the consent of the wife of the settlor, to "pay over to the beneficiary the whole or any part or parts and from time to time of such remainder previously to Feb. 8, 1941, if no such act or event shall have happened as aforesaid."

The question is whether this deed of July 7, 1935, operated to bring about a forfeiture of the interest in the sums dealt with under the original deed. For that purpose one looks back first to the forfeiture clause itself. As has been pointed out, it is in narrow terms, and it is not in the usual somewhat wider terms which one often finds in a forfeiture clause. It reads:

> Until any act or event shall happen either before or after the death of the settlor whereby the income of the trust funds would, if belonging to the said Robert Howard Dennis absolutely, become vested in or charged in favour of some other person or persons or corporation.

The clause does not include such words as "the personal enjoyment of the income," or any words of that kind. It is not, in my judgment, possible for the court to supply words in a forfeiture clause in an instrument of this kind. That seems to be the effect of the judgment of CHITTY, J., in *Re Brewer's Settlement* (1). CHITTY, J., said, at p. 507:

> In construing clauses of cesser or forfeiture such as that before me, the court is not at liberty to depart from the language of the document. The words "or cease to be payable to himself" are not in the settlement; and I find myself unable to say that, by any just method of construction applicable to such clauses, I ought to supply those words.

Therefore, in my judgment, I am bound to construe the words which are actually used, and not to extend them or to read into the clause words which in fact are not there.

The first point that was taken on behalf of the son was on the words:

> . . . whereby the income of the trust funds would, if belonging to the son absolutely, become vested in or charged in favour of some other person or persons or corporation.

It is said that there is not inserted here the words "Whereby the income or any part thereof would if belonging to the son become vested in or charged to some other person," and that the clause must be read as though it only took effect in the event of the whole of the income being vested in or charged in favour of some other person or persons. I am not able to adopt that view. In my judgment, it clearly is intended that the forfeiture is to take effect if any part of the income becomes vested in or charged in favour of some other person or persons. I do not think it is a proper construction, or a construction which is in any way proper, to read these words as being limited solely to an event which operated so as to affect the whole of the income, whereas, if the event affects only a portion of the income, the forfeiture would not take effect. In my judgment, it is reasonably plain that the forfeiture was intended to, and does under the true construction of this document, take effect if any part of the income becomes vested in or charged in favour of some other person or persons.

It is quite plain that the supplemental deed has not the effect of charging the income, or any part of the income, in favour of any other person or persons. The question is whether it had the effect of vesting part of the income in some other person or persons. That depends on the true construction of cl. 3 of the supplemental deed. In my judgment, the result of that clause is that, so far as the income of the accumulations is concerned, it is part of the income of the fund. The son gets a contingent interest in that, contingent on him being alive on Feb. 8, 1941, and no event having happened before that date of the kind indicated which would be a forfeiture. The result is that the income has to that extent become vested in another person, because the interest of the son, instead of being an interest in the whole of the income, has become a contingent interest in a part of the income, and the rest of the income vests in another person.

It is said that the effect of the supplemental deed is that the son remains the only person who has an interest in the income, and that, therefore, the forfeiture clause never comes into operation at all. In my opinion, that is not the true view of the supplemental deed, nor the effect of it. The effect, as I have pointed out, is to give the son a contingent interest only in part of the income; with the result that that part of the income which is given only contingently to the son is vested, subject to that contingency, in a person or persons other than the son. Accordingly, in my judgment, the true effect of these two documents is that there has been a forfeiture of the interest of the son.

Declaration that life interest had been forfeited granted. Costs of all parties as between solicitor and client to be paid out of the settled fund.

Solicitors: *Ellis, Munday & Clarke* (for all parties).

[*Reported by* Irene G. R. Moses, *Barrister-at-Law.*]

Re OGILBY, OGILBY *v.* WENTWORTH-STANLEY.

[Chancery Division (Simonds, J.), **March 24, 1942.**]

Distribution and Descent—Rights of surviving spouse—"Personal chattels"—Herd of shorthorn cattle—Administration of Estates Act, 1925 (c. 23), *ss.* 46 (1) (i), 55 (1) (*x*).

The first husband of the deceased was keenly interested in the breeding of shorthorn cattle. For this purpose he farmed some 180 acres. After his death his herd was disposed of, but later the deceased herself took up the breeding of shorthorn cattle on the same holdings. She consistently incurred a loss, and for income tax and rating purposes claimed that she was in occupation of the land for the purpose of husbandry. The live and dead stock on the holdings was valued for probate at between £1,400 and £1,500, including 31 head of cattle. It was claimed that certain cows came within the definition of personal chattels in the Administration of Estates Act, 1925, s. 55 (1) (*x*), on the ground that they were domestic animals and were kept as a hobby and not for business purposes:—

Held: having regard to the size of the holdings and the scale on which the cattle were bred, a farming business had been carried on by the deceased. The cows, therefore, were not domestic animals within the meaning of those words in the definition of personal chattels in the Administration of Estates Act, 1925, s. 55 (1) (*x*).

[**EDITORIAL NOTE.** A case of this nature necessarily turns largely upon its own facts. This matter, however, has an importance beyond its own facts. The question of what are personal chattels within the definition in the Administration of Estates Act, 1925, may occur in any case of intestacy, and, since wills are often drawn on similar lines, the decision may also be a guide in the construction of many wills. The necessity of having wills construed by the court for the decision of relatively small matters has been the subject of comment for some years and has led to the introduction of clauses forfeiting the interests of beneficiaries disputing the will on the one hand, and, on the other, clauses making the opinion of counsel binding upon the parties. There are objections to both these courses. It may be that some relief may be found in the use by draftsmen of statutory definitions and the statutory will forms, for it is possible that, in the course of a few years, sufficient authority on the meaning of these definitions and forms may be available to resolve any ordinary case of doubt.

As to the Meaning of Personal Chattels, see HALSBURY, Hailsham Edn., Vol. 10, p. 578, para. 833; and for Cases, see DIGEST, Vol. 44, pp. 691, 692, 711-714, Nos. 5325-5329, 5559-5625.]

Summons to determine *inter alia* whether certain cows were personal chattels within the meaning of the Administration of Estates Act, 1925, s. 55 (1) (*x*). All the relevant facts are set out in the judgment.

E. J. Heckscher for the plaintiff.

G. D. Johnston for the first defendant.

Wilfrid M. Hunt for the second, third and fourth defendants.

Simonds, J.: Isabel Katherine Ogilby died intestate on Oct. 16, 1940. The question has now arisen, between her surviving husband and her children by her first marriage, what were her personal chattels within the meaning of the Administration of Estates Act, 1925, s. 55 (1) (*x*). The question, according to the summons, has been raised specifically in regard to her live and dead stock, hay, corn, tillages, implements, machines, harness and loose tools, but before me the only question that has been raised has been in fact about certain live stock.

Before I turn to the relevant facts I will just read the definition section in the Act which I have to construe. That definition is as follows:

> "Personal chattels" mean carriages, horses, stable furniture and effects (not used for business purposes), motor cars and accessories (not used for business purposes), garden effects, domestic animals, plate, plated articles, linen, china, glass, books, pictures, prints, furniture, jewellery, articles of household or personal use or ornament, musical and scientific instruments and apparatus, wines liquors and consumable stores, but do not include any chattels used at the death of the intestate for business purposes nor money or securities for money.

As I have said, the claim, though the summons raises a wider question, is limited to certain live stock and, as I understand it, is limited to certain cows and does not extend to other live stock, namely, certain sheep. It is claimed that those cows are personal chattels within the definition as being domestic animals and as not being used at the death of the testator for business purposes.

The facts, very shortly, are these. The intestate's first husband, the Rev. Charles Henry Brocklebank, was keenly interested in the breeding of shorthorn cattle. He had formerly lived at Bartlow, but had in 1925, moved to Westwood Park, West Bergholt, Essex, a large residence with pleasure grounds and a home farm of about 135 acres. Westwood Park consisted of pasture land, plantation and workmen's cottages. There was also a small holding known as Spring Farm, which included a dwelling house, a barn, and 44½ acres arable and pasture, which was purchased by him at a later date. There he carried on, and I know no other appropriate expression, the business of breeding shorthorn cattle with the other incidents of farming that could usefully be carried on therewith. He died in 1935, and his herd was disposed of.

His widow, who later married her second husband, Colonel Ogilby, the plaintiff in these proceedings, after an interval herself took up the business of breeding cattle, as her first husband had done. She also was interested in the breeding of a special strain of shorthorn cattle, and she carried on that business until her death. It is said that it was her hobby and that, at least, it was not the business of her life. It is said that she consistently made a loss, and for that reason, as I understand the argument, it is said that she did not carry on the business of farming and that she did not keep these cows and the other live and dead stock, the accompaniment of her farm, as a business.

I am wholly unable to follow that argument. According to the ordinary use of the English language, this lady at her death was carrying on the business of a farm at Westwood Park and on the adjoining small holding known as Spring Farm. The live and the dead stock which she used for that purpose she used for the business of farming. It seems to me to be impossible to say that, in these circumstances, the live stock, including the cows here in question, and the dead stock, were not used for business purposes by her at her death within the meaning of the Administration of Estates Act, 1925, s. 55 (1). It may be that there are cases where an intestate keeps a cow or two for her own use, or it may be a pig or it may be humbler domestic animals, and in such case it may be right to say of those animals that they are not kept for business purposes. It may in fact be difficult to draw the line; but where you find farming on this scale—a home farm with a substantial acreage and live and dead stock which may be valued for the purpose of probate at between £1,400 and £1,500, including 31 head of cattle and 35 head of sheep—in such a case as that there is no doubt upon which side of the line the case falls. There is a farming business being carried on, and the live and the dead stock are being used for the purpose of that business. My attention has been called to a number of cases in which the word "business" has been used, but I have to consider the word in the context in which I find it. and whether or not, for the purpose of the Bankruptcy Act, the intestate might be said to be carrying on a business is, I think, neither here nor there.

It is perhaps relevant for this purpose to find, as I do find, that during the intestate's lifetime, whether for the purpose of income tax or for the purpose of rating, she claimed to be in occupation of land which she farmed for the purpose of husbandry, treating it as a buisness, so that for the purpose of derating and for the purpose of setting off her losses for income tax purposes against other income, she claimed that she was carrying on a business in respect of which she was entitled to relief.

The substantial question is, I think, simply one of the interpretation of the words in the definition section of the Administration of Estates Act. Accordingly, I answer the first question by saying that the plaintiff is not entitled to any of the items enumerated which were in or upon the home farm, unless there are included amongst those items some implements which can be called garden implements within the meaning of the section.

Solicitors: *Mount, Sterry & Co.* (for the plaintiff); *Kenneth Brown, Baker, Baker* (for the defendants).

[*Reported by* Irene G. R. Moses, *Barrister-at-Law.*]

LANE *v.* MINISTER OF WAR TRANSPORT.

[Chancery Division (Farwell, J.), **March 16, 1942.**]

Emergency Legislation—Requisitioning notice—Chattel already subject of hiring agreement—Hiring agreement subject to determination forthwith on notice—Requisitioning notice sufficient to determine hiring agreement—Defence (General) Regulations, reg. 53.

The county council, acting on behalf of the defendant, had contracted orally to hire the plaintiff's lorry for haulage, and one of the terms of a written order confirming the agreement stated that " the county council reserves the right to terminate your employment under this haulage order at any time." At a later date the defendant served a notice requisitioning the lorry under the Defence (General) Regulations, 1939, reg. 53. The plaintiff contended that, since the lorry was already in the defendant's possession under the hiring agreement, which was still subsisting since no notice terminating it had been served, the requisitioning notice was invalid:—

Held: the contract could, by the terms thereof, be terminated at any time and, in those circumstances, the requisitioning notice was not invalid.

[**EDITORIAL NOTE.** Some contracts require a period of notice for their determination, others may be determined immediately upon notice being given. In the latter case, it has often been held that an unequivocal act showing that the party no longer intends to be bound by the contract is equivalent to notice. The most common example s the determination of a tenancy at will by the landlord re-entering into possession. This doctrine is here applied to the case of a requisition notice. The service of the requisition notice dispenses with the necessity for determining the hiring contract by a specific notice. This, however, is only the case where the hiring contract can be forthwith determined by notice. It is otherwise where a period of notice is required.

For the Defence (General) Regulations, reg. 53, see BUTTERWORTHS EMERGENCY LEGISLATION SERVICE, [13], 65.]

Summons to determine whether a requisitioning notice served by the defendant was valid. The facts are fully set out in the judgment.

G. R. F. Morris for the plaintiff.

The Attorney-General (*Rt. Hon. Sir. Donald Somervell, K.C.* and *H. O. Danckwerts* for the defendant.

Farwell, J.: This is a summons taken out by Robert Lane against the Minister of War Transport, for the determination of

(1) Whether the defendant, the Minister of War Transport, has or had at any time, by virtue of reg. 53 of the Defence (General) Regulations, 1939, or at all, power to requisition and/or to acquire a motor vehicle Y.G.5340, the property of the plaintiff, when at all material times the said vehicle was in the possession and/or power of the defendant, his servants or agents under a contract of hire entered into between the plaintiff and the defendant.

The point is a very short one and has been argued with great ability by counsel for the plaintiff. The facts which give rise to the question appear from the affidavit of the plaintiff and are as follows. The plaintiff says he carries on business in Yorkshire as a haulage contractor, and that

On or about May 30, 1940, the county council of the North Riding of Yorkshire,

> acting for and on behalf of the Minister of War Transport, hired my motor lorry Y.G.5340 for a continuous period commencing on that date at the rate of £1 per day. The full terms of the contract of hiring were contained in telephone conversations between me, this deponent, and an official of the said council and confirmed by the said council in a written order dated May 30, 1940.

The written order is produced. The order is headed: "North Riding of Yorkshire County Council. Highways Department"; and is addressed to the plaintiff at Catterick. It is dated May 30, 1940, and is in these terms so far as it is material:

> I shall be glad if you will haul to the order of the officer in charge Catterick Aerodrome as and when required . . . tons of gravel, etc., at the rate of . . . tons per day . . . This work is to be undertaken at day rates from May 30 . . . This work is offered subject to the conditions contained in your accepted tender for haulage, and on the understanding that the county council reserves the right to terminate your employment under this haulage order at any time.

The result of that agreement was that the lorry in question was in possession of the Crown acting through its proper officer as from May 30, 1940; and the plaintiff was accordingly being paid at the rate provided by the contract. The affidavit proceeds:

> On or about May 30, 1940, I delivered the said lorry in accordance with the terms of the said order to the officer in charge, Catterick Aerodrome, and from time to time received cheques in payment for the hire of the said lorry from the Ministry of Transport, Road Division, Leeds. On or about Jan. 10, 1941, an officer of the 697th Co., Royal Engineers informed me by telephone that the said motor lorry required repairs, and requested me to inspect the said motor lorry and submit an estimate for the cost of the necessary repairs. On or about Jan. 10, 1941, I inspected the said motor lorry and submitted an estimate for the cost of the said repairs to the officer in charge Transport 697th Co., Royal Engineers. I received no reply nor any other communication from the said officer or at all.

That statement does not seem to me very material to anything I have to decide. Then the plaintiff says:

> I have never at any time received any notice verbal or written from the said county council or from the Ministry of War Transport or at all to terminate the said hiring of the said motor lorry. On or about Mar. 28, 1941, I received a notice of that date from the regional transport commissioner purporting to requisition and acquire the said motor lorry on behalf of the Ministry of Transport.

That notice is dated Mar. 30, 1941, and is headed "Requisition of vehicles." It is addressed to the plaintiff at Catterick in these terms:

> I, an officer authorised by the Minister of Transport in that behalf, hereby requisition the under-mentioned vehicle and equipment.

Then follow the type and number of the vehicle and the index mark and registration number, and a reference to the make, the date of the first registration, the condition of the vehicle, equipment, and so on. Then the document proceeds: "For use of the Ministry of Transport," and it is signed by the "Chief Assistant to the Road Transport Commissioner."

I think that those are the whole of the facts which give rise to this proceeding. On those facts it is said on behalf of the plaintiff that the Crown was not and is not entitled to serve the notice which it did serve to requisition or to acquire the vehicle in question, because at the date when the notice was served the vehicle was already in possession of the Crown under the hiring agreement, which had never been terminated by notice given by the Crown.

The power which the Crown purported to exercise, and which it claims was rightly exercised, was conferred upon the Crown by the Defence (General) Regulations, 1939, reg. 53, in these terms:

> (1) Subject as hereinafter provided, a competent authority, if it appears to that authority to be necessary or expedient so to do in the interests of the public safety, the defence of the realm, or the efficient prosecution of the war, or for maintaining supplies and services essential to the life of the community, may requisition (*a*) any chattel in the United Kingdom (including any vessel or aircraft and anything on board a vessel or aircraft), and (*b*) any British ship or aircraft or anything on board a British ship or aircraft, wherever the ship or aircraft may be; and may give such directions as appear to the competent authority to be necessary or expedient in connection with the requisition

> . . . (2) . . . Where a notice of acquisition is served under this paragraph on the owner of any vessel . . . at the beginning of the day on which the notice is served (*a*) the vessel, vehicle, aircraft . . . shall vest in the competent authority free from any mortgage, pledges, lien or other similar obligation, and (*b*) the period of the requisition thereof shall end.

It is well, perhaps, to see what is the definition of "requisition" contained in the Compensation (Defence) Act, 1939. Sect. 17 (1) of that Act provides as follows : A

> ". . . requisition" means, in relation to any property, take possession of the property or require the property to be placed at the disposal of the requisitioning authority . . .

Therefore, what the Crown has done or has purported to do, is to requisition this vehicle and thereby to take possession of it, or require the property to be placed at the disposal of the requisitioning authority. It is said that the Crown has no power to do that where the vehicle requisitioned is already in possession B of the Crown under an existing agreement of hire. If the Crown's power to requisition is limited under the Act, it must be limited either by something in the Act itself or by something in the regulations. I am unable myself to see that there is anything which prevents the Crown from taking the step which it has taken in this case.

It is said that, if the hiring agreement was still in existence at the date when C the notice of requisition was given, then the notice cannot be a good notice, because it would be a breach of the hiring agreement already entered into between the Crown and the owner of the vehicle. What the position might be in another case where the agreement contained some provision as to the length of notice required, does not arise here ; and it is not a matter which I must or need consider. The position here is that the contract provides that the agreement can be terminated at any time. In my judgment, the notice to D requisition the vehicle was in itself notice to determine the hiring agreement.

It is said that the Crown, through its proper officer, ought to have given notice immediately before the requisition notice was served on the plaintiff, but I cannot myself see in this particular case that there can be any difference between telephoning five minutes before the notice is served that the hiring agreement is at an end, and the serving of the requisition which, in my judgment, in itself operated as a notice of termination of the hiring agreement. As I have E said, the position may be quite different in cases where the contract provides a particular time for giving notice to determine the agreement. Whether, in such a case as that, the Crown can exercise its power to requisition before notice has been given or has expired, is a question which does not arise in the present case, and I am not proposing to give any opinion upon it at all. I am deciding this case on the facts which are before me, the fact here being that there was a hiring agreement under which the vehicle was, no doubt, in the possession of F the Crown.

The Crown apparently considered here that it would be better that it should acquire the vehicle, and by that means put an end to the hiring arrangement. The agreement itself provided that the hiring agreement should be put an end to at any time. In my judgment, the moment that notice to acquire was served upon the plaintiff, that operated in itself as a sufficient notice to determine the G hiring agreement. Therefore, there was nothing, so far as I can see, which in any way prevented the Crown from serving the requisition notice, because the hiring agreement must be taken to have been determined when that notice itself was served.

In my judgment, therefore, the relief which the plaintiff is seeking in this case is a relief to which he is not entitled ; and, accordingly, the summons must be dismissed with costs. H

Summons dismissed with costs.

Solicitors : *Mawby, Barrie & Letts* (for the plaintiff) ; *Treasury Solicitor* (for the defendant).

[*Reported by* IRENE G. R. MOSES, *Barrister-at-Law.*]

ZURICH GENERAL ACCIDENT AND LIABILITY INSURANCE CO., LTD. *v.* MORRISON AND OTHERS.

[KING'S BENCH DIVISION (Atkinson, J.), **December 15, 1941.**]

[COURT OF APPEAL (Lord Greene, M.R., and MacKinnon and Goddard, L.JJ.), **March 12, 13, 26, 1942.**]

Insurance—Motor insurance—Third-party risks—Action by company for declaration—Material misrepresentation and non-disclosure—Notice to third party of matters relied upon—Insurance company subsequently discovering further non-disclosure—Insurance company restricted to matters stated in notice as against third party—Road Traffic Act, 1934 (c. 50), *s.* 10 (3).

The appellants sought to avoid a policy issued under the Road Traffic Act, 1936, s. 36, on the ground of misrepresentation and non-disclosure of material facts. The respondent, Mrs. Rackley, was a widow who had been awarded damages in respect of the death of her husband, caused by the negligent driving of the insured car. On Feb. 26, 1940, the appellants served the respondent with a notice specifying the grounds on which they relied. On Mar. 1, 1940, they issued their writ against the insured and on Nov. 26 an order was made adding the respondent as a defendant. On Feb. 3, 1941, the appellants filed their statement of claim in which they relied upon the matters of misrepresentation and non-disclosure specified in their notice of Feb. 26, 1940. In Oct., 1941, the appellants applied to amend the statement of claim by adding further allegations of misrepresentation and non-disclosure, and they were allowed to do so. The respondent contended that, since the further matters alleged were not included in the notice to her dated Feb. 26, 1940, they could not be relied upon by the appellants against her :—

HELD : on the true construction of the Road Traffic Act, 1934, s. 10 (3), the insurers were prevented from relying either directly or indirectly on any matter not specified in the notice as a ground for avoiding the policy as against a third party ; but not as against the insured.

[**EDITORIAL NOTE.** The Road Traffic Act, 1934, s. 10, was designed to make the sums payable under motor car policies available to third parties who had recovered damages against the insured. So far as third parties are concerned, however, the protection afforded is very meagre. The insurance company can avoid the policy for material misrepresentation or non-disclosure if, within 3 months after the commencement of the action by the injured party, it brings an action for a declaration that the policy was obtained by such misrepresentation or non-disclosure ; but such a declaration will not avail the insurance company against the third party unless, within 7 days after the commencement of its action, it serves a notice on the third party of the matters it intends to rely upon as material misrepresentation and non-disclosure. In the present case, the insurance company served such a notice in good time, but later discovered a further matter of non-disclosure, and the whole question is whether it could rely upon this further matter, which was, of course, not mentioned in the notice. All the judges are agreed that the company is restricted to the matters mentioned in the notice. This settles a matter which has been much discussed in the past two or three years. In the lower court, another clause recently introduced in motor car policies was discussed. The clause states in brief that nothing in the policy shall affect the rights of third parties, but the insured shall repay all sums paid as indemnity to such third parties. This clause was considered in *Merchants & Manufacturers Assurance Co.* v. *Hunt* (7), but its construction did not there have to be finally decided. Here, again, the matter is merely *obiter*, but, as the clause is a very difficult one, the remarks of ATKINSON, J., on this matter, which are more or less in line with those of the Court of Appeal in the earlier case, will be useful, if and when the meaning (if any) of this clause is finally settled.

AS TO RIGHTS OF THIRD PARTIES AGAINST INSURERS, see HALSBURY, Hailsham Edn., Vol. 18, pp. 563-565, paras. 913, 914 ; and FOR CASES, see DIGEST, Supp., Insurance, Nos. 3217pp-3217yy.]

Cases referred to :

(1) *Contingency Insurance Co.* v. *Lyons* (1940), 65 Lloyds L.R. 53.

(2) *Blackburn, Low & Co.* v. *Vigors* (1887), 12 App. Cas. 531 ; 29 Digest 174, *1308* ; 57 L.J.Q.B. 114 ; 57 L.T. 730.

(3) *Pickersgill (William) & Sons, Ltd.* v. *London & Provincial Marine & General Insurance Co., Ltd.*, [1912] 3 K.B. 614 ; 29 Digest 91, *490* ; 82 L.J.K.B. 130 ; 107 L.T. 305.

(4) *Jester-Barnes* v. *Licenses & General Insurance Co., Ltd.* (1934), 49 Lloyds L.R. 231.
(5) *Mutual Life Insurance Co. of New York* v. *Ontario Metal Products Co., Ltd.*, [1925] A.C. 344; 29 Digest 352, *2849*; 94 L.J.P.C. 60; 132 L.T. 652.
(6) *Dawsons, Ltd.* v. *Bonnin*, [1922] 2 A.C. 413; 29 Digest 309, *2553*; 91 L.J.P.C. 210; 128 L.T. 1.
(7) *Merchants & Manufacturers Assurance Co.* v. *Hunt*, [1941] 1 K.B. 295; [1941] 1 All E.R. 123; Digest Supp.; 110 L.J.K.B. 375; 165 L.T. 49.
(8) *Richards* v. *Brain & Port of Manchester Insurance Co.* (1934), 50 Lloyds L.R. 88.
(9) *Joel* v. *Law Union & Crown Insurance Co.*, [1908] 2 K.B. 863; 29 Digest 353, *2858*; 77 L.J.K.B. 1108; 99 L.T. 712.
(10) *Aaron's Reefs* v. *Twiss*, [1896] A.C. 273; 35 Digest 7, *16*; 65 L.J.P.C. 54; 74 L.T. 794.

Action for a declaration under the Road Traffic Act, 1934, s. 10 (3), that a policy of insurance against third party liability was not binding upon the insurers, the plaintiffs, on the ground that it was obtained by misrepresentation and concealment of material facts. The policy was issued to the first defendant Morrison, and was to operate from Nov. 22, 1938. On Sept. 30, 1939, while being driven by the second defendant, Lauriston, with the consent of the first defendant, the car caused the death of the husband of the third defendant, Mrs. Rackley. Lauriston was a fully licensed driver and *primâ facie* covered by the policy. Mrs. Rackley recovered judgment against Lauriston for £1,800 damages on Aug. 29, 1940. It was to avoid indemnifying Lauriston or paying Mrs. Rackley that this declaration was sought.

Mrs. Rackley commenced her action on Dec. 5, 1939, and the plaintiffs commenced their action for a declaration on Mar. 1, 1940, having on Feb. 28, 1940, served Mrs. Rackley with a notice of the matters on which they intended to rely. She was subsequently joined as a defendant. The notice was in the following terms:

> Particulars: The material facts which the said Morrison failed to disclose were (*a*) that he had not regularly or continuously driven a motor car during the twelve months preceding Nov. 23, 1938; (*b*) that he had not driven motor cars for three years and was the holder of only a provisional driving licence who on being given a driving test had failed to pass such test; (*c*) that the said Lauriston would ordinarily drive the motor car to be insured by the said policy (in addition to the said Morrison and also one F. Heard). In the proposal form dated Nov. 23, 1938 (being the proposal form upon which the said policy was issued) filled in and signed by him, the said Morrison made representations which were false in material particulars as follows: In answer to question 2 thereof he stated: (*a*) that he had driven motor cars regularly and continuously in the United Kingdom during the past twelve months; (*b*) that he had driven motor cars for three years. In answer to question 3 thereof, he stated: (*c*) that the motor car would ordinarily be driven only by F. Heard in addition to himself.

The word " only " ought not to have been included in the last sentence since it did not appear in the answer. On Oct. 20, 1941, the plaintiffs applied for leave to amend their statement of claim by adding the following:

> On July 11, 1938, at the Sheriff Court of Lanarkshire at Hamilton, Scotland, the first-named defendant was convicted of contravening the Road Traffic Act, 1930, s. 15 (1), and was thereupon sentenced to pay a fine of £10 or to suffer 30 days' imprisonment and was further thereupon disqualified from holding or obtaining any driving licence for a period of twelve months from the said July 11, 1938, and his licence was indorsed accordingly.

In fact, the conviction was for being in charge of a car when he was unfit to be in charge of a car. Leave to amend was given, reserving until the trial the determination of the question whether and to what extent the plaintiffs were entitled to rely upon this further matter.

Morrison was a general foreman carpenter, a little under 40 years of age. He first drove a car about 1936, and he drove for about 3 months in Scotland. In Nov., 1936, he obtained employment at the Ebbw Vale Works, which cover a very extensive area. He bought a car to drive about that area, and between 1936 and the date of the accident, he had possessed 3 other cars. He drove regularly about that area for 19 months, that is, until June, 1938. In Nov., 1937, that is, after driving about this area for a year, he applied for and obtained a provisional driving licence. He insured with the General Accident Insurance Co., and, being a new driver with only a provisional licence, he was made to take the first £5 of any loss himself. In Jan., 1938, he had a driving test and failed. He arranged for another soon after and arrived a few minutes late, and the examining driver refused to wait and give him a trial. He did not bother to apply for any further test, because he was busy and content with the provisional licence, which was renewed from time to time. Every day since getting his licence he drove from his home to the works at Abergavenny and back, 44 miles a day, and during the day was driving continuously about the works area. In June, 1938, he left the Ebbw Vale works and went to a new place at Monkswood, where again the works covered a very large area, and he used a car to drive about the works. Until his conviction he was also using a car to drive to and from his home. In July, 1938, he was convicted, as already stated, and his licence was suspended, but he continued to drive about the works. As it was private property, he did not need a licence for that, and his head carpenter, who had held a licence for 12 years, a competent driver, drove him to the works and home each day. In Nov., 1938, his policy being about to expire, he discussed its renewal with a car salesman, who had sold him all his four cars or arranged for the purchase of them, and who had a promise of reward from the plaintiffs if he procured any business for them. This salesman, who knew all about Morrison, produced a proposal form for a policy with the plaintiffs. Morrison filled it in, how far with the salesman's assistance was not ascertained. Then Botham, an employee of the plaintiff company, came to see Morrison. He brought with him a typed copy of the form which had been sent in. He saw Morrison and went through it with him. Morrison made corrections and, in particular, he corrected two answers relating to existing insurance. He told Botham that he had been insured for the past year with the General Accident and that he had been made to take the first £5, because he had been treated as a new driver as he had only a provisional licence. The proposal was accepted. The policy was sent some 10 weeks later and Morrison found to his annoyance that the company had imposed upon him the condition of being liable for the first £5.

The allegation of misrepresentation in the third answer (*c*) (" that the motor car would ordinarily be driven only by F. Heard in addition to himself ") was withdrawn.

Gilbert Beyfus, K.C. and *N. R. Fox-Andrews* for the plaintiffs.

A. T. Denning, K.C. and *C. L. Hauser* for the third defendant, Mrs. Rackley.

ATKINSON, J.: The first question to be decided is whether and to what extent the plaintiffs were entitled to rely upon the further matter stated in the amendment to the statement of claim. In *Contingency Insurance Company, Limited* v. *Lyons* (1), the Court of Appeal heard an interlocutory appeal from the judge in chambers with reference to an amendment in the statement of claim. The amendment was resisted, and the appeal was based upon the ground that the particulars which it was sought to incorporate in the plaintiffs' claim could not be relied upon against the defendant because notice had not been given in accordance with the Act, and it was desired that these amendments should be struck out. The Court of Appeal refused to strike them out, but they indicated in words which I shall read in a moment that there was, putting it at its lowest, extreme doubt as to whether the plaintiff should be entitled to rely upon them. SLESSER, L.J., said this:

> In fact, in the pleadings which have been amended . . . a number of matters are raised . . . of which there is no complaint, alleging particulars of non-disclosure and particulars of misrepresentation, a great many in number, none of which admittedly appears in the notice which has been served upon [the third party]. What is said is that, as this statement of claim as it stands is not only against Lyons and Isenberg, but also against [the third party] who has been joined, so far as regards [the third party] she is entitled to have the statement of claim against her limited to the matters specified in the notice under subsect. (3), and that as regards her these other matters beyond the notice should be struck out.

Then SLESSER, L.J., went on to deal with the arguments and said that counsel for the plaintiffs wished to be at liberty to contend at the trial that:

> . . . notwithstanding the provision that the declaration when obtained cannot be used against the third party unless within 7 days after the commencement of the action that third party has received the requisite notice specifying non-disclosure or false representation, when once the specification of non-disclosure or false representation on which he proposes to rely has been made he is then at liberty at the trial to rely on other matters of non-disclosure and false representation. It is an argument which impresses me very little indeed, but I do not feel on the authorities that it can be said with regard to those further matters now that it is so plain that there is no cause of action that we

ought to strike the matter out at this stage. There is ample authority for the proposition that, if there is any arguable point of law to be raised, any arguable cause of action to be raised, it should not be excluded by striking out, but should stand on the pleading for determination at the trial.

Taking the same view MacKinnon, L.J., said that he thought it was arguable to the same extent as it is arguable that black is white. du Parcq, L.J., said he had not heard counsel for the plaintiffs upon it, but, as far as he could see on what he had heard, it would be a very difficult proposition to maintain. It is obvious that the point was not decided. Anything which was said was *obiter* and, therefore, I have to consider and decide it for myself, though, of course, I cannot ignore a view so strongly expressed. I can see no reason for refusing to permit the plaintiffs to rely upon the further non-disclosure alleged in the amendment in support of their claim to avoid the policy against the first two defendants. The allegation is admitted by Morrison, and, in my judgment, the conviction was a material fact which it was the duty of Morrison to disclose, and the plaintiffs are entitled, *prima facie*, if there be any necessity for it or if any useful purpose can be achieved thereby, to a declaration that they are entitled to avoid the policy as against the first two defendants. However, that declaration would not avail the plaintiffs against the third defendant as the plaintiffs have not complied with the condition laid down in subsect. (3), that is, given notice within the seven days specifying the non-disclosure on which they propose to rely. Counsel for the plaintiffs contends, as was contended by counsel for the plaintiffs in the case to which I have referred, that, so long as the notice specified the grounds on which the plaintiffs proposed at that time to rely, they are free to rely on any further ground which they may discover or which may occur to them. I do not know how far he would press that. If any of the grounds in the notice are good and sufficient, why seek to add to them ? The only answer there can be to that is that the plaintiffs were not and are not content to rely upon them. In my judgment, a declaration obtained on grounds of which notice was not given within 7 days does not avail an insurer against a third party judgment creditor. I do not think the court has any power to vary the section and to dispense with the condition laid down. I think its duty is to give effect to it, and, respectfully, I entirely agree with the views indicated by the Court of Appeal. I would add this. It seems to me that there is a very good reason why the legislature should have laid down this condition. A plaintiff about to sue, or suing, a motor car owner is to be told early on that the insurance company is going to repudiate liability. The plaintiff has to make up his mind whether to go on or not. If the grounds indicated are perfectly clear and he knows the defendant he is suing is not worth powder and shot, he does not waste money on an action ; but, if the grounds seem to him insufficient, he goes on and gets judgment. It seems to me extremely hard and going in the teeth of the intention of Parliament if, at the last moment, some new ground can be introduced which may destroy the value of his judgment.

I have now to consider whether the plaintiffs are entitled to a declaration on any of the grounds in the notice. The first answer in the proposal form of which complaint is made is "that he had driven motor cars regularly and continuously in the United Kingdom during the past 12 months." It is said that that was untrue. The admitted facts are that for just under 8 months he had driven regularly and continuously at large on the highway as well as at the works and for the last 4 months he had been driving regularly and continuously about either the Ebbw Vale or the Monkswood works. Morrison said it was at least as difficult to drive about there as on the roads. I cannot think that there was anything materially untrue in that answer. The other matter relied upon was the statement that he had driven motor cars for 3 years. Everybody who has given evidence has admitted that, if he had been driving for 2 years, there would be nothing materially untrue about that. In fact, he had 2 years and 3 months' driving experience. I think there is nothing in the alleged misrepresentation. I do not think it is unfair to say that they were not very strenuously relied upon. Reliance, in substance, was chiefly placed on the non-disclosure. It was said that he failed to disclose "that he had not regularly or continuously driven a motor car during the 12 months preceding Nov. 23, 1938." I have dealt with that, and there is nothing in it. The material allegation is (*b*). The first part of this allegation—"that he had not driven motor cars for 3 years"—is agreed not to be material. The second part is: "and was the holder of only a provisional driving licence who, on being given a driving test, had failed to pass such test." It is to be noted that there is no question asked about licences in the proposal form. Botham had in fact been told a year before, when a previous policy had been taken out, that he was at that time a new driver with only a provisional licence, and it was not put to him: "Well, I suppose since then you have got a full licence. We will soon put that right," or anything of that sort. No question was asked about it, which, if it is regarded as of importance, is rather strange. I am not satisfied at all that there was any material concealment about this provisional licence, nor about the test. Boston, an underwriter called by the insurers, clearly thought that the important thing is a man's driving experience. It seems to me that, if Botham had been told everything—the trial, that he had gone for another test, that it had been refused because he was late and explained why he had not been for another and explained his driving experience—it would not have made any material difference. Although I am not satisfied about that, and the burden is on the plaintiffs, there is one thing about which I am completely satisfied. It is not enough for an insurer to prove a material non-disclosure. To get the benefit of this subsection, he must prove that the policy in question was obtained by that non-disclosure, in other words, he must prove that, but for that non-disclosure, the contract which was obtained would not have been obtained. It is a material averment in an action for rescission based on misrepresentation to aver and to prove that the misrepresentation has been relied upon. So here the insurer has to satisfy me that Morrison got a contract which he would not have got but for his non-disclosure. Now this aspect of non-disclosure, whether or not it has induced a particular contract, has received very little consideration in our courts for two reasons. Usually there is a warranty in the proposal form incorporated in the policy that there has been no material non-disclosure. In such cases the insurer has merely to prove material non-disclosure and the policy falls to the ground by virtue of that term of the contract. He has not to prove inducement or anything of the kind. Again, even if there is no clause making full disclosure a condition of the contract, as the duty to disclose proceeds from an implied term in the contract wherever full disclosure is a condition precedent to the liability of the underwriter, again inducement has no relevance. That seems quite clear from *Blackburn* v. *Vigors* (2), *Pickersgill & Sons, Ltd.*, v. *London and Provincial Marine and General Insurance Company, Limited* (3), and *Jester-Barnes* v. *Licenses and General Insurance Company, Limited* (4). I think the best summary is to be found in the judgment of HAMILTON, J., in the *Pickersgill* case (3). He was dealing there with the question of non-disclosure, whether it was something arising out of the contract under the Marine Insurance Act, 1906, s. 50 (2), and he said this, at p. 621:

> Furthermore the words are "arising out of the contract." I am bound by the authority of the Court of Appeal in *Blackburn* v. *Vigors* (2) and of the House of Lords, more particularly the opinion of LORD WATSON, to hold, in accordance with what has long been stated by the majority of approved text-writers, that the rule imposing an obligation to disclose upon the intending assured does not rest upon a general principle of common law, but arises out of an implied condition, contained in the contract itself, precedent to the liability of the underwriter to pay. Failure to perform this condition is a defence arising out of the contract—not, it is true, out of any written words in the contract, but still out of the contract itself, because an implied condition precedent to the underwriter's liability has not been performed.

The result, of course, is the same if the effect of non-disclosure is deemed to prevent the existence of a *consensus ad idem.* That view has been expressed once or twice, I think, but whichever view is right, in cases dealing with non-disclosure the question of inducement naturally has not arisen. There is, however, one case in which this question of inducement was considered, and had to be considered. It is *Mutual Life Insurance Co. of New York* v. *Ontario Metal Products Co., Ltd.* (5). There the question was whether a policy of life insurance was effective. The insured person died and liability to pay was being resisted on the ground that there had not been full disclosure as to what medical attendance the man had had. There was an answer which was untrue, and the question was whether this entitled the insurance company to set aside the policy. At p. 349 LORD SALVESEN, delivering the judgment of the Privy Council, said that there had been an answer to one of the questions which was inaccurate, and that there was a duty to have disclosed a certain doctor's name as a physician who had prescribed for and attended him within 5 years of the date of the policy. He continued, at pp. 349-352 :

> This finding would have been conclusive against the respondents had the policy been in the same form as that which was considered in the recent case of *Dawsons, Ltd.* v. *Bonnin* (6), decided in the House of Lords. There the fact that an inaccurate answer was given to a question in the application form, although in itself of no materiality, was held to invalidate the policy of insurance, because the accuracy of the assured's answers was made a basic condition of the contract. In other words, the assured warranted the truth of the representations he made. It is not so in the policy now under consideration. It contains a clause in the following terms : " All statements made by the insured shall, in the absence of fraud, be deemed representations and not warranties and no such statement of the insured shall avoid or be used in defence to a claim under this policy unless contained in the written application herefor and a copy of the application is indorsed on or attached to this policy when issued." This clause was inserted with a view to complying with the Ontario Insurance Act (R.S. Ont., 1914, c. 183), s. 156 (5). But the full effect of the Act, which governs all policies made in Ontario, can only be appreciated by a careful study of its terms. By subsect. (3) it is provided : " The proposals or application of the assured shall not as against him be deemed a part of or considered with the contract of insurance except in so far as the court may determine that it contains a material misrepresentation by which the insurer was induced to enter into the contract." Again by subsect. (4) it is (*inter alia*) provided, " No contract shall be avoided by reason of the inaccuracy of any such statement [i.e., in an application for a policy] unless it is material to the contract," and finally, subsect. (6) provides : " The question of materiality in any contract of insurance shall be a question of fact for the jury or for the court if there is no jury." . . . All of the questions may be presumed to be of importance to the insurer who causes them to be put, and any inaccuracy, however unimportant in the answers, would, in this view, avoid the policy. Suppose, for example, that the insured had consulted a doctor for a headache or a cold on a single occasion and had concealed or forgotten the fact, could such a concealment be regarded as material to the contract ? Faced with a difficulty of this kind, the appellants' counsel frankly conceded that materiality must always be a question of degree, and therefore to be determined by the court, and suggested that the test was whether, if the fact concealed had been disclosed, the insurers would have acted differently, either by declining the risk at the proposed premium or at least by delaying consideration of its acceptance until they had consulted [the insured's doctor]. If the former proposition were established in the sense that a reasonable insurer would have so acted, materiality would, their Lordships think, be established, but not in the latter if the difference of action would have been delay and delay alone. In their view, it is a question of fact in each case whether, if the matters concealed or misrepresented had been truly disclosed, they would, on a fair consideration of the evidence, have influenced a reasonable insurer to decline the risk or to have stipulated for a higher premium.

That is the test whereby it is to be determined whether there has been misrepresentation by which the insurer was induced to enter into the contract. In other words, if there had been full disclosure, would a reasonable insurer have declined the risk or have stipulated for a higher premium ? Ontario is far ahead of us in its desire to protect insured persons against an insurance company being able to get out of liability by mere proof of some non-disclosure which in truth never induced the contract. That is the test which I think has got to be applied by me in dealing with sect. 10 (3). In other words, I have to be satisfied that, if the fact that he had only had a provisional licence for the last 12 months and that he had not passed a test at the beginning of the year had been disclosed with the full explanation, that a reasonable insurer would not have given the contract which he did, that he would have been influenced to decline the risk or to have stipulated for a higher premium or possibly, to keep in harmony with subsect. (5), impose conditions which were not imposed. I am absolutely satisfied that Morrison would have got just the same policy as he did in fact get if there had been the fullest disclosure. I fail to see how any reasonable insurer could have put forward worse terms than £5 excess, which is the recognised basis on which to put a new driver who has never driven a yard. Therefore, I am driven to the conclusion that the plaintiffs have failed to prove that this policy was obtained by the non-disclosure of a material fact. They have to show that, if they had been told the truth, the whole truth and nothing but the truth, this policy would not have been granted. If they prove that, it is not unfair that the Act should provide a defence against a third party ; but I am sure Parliament thought that it would be grossly unfair that the mere fact that there had been a concealment—it may be a material concealment or a material misrepresentation—should afford a defence against a third party, unless it had induced the contract. If the same contract would have been obtained and the same policy issued notwithstanding the concealment, I cannot think Parliament meant that the third party should suffer.

A further matter was raised. There is a clause in the policy to this effect:

> Nothing in this policy or in any indorsement hereon shall affect the right of any person indemnified by this policy or of any other person to recover an amount under or by virtue of the provisions of the Road Traffic Act, 1930, s. 38; Road Traffic Act, 1934, ss. 10, 12; Motor Vehicles and Road Traffic Act (Northern Ireland), 1930, ss. 7 (1) (*c*), 9; Motor Vehicles and Road Traffic Act (Northern Ireland), 1934, ss. 18, 20; Road Traffic (Compulsory Third Party Insurance) (Guernsey) Law, 1936, ss. 4, 6, 9. But the insured shall repay to the company all sums paid by the company which the company would not have been liable to pay but for the said provisions of the above-mentioned Acts.

It is said that this clause prevents an insurance company from relying upon misrepresentation or concealment even where it may have induced the giving of the policy. The argument is as follows. The duty to disclose rests on implied condition precedent. There is no room for implied conditions where there is an express term in the contract covering the same ground. There is an express condition in this policy and, therefore, the right to repudiate the policy rests on an express term in the contract. Even if the implied condition be deemed still to remain, none the less it is something arising out of the policy. Therefore, if nothing in the policy is to affect the right of the third party, the insurance company are not entitled to set up material non-disclosure. STABLE, J., took that view in *Merchants & Manufacturers Assurance Co.* v. *Hunt* (7), and the Court of Appeal upheld his judgment on different grounds. They expressed some doubt as to the accuracy of that view; but what they said about it was only *obiter*. They took pains to say that they were not deciding the point and, therefore, I have to make up my mind about the same point. The view I take of it is this. It must be remembered that, *prima facie*, underwriters have two sets of rights. There are the contractual rights to avoid the policy in certain events, rights based on matters arising out of the terms of the policy. A second right given to them, perhaps in part by law but certainly by this subsect. (3), is the right to avoid the policy arising out of matters outside the contract altogether. I am unable to see how a clause which declares that rights arising out of the contract shall not be relied upon to defeat a third party can be interpreted as covering rights arising outside the contract. I cannot see how a clause which declares, in effect, that some material non-disclosure shall not affect a third party's rights can be construed as meaning that, if the policy has been obtained by non-disclosure of material facts, that, too, is excluded. "We will not treat mere non-disclosure as a defence against a third party" seems to me very different from saying "We will not avoid this contract even if it has been obtained by non-disclosure." To put the same point perhaps in another way, the words "Nothing in this policy" cannot, in my view, mean "Nothing in this policy nor in the Act." I appreciate the desire of STABLE, J., to give some effect to the words. It is quite true that in the view I am expressing those words are meaningless. They have no legal effect at all. I imagine the object of them was merely to call attention to the position and to make it clear to the insured that in certain events there would be a claim over against him. Be that as it may, I cannot see that the mere fact that the words may have no legal effect whatever entitles the court to give them a meaning which they cannot reasonably bear. If one bears in mind that there are rights arising out of the terms of the contract and the separate right arising under this subsect. (3)—a more burdensome right, a right not to get out of liability by mere proof of non-disclosure, but requiring proof of inducement of the contract as well—I cannot see that words which exclude the one defence can be deemed to exclude the other defence as well. It has also to be borne in mind that, if the insurers succeed under subsect. (3), the whole contract, including this clause, goes. Therefore, with the greatest respect for the view taken by STABLE, J., I am unable myself to agree with it.

The material ground on which I decide against the plaintiffs is that I am not satisfied that this policy was obtained by a material non-disclosure, for, indeed, I am quite convinced of the contrary. I am not satisfied that the non-disclosure was material. I am quite satisfied that it did not induce this contract and that the fullest disclosure would have produced a contract certainly no less favourable to Morrison than this one.

The insurance company appealed.

Beyfus, K.C.: The Road Traffic Act, 1934, s. 10, should not be construed to prevent the appellants from relying upon anything which they discovered at any time. The appellants put into their notice everything of which they had knowledge which would enable them to ask that the policy should be set aside. Application to amend may, however, be made. It is unlikely that an insurance company would omit from their notice any particulars of misrepresentation by non-disclosure of which they knew, and the words of the section should be read so as not to afford to the injured person a greater protection than the legislature has thought fit to give. If the insured had disclosed that he had not passed the driving test, the appellants would have found out the fact of the conviction. At the time when the Road Traffic Act, 1934, was passed, any concealment of a material fact might vitiate the insurance, the principle being that it was not for the court, but for the underwriter, to say how far he would allow the fact to influence his mind: *Pickersgill (Wm.) & Sons, Ltd.* v. *London & Provincial Marine & General Insurance Co., Ltd.* (3). The definition of a material fact in the Road Traffic Act, 1934, is, in substance, the same as that in the Marine Insurance Act, 1906. In a case of this kind, it is impossible to overlook the principle laid down in *Aaron's Reefs* v. *Twiss* (10), as to the necessity of looking at the document as a whole. An inquiry as to whether or not the non-disclosure would have made any difference may, in a particular case, be relevant as to whether or not the fact is material. The present, however, is not such a case, because the test is obligatory by law, and it is not possible to regard the failure to pass the test as not being material.

Denning, K.C., for the respondent was not called upon.

Lord Greene, M.R.: By the Road Traffic Act, 1934, s. 10, provision is made for enabling third parties to recover from insurers the amount of any judgment obtained in respect of a liability covered by a policy under the Road Traffic Act, 1930, s. 36. The scheme of the section, so far as relevant, is as follows. By subsect. (1) the right so to recover from the insurers is conferred on third parties notwithstanding that the insurer may be entitled to avoid or cancel or may have avoided or cancelled the policy. By subsect. (3) the right of the insurer to avoid the policy is preserved provided that, in an action commenced before or within 3 months after the commencement of the action in which the third party obtains judgment, he obtains a declaration that the policy was obtained by the non-disclosure of a material fact or by a representation of fact which was false in some material particular. If this subsection had stopped there, the benefit conferred by subsect. (1) on third parties would have been seriously curtailed; but a proviso is added for their protection, by which the benefit of the declaration is not to avail the insurer as against a third party who obtains his judgment in proceedings commenced before the commencement of the insurer's action, unless the insurer has, before or within 7 days after the commencement of his own action, given notice to the third party "specifying the non-disclosure or false representation on which he proposes to rely"; and the third party can then apply to be added as a party to the insurer's action. The object of this proviso clearly is to enable the third party to decide whether, in view of the allegations contained in the notice, it is worth his while to incur the expense of proceeding with his action and to allow him, as a person interested in disputing the insurer's claim, to be heard in opposition to it. Subsect. (5) defines the word "material" as meaning:

> . . . of such a nature as to influence the judgment of a prudent insurer in determining whether he will take the risk and, if so, at what premium and on what conditions . . .

In the notice served under the proviso to subsect. (3), the appellants gave particulars of the non-disclosure and misrepresentation upon the part of the policy holder, Morrison, on which they proposed to rely. Only two of these matters need be mentioned, namely, (i) the following question and answer in the proposal form:

> State whether you have driven motor cars regularly and continuously in the United Kingdom during the past 12 months—Yes.

(ii) the non-disclosure of the fact that Morrison

> . . . was the holder of only a provisional driving licence who on being given a test had failed to pass such test.

The statement of claim as delivered set out these matters and also other matters mentioned in the notice upon which the appellants do not now rely. At a later stage, a further allegation of non-disclosure was added to the statement of claim by amendment, namely, non-disclosure by Morrison of the fact that he had been convicted of contravening the Road Traffic Act, 1930, s. 15 (1), and was disqualified from holding or obtaining any driving licence for a period of 12 months. It is not open to doubt that, as against Morrison and the second defendant, Lauriston, the appellants were entitled to rely on this additional non-disclosure and that, as against them, it was sufficient to entitle the appellants to avoid the policy. The appellants maintain that they are also entitled to rely upon it as against the respondent, notwithstanding the fact that it was not mentioned in the notice. In my opinion, this contention is quite hopeless. True it is that the proviso to subsect. (3) does not in terms say that, as against the third party, the insurer is to be confined to the particulars set out in his notice. The reason for this is that it was quite unnecessary for it to do so. If the insurer could, as against the third party, bring forward matters not specified in the notice, the protection which the proviso gives could be rendered completely abortive. ATKINSON, J., was, in my opinion, manifestly right in his decision upon this point.

The next matter relied upon by the appellants was the answer to question 2 in the proposal form above set out. The facts, which were unusual, are fully stated in the judgment of ATKINSON, J., and I need not repeat them. He held that the appellants had failed to show that the answer given by Morrison to this question was untrue and I agree with him. The question is hopelessly vague, and I am quite unable to give any precise meaning to it. It is, to my mind, most unfortunate that questions framed in such a slovenly way should be put to a person making a proposal for insurance, who may afterwards find himself accused of having given a false answer according to the construction which the insurer may, in his particular case, choose to put upon the question. The practice is particularly vicious, when, as in the present case, the proposer is required to warrant the truth of his answer. Questions of this kind are—I do not say designedly—mere traps, and insurance companies must not be surprised if they are construed strictly against them.

What, in my view, is the only matter of substance in the appeal, relates to the non-disclosure of the alleged fact that Morrison " was the holder of only a provisional driving licence who, on being given a driving test, had failed to pass such test." I say " alleged " because one of the facts alleged was not true. Morrison did not hold a provisional licence, since the provisional licence which had been issued to him had been suspended as the result of his conviction. It was the fact, however, that he had failed to pass the driving test ; and, when he presented himself for another test at a later date, it could not take place because he arrived too late. The questions then arise whether this admitted non-disclosure was non-disclosure of a material fact within the definition of the word " material " in subsect. (5) and whether, on the facts, the policy was " obtained " by it. In answering these questions, ATKINSON, J., adopted the test laid down by the Privy Council in *Mutual Life Insurance Co. of New York* v. *Ontario Metal Products Co., Ltd.* (5), at pp. 351, 352 :

> . . . it is a question of fact in each case whether, if the matters concealed or misrepresented had been truly disclosed they would, on a fair consideration of the evidence, have influenced a reasonable insurer to decline the risk or to have stipulated for a higher premium.

In my opinion, ATKINSON, J., was right in thinking that the same test is to be applied under the language of the present section. On the facts he held that the appellants had not satisfied the test, and I agree with him. The evidence entirely fails to convince me that the insurers, had they known of the failure to pass the test, would have declined to issue a policy on precisely the same terms as those on which they did issue the policy in question. As it was, they required the insured to bear the first £5, a condition which they regularly impose upon inexperienced drivers. MACKINNON, L.J., in the course of the argument, pointed out what had till then escaped notice, namely, that on the back of the proposal form there is the following statement:

Inexperienced drivers. Where the proposer or any person who will ordinarily drive the car has not driven motor cars regularly and continuously in the United Kingdom during the preceding 12 months the insurance is subject to the proposer bearing the first £5 of each and every claim.

In passing, I may point out that this statement has a bearing on the materiality of the answer to question 2; but, on the point which I am discussing, it does show that inexperienced drivers are given precisely the same terms as those given to Morrison. I am quite unconvinced by the suggestion that more onerous terms would have been imposed on a learner who had failed in his test than were regularly imposed on one who had never sat at the wheel of a motor car in his life.

In truth, the witnesses called on behalf of the appellants were obviously unable to disembarrass their minds of the knowledge that Morrison had been convicted, and this led them to attribute a quite unwarrantable importance to the incident of the driving test. The matter was put in this way by counsel for the appellants. He said that, if the failure to pass the test had been disclosed, the appellants would have insisted on having a private test of their own; that no such test could have been carried out on the public highway, because Morrison did not hold a licence; that this would have led them to knowledge of the conviction; and that, consequently, they would have declined the risk. He maintained that, even if he was not entitled to rely on the concealment of the conviction as a ground for avoiding the policy as against the respondent, he was nevertheless entitled to prove that it had taken place as a fact; and that the importance of the non-disclosure in relation to the driving test was that, had the failure to pass it been disclosed, the appellants would have been put upon the track of the conviction. This argument is, in my opinion, unsound. It amounts to saying that, even if the non-disclosure on which the insurer is entitled to rely is not in itself sufficient for his purpose, it ought to be treated as sufficient because, had it not taken place, it would have led him to the discovery of a different non-disclosure upon which, *ex hypothesi,* he is not entitled to rely. This appears to me to be quite inconsistent with what I have already found to be the true construction of the proviso to subsect. (3). It involves reliance upon a matter upon which the insurer is precluded from relying. If the proviso prevents the conviction from entering by the front door, it cannot be allowed to climb in through the window. If the conviction had been discovered in the manner suggested, it would have been the fact of the conviction, not the failure to pass the driving test, which would have led the appellants to refuse to issue the policy. If I am right in thinking that only matters referred to in the notice can be relied upon, it seems to me to follow that the questions whether such matters are material and whether the policy was obtained by them, must be examined on the artificial basis that, as between the insurer and the third party, all other statements made by the insured must be taken as true and all other material facts as having been disclosed. The result is to prevent the insurer from relying either directly or indirectly on any matter not specified in the notice as a ground or part of a ground for avoiding the policy as against the third party.

The appeal must be dismissed.

MacKinnon, L.J.: I agree that this appeal fails and should be dismissed. Mrs. Rackley issued her writ against Lauriston on Dec. 5, 1939, and recovered damages for the death of her husband caused by his negligence. If he could not pay, she would, under the Road Traffic Act, 1934, have a right to pursue her claim against the Zurich Company. Pursuant to the provisions of that Act, the company on Feb. 28, 1940, served her with a notice specifying the matters of misrepresentation and concealment on which they claimed to avoid the policy. On Mar. 1, 1940, they issued their writ against Morrison and Lauriston, claiming a declaration that they were entitled to avoid the policy. By an order dated Nov. 26, 1940, Mrs. Rackley was added as a defendant to that action. On Feb. 3, 1941, the plaintiffs filed their statement of claim, in which they relied on the matters of misrepresentation and concealment which they had specified in their notice to Mrs. Rackley of Feb. 28, 1940. In Oct., 1941, the plaintiffs applied to amend their statement of claim by adding further allegations of concealment and misrepresentation, and they were allowed to do so by an order of

Atkinson, J., of Oct. 17, 1941. To this amended statement of claim Mrs. Rackley filed an amended defence on Oct. 20, 1941, in which, by para. 5 (*a*), she pleaded that the further matters specified in the amended statement of claim were not included in the notice to her of Feb. 28, 1940, and, therefore, that "they cannot now be relied on by the plaintiffs as against the defendant, Mrs. Rackley." The judge upheld this plea of Mrs. Rackley, and I think he was clearly right. The provisions of the Act of 1934 are clearly intended to A limit the grounds on which insurers can avoid the policy so as to defeat the claim of a third party in the position of Mrs. Rackley to those grounds which they have specified in the notice which the Act requires them to serve upon her.

Therefore, the plaintiffs' claim to avoid this policy so as to make it of no avail to Mrs. Rackley must be limited to that pleaded in the unamended statement of claim of Feb. 3, 1941. That claim, apart from matters that were abandoned, relied on two misrepresentations and one matter of concealment. The misrepresentations B were contained in the following questions and answers:

> Have you [Morrison] driven cars regularly and continuously in the United Kingdom during the past 12 months ?—Yes. How long have you driven motor cars ?—3 years.

The alleged concealment was that Morrison was the holder of a provisional driving licence only (that is, that of a learner) and on going in for a driving test had failed to pass the test.

C Under the general law of insurance an insurer can avoid a policy if he proves that there has been misrepresentation or concealment of a material fact by the insured. What is material is that which would influence the mind of a prudent insurer in deciding whether to accept the risk or fix the premium. If this be proved, it is not necessary further to prove that the mind of the actual insurer was so affected. In other words, the insured could not rebut the claim to avoid the policy because of a material representation by a plea that the particular D insurer concerned was so stupid, ignorant or reckless that he could not exercise the judgment of a prudent insurer and was in fact unaffected by anything the insured had represented or concealed. Under the provisions of this Act of 1934, however, I think that this general rule of insurance law is modified. Section 10 of that Act requires the insurer to establish that the policy was "obtained" by non-disclosure or misrepresentation. In such a case as this, therefore, I think E that the plaintiffs must establish two propositions: (i) that the matter relied on was "material" in the sense that the mind of a prudent insurer would be affected by it, and (ii) that in fact their underwriter's mind was so affected, and the policy was thereby obtained.

The judge was not satisfied that the plaintiffs had established either of these propositions, and I agree with him. The two misrepresentations were in effect the statements: "I have driven cars regularly and continuously in the F United Kingdom for 12 months," by answering "Yes" to the question above set out. That question is obviously one of extreme vagueness. No one can say what is meant by "driving regularly and continuously," and the experts could not elucidate it. The man had driven for 12 months, but for part of the time only in the big works in which he was employed. The question does not say "on the highway," and I see no reason why it should be implied. As for the second statement, that he had driven cars for three years, he had in fact G driven for 2 years and 3 months. As to the concealment, the evidence was that, if a man had only a learner's licence, he was given a policy but made to bear the first £5 of any loss himself. It is, I think, very material to note that in the proposal form in this case there is the following paragraph towards the end of its advertising matter:

> *Inexperienced Drivers.* Where the proposer . . . has not driven . . . cars regularly H and continuously in the United Kingdom during the preceding 12 months the insurance is subject to the proposer bearing the first £5 of each and every claim.

Therefore, the plaintiffs proclaim that, if Morrison had avowed that he was only an inexperienced driver with a provisional licence, he would have been given a policy with this limitation of liability. The policy issued to Morrison did in fact, and to his chagrin, contain this stipulation.

In these circumstances, I am satisfied that the judge was amply justified in his conclusion that the plaintiffs had not established their case, and that this appeal should be dismissed.

Goddard, L.J.: The Road Traffic Act, 1934, Part II, was passed to remedy a state of affairs that became apparent soon after the principle of compulsory insurance against third party risks had been established by the Road Traffic Act, 1930. That Act and the Third Parties' (Rights Against Insurers) Act, passed in the same year, would naturally have led the public, at least those who were neither lawyers nor connected with the business of insurance, to believe that, if thereafter they were, through no fault of their own, injured or killed by a motor car, they or their dependants would be certain of recovering damages, A
even though the wrongdoer was an impecunious person. How wrong they were quickly appeared. Insurance was left in the hands of companies and underwriters, who could impose what terms and conditions they chose. Nor was there any standard form of policy, and any company, which could fulfil the not very onerous financial requirements that were necessary for acceptance as an approved insurer, could hedge the policies with so many warranties and conditions that no one advising an injured person could say with any certainty B
whether, if damages were recovered against the driver of the car, there was a prospect of recovering against the insurers. I myself once tried a case (*Richards* v. *Brain and Port of Manchester Insurance Co.* (8)), where the insurers were enabled to escape liability if at the time of the accident the car was being driven by a jew, a bookmaker or an actor. It was indeed a state of affairs to which the words of Fletcher Moulton, L.J. in *Joel* v. *Law Union & Crown Insurance Co.* (9) were forcibly applicable. In that case Fletcher Moulton, L.J., in C
dealing with a life policy, said, at p. 885:

> I wish I could adequately warn the public against such practices on the part of insurance offices. I am satisfied that few of those who insure have any idea how completely they leave themselves in the hands of the insurers should the latter wish to dispute the policy when it falls in.

In the case of motorcar insurance, however, it was the third parties who needed D
the warning, and unfortunately they had no voice as to the warranties or conditions that were inserted in policies, though it was only because careless drivers held a policy that they were enabled to drive and put other persons in peril. It is not surprising, therefore, that by 1934 Parliament interfered, and, by the Road Traffic Act, 1934, s. 10, took steps towards remedying a position which to a great extent nullified the protection that compulsory insurance was intended to afford. Generally speaking, sect. 10 was designed to prevent conditions in E
policies from defeating the rights of third parties; but insurers were still allowed to repudiate policies obtained by misrepresentation or non-disclosure of material facts. This right, however, was made subject to certain conditions and restrictions contained in sect. 10 (3). It seems to me that what the legislature had in mind was that, if an insurer was intending to repudiate a policy, it was only fair that the injured third party should know the grounds on which repudiation was sought before he went to the expense of endeavouring to establish his F
claim against the insured, who, if not entitled to indemnity, might be unable to satisfy a judgment. It was to prevent an injured party incurring further useless expense. Hence the necessity of the notice prescribed by the proviso to the subsection. The protection afforded is little enough. As I have said, it is only because the company has issued a policy and certificate of insurance that the motorist responsible for the accident was enabled to be on the road, but the result G
in such cases is that a widow, very likely, as here, in humble circumstances, who already has had to bring one action to establish her right to compensation, may then have to litigate points perhaps of considerable difficulty in insurance law with the insurers. In the present case, but for the generous and gratuitous help afforded by the solicitors and counsel representing her, she would have got nothing.

The appellants in this case contend that, if they once serve a notice specifying H
grounds on which, at the time they serve it, they intend to rely, they are at liberty to set up any further grounds of repudiation which they may think will help them and which they subsequently discover, if they can get leave to amend their pleading, although the statutory period within which the notice must be served has expired. Now be it observed that, as against the insured, who must be a party to the action, there is no limitation as to the grounds on which the policy can be disputed, so, if something is discovered which was not known when the original pleading was delivered, there may be good reason why an amendment

should be granted. There is, however, every reason why it should not prejudice the third party. If by amending his pleading the insurer can, in effect, add to the notice which he has given to the third party, the protection which, in my opinion, the proviso is designed to give to the latter is rendered nugatory. I have no hesitation in holding that, although the proviso does not contain words expressly precluding the insurers from setting up any grounds not mentioned in his notice, that is its effect. This construction was evidently that which appealed to this court in *Contingency Insurance Co.* v. *Lyons* (1) and, though they refused to stay the action, since there is no indication in any report that the case was ever tried, it was evident that the plaintiffs realised that, in view of what the court said, it was hopeless to proceed with it. The defendants cannot, therefore, rely on the conviction of the insured either as a misrepresentation or as a material fact which was not disclosed, and I agree with ATKINSON, J., in thinking that the case must be treated for all purposes as though the conviction had never happened. As LORD GREENE, M.R., put it during the argument, anything not contained in the notice must, so far as it is a representation, be regarded as true, and, so far as it was not disclosed, must be treated as not material. Otherwise one would be admitting by one door that against which the other is closed.

The plaintiffs being thus confined to the matters contained in their notice, the first matter, alleged to be a misrepresentation or concealment is that the insured had not regularly or continuously driven motor cars during the 12 months preceding the proposal for a policy. I need not reiterate the facts, but this matter relates to one of the specific questions in the proposal form. It is a most embarrassing question, and, if taken literally, no one could answer it otherwise than in the negative. The plaintiffs' witnesses themselves do not seem to know precisely what is meant by it. Boston said it meant " at any rate several times a week," but, when asked a few questions by the judge, he soon went away from that. The plaintiffs' underwriter, in answer to the judge, agreed that the point was to make sure that the insured was keeping his hand in, and that is what I should myself think was the correct view. In view of the experience of driving that the insured in this case had, I see no ground for holding that this answer was untrue. Then he had driven cars for some years at such places as the Ebbw Vale works, though he had not driven on public roads before Nov., 1937, a year before he took out a provisional licence. I cannot see that the answer that he gave to the question " How long have you driven motor cars ? " was untrue. If the plaintiffs want to know how long a man has driven on the road, or for how long he has held a licence, they should ask the question in plain terms. There may be many skilful drivers engaged at racing tracks or the private testing grounds of manufacturers who do not own a car of their own and so do not take out a licence, and yet drive cars on the tracks very frequently. The next concealment which is alleged raises questions that are perhaps more debatable. In the notice to the defendant, Mrs. Rackley, it was stated that the insured was the holder of a provisional licence only, and, on being given a driving test, he had failed to pass it. In fact the provisional licence which he had held had been suspended owing to his conviction ; but it is said that he ought to have disclosed that he had failed to pass the driving test. The evidence of the underwriters on this matter seems to me to be very unsatisfactory. Their real point is that, had this been disclosed, they would have made inquiries which would have led them to discover the conviction, which is just the matter on which they are not entitled to rely, and which must, for the purpose of considering whether they are entitled to avoid the policy so as to defeat Mrs. Rackley's rights under the 1934 Act, be regarded as a non-material matter. It is this that colours the whole of their evidence. I cannot believe that, if they are willing to insure inexperienced drivers, one, for instance, who had never driven a car in his life, they would refuse to insure one who had received instruction but had not got through his test the first time. It is common knowledge that many would-be drivers have failed several times. If this were held material, one result would be that, if a learner took out a policy admittedly as a learner with the £5 excess clause in it, and failed to pass a test before he applied for a renewal, he would have to disclose that fact, although all he was seeking was a renewal of the inexperienced driver class of policy. I do not think it would ever occur to anyone in such circumstances to do so, yet, if it is material, he would get only a voidable policy. I am well aware that, if a fact is material and so ought to be disclosed, it is no answer to say that the insured did not think it was material. Nor is it of itself a good answer to say: "If it was material, why did you not ask?" Underwriters cannot frame their questions so as to include everything that may affect any particular proposer, and the fact which ought to be disclosed may well be something peculiar to an individual case; but whether or not a person has failed in his test must, I should think, affect a very large number of proposers. The underwriter exhibits to them a long catechism in which he puts questions on matters which may affect any proposer, such as whether the car is to be used for hire, whether the person who will drive has any infirmity, or whether he has been convicted of any motoring offence, and I cannot help thinking that, if it is material for the underwriter to know whether or not the proposer has failed in a test, he would ask the question. The fact is that what the plaintiffs really regard as material is the conviction, and that, if they had known that the insured had failed in the test, that would have led them to find out that which was material, but on which they cannot rely in the present case. For myself, I am not prepared to hold, on this evidence, that the mere fact that the insured had failed in his test was material to underwriters who were issuing an inexperienced driver's policy. In any case, I am convinced, as was the judge, that, had the fact been disclosed, the insured would have got exactly the same policy as was issued in this case and, consequently, that it was not obtained by non-disclosure of a material fact.

Appeal dismissed.

Solicitors: *A. E. Wyeth & Co.* (for the appellants); *E. & J. Mote*, agents for *Carter & Fisher*, Torquay (for the respondent).

[*Reported by* D. K. Belcher *and* W. K. Scrivener, Esq., *Barristers-at-Law.*]

Re SMITH & FAWCETT, LTD.

[Court of Appeal (Lord Greene, M.R., Luxmoore, L.J. and Asquith, J.), **March 26, 27, 1942**].

Companies—Shares—Refusal to register transfer—Article of association conferring absolute discretion on directors—Transfer to executor of deceased member—Sale of portion of holding to director required before registration of transfer of remainder—Bona fide exercise of discretion.

The articles of association of a private company provided that "the directors may at any time in their absolute and uncontrolled discretion refuse to register any transfer of shares." The appellant, as executor of his father, claimed to be registered in respect of 4,001 shares. The directors refused to register a transfer unless he was willing to sell 2,000 of the shares to a named director at a certain price, in which case they would register a transfer of the remainder:—

Held: having regard to the terms of the article, the only limitation on the directors' discretion was that it should be exercised *bona fide* in the interests of the company. There was no ground for saying that the directors' refusal to register the transfer was not due to a *bona fide* consideration of the interests of the company as seen by them.

[**EDITORIAL NOTE.** As Lord Greene, M.R., points out, it is now a well-established practice for articles of private companies to contain severe restrictions on the transfer of the shares of the company. Such companies are more in the nature of a private partnership than of a public corporation. The greater part of the shareholding is usually vested in the principal director or directors, and powers are taken in the articles to control the beneficial interest in the remainder of the shares. These powers are, however, fiduciary powers which must be exercised in the interest of the company, but it is assumed that they are being so exercised unless there is clear evidence to the contrary. Each article, of course, falls to be construed according to its terms, and it may, by its very wording, show how the interest of the company is to be safeguarded. A common form of article permits transfers to named persons only, unless the transfer to some other transferee is approved by the directors and in the latter case the transfer is often made subject to rights of pre-emption. The article here considered gave the directors a much wider discretion, and it is held to be controlled only by the principle that, being a fiduciary power, it must be exercised for the benefit of the company. If the directors state upon oath that they have so exercised their discretion, that statement must prevail unless it is shown to be wrong by cross-examination of the deponents or by evidence establishing a substantive case showing how the discretion has been wrongly exercised, though, in some cases, the affidavit may show on its face that the discretion has been wrongly exercised.

As to Refusal to Register Transfers, see HALSBURY, Hailsham Edn., Vol. 5, pp. 270-272, para 469; and for Cases, see DIGEST, Vol. 9, pp. 375-379, Nos. 2388-2404.]

Cases referred to:

(1) *Re Bede Steam Shipping Co.*, [1917] 1 Ch. 123; 9 Digest 378, *2404*; 86 L.J.Ch. 65; 115 L.T. 580.

(2) *Re Royal British Bank, Nicol's Case* (1859), 3 De G. & J. 387; 9 Digest 374, *2382*; 28 L.J.Ch. 257; 33 L.T.O.S. 14.

(3) *Re Gresham Life Assurance Society, Ex p. Penney* (1872), L.R. 8 Ch. App. 446; 9 Digest 379, *2408*; 42 L.J.Ch. 183; 28 L.T. 150.

(4) *Re Stranton Iron & Steel Co.* (1873), L.R. 16 Eq. 559; 9 Digest 382, *2421*; 43 L.J.Ch. 215.

(5) *Re Bell Brothers, Ex. p. Hodgson* (1891), 65 L.T. 245; 9 Digest 372 *2368*.

(6) *Re Dublin North City Milling Co.*, [1909] 1 I.R. 179; 9 Digest 376, *r*.

Appeal by the applicant from an order of Simonds, J., dated Feb. 17, 1942. The father of the applicant was at the date of his death the holder of 4,001 shares in Smith & Fawcett, Ltd. The applicant, as executor of his father, claimed to be registered as the holder of those shares. The directors, acting under an article restricting transfer of shares, refused to register a transfer unless 2,000 of the shares were sold to a named director at a stated price.

W. P. Spens, K.C., and *J. Pennycuick* for the appellant.

R. F. Roxburgh, K.C., and *Sir Norman G. Touche* for the respondent.

Spens, K.C.: Whatever form the article giving power to the directors to refuse to register transfers may take, the authorities lay down that it has to be exercised on grounds which are personal to the transferee. In the present case, the refusal to register was to enable one of the directors to obtain an additional 2,000 shares for himself. There has not previously been a case in which the directors have said that they were prepared to register the transferee in respect of part of the shares but not in respect of a larger number. Under the power possessed by directors to refuse to register, they are not entitled to refuse to register the personal representative of a deceased shareholder in respect of the whole holding. Subject to anything in the articles an executor is entitled to be registered in respect of the holding of a deceased shareholder. The only grounds which the court recognises to be proper grounds for refusing to register transfers are that the proposed persons are not proper persons to be registered either because there is a liability on the shares or the proposed shareholders are business rivals. It is not a good ground for refusing to register that the refusal is made to prevent a deadlock in the affairs of the company. All the cases, from 1859 onwards, show that the refusal must be for the protection of shareholders and to prevent the admission into the company of an undesirable new member. [Counsel referred to *Re Royal British Bank, Nicol's Case* (2), *Re Gresham Life Assurance Society, Ex p. Penney* (3), *Re Stranton Iron & Steel Co.* (4), *Re Bell Bros., Ex p. Hodgson* (5), *Re Bede Steam Shipping Co.* (1), and *Re Dublin North City Milling Co.* (6).]

Roxburgh, K.C., was not called upon for the respondents.

Lord Greene, M.R.: The principles to be applied in cases where the articles of association of a company confer a discretion on directors with regard to the acceptance of transfers of shares are, for the present purposes, free from doubt. They must exercise their discretion *bona fide* in what they consider—not what a court may consider—to be in the interests of the company, and not for any collateral purpose. They must have regard to those considerations, and those considerations only, which the articles upon their true construction permit them to take into consideration. In construing the relevant provisions in the articles, it is to be borne in mind that one of the normal rights of a shareholder is the right to deal freely with his property and to transfer it to whomsoever he pleases. When it is said, as it has been said more than once, that regard must be had to this last consideration, it means, I apprehend, nothing more than this: that the shareholder has such a *prima facie* right, and that right is not to be cut down by uncertain language or doubtful implications. The right, if it is to be cut down, must be cut down with satisfactory clarity. It certainly does not mean that articles, if appropriately framed, cannot be allowed to cut down the right of transfer to any extent which the articles on their true construction permit.

There is also another consideration which I think is worth bearing in mind when one comes to examine the construction of any article that falls for consideration, and that is that this type of article is one which is for the most part confined to private companies. Private companies are, of course, separate entities in law just as much as are public companies, but from the business and personal point of view they are much more analogous to partnerships than to public corporations. Accordingly, it is to be expected that, in the articles of such a company, the control of the directors over the membership may be very strict indeed. There are very good business reasons, or there may be very good business reasons, why those who bring such companies into existence should give them a constitution which gives to the directors powers of the widest description.

In the present case the article is as follows :

> The directors may at any time in their absolute and uncontrolled discretion refuse to register any transfer of shares.

As I have said, it is beyond question that that is a fiduciary power, and the directors must exercise it *bona fide* in what they consider to be the interests of the company. The language of the article does not point to any particular matter as being the only matter to which the directors are to pay attention in deciding whether or not they will allow the transfer to be registered. The article does not, for instance, say, as is to be found in some articles, that they may refuse to register any transfer of shares to a person not already a member of the company, nor does it say that they may refuse to register any transfer of shares to a transferee of whom they do not approve. In cases where articles are framed with some such limitation on the discretionary power of refusal as I have mentioned in the two examples which I have given, it follows on plain principle that, if they go outside the matters which the articles say are to be the only matters to which they are to have regard, the directors will have exceeded their powers.

Counsel for the appellant maintained that, whatever language was used in the articles, the power of the directors to refuse to register a transfer must always be limited to matters personal to the transferee, and he points out that in the present case there can be no personal objection to his client becoming a member of the company, for the simple reason that the directors are prepared to accept him as the holder of 2,000 of the shares which have come to him as legal personal representative of his father. Counsel therefore says that there is no personal objection to the transferee here, and that is the only matter which directors are entitled to take into account. He relies for that proposition upon observations in several authorities where that is laid down, but on examination of those authorities it becomes quite clear that the judges who delivered the judgments in them were dealing with the particular form of article which happened to be before them, and the form of article was one which by its express language confined the directors to the consideration of the desirability of admitting the proposed transferee to membership on grounds personal to him.

I cannot put the point, which I am endeavouring to make, with greater clearness than it is put by WARRINGTON, L.J., in *Re Bede Steam Shipping Co.* (1). In that case the articles empowered the directors :

> . . . in their discretion and without assigning any reason therefor [to] refuse to register the transfer of any shares (not being a fully paid up share) to any person of whom they do not approve as transferee and may decline to register the transfer of any fully paid up share or shares on certifying that in their opinion it is contrary to the interests of the company that the proposed transferee should be a member thereof.

That was the precise limitation on the directors' power to refuse the transfer which was in issue in that case. WARRINGTON, L.J., says this at p. 136 :

> The article gives them one ground, and one ground only, for refusing to register the transfer of a fully-paid share, namely, that in their opinion it is contrary to the interests of the company that the proposed transferee should be a member.

It is perfectly clear from that observation that the court was not laying down some general rule to be applied to all forms of article, but was coming to a decision upon the particular article before it, the nature of which was such as to confine the directors to the consideration of one particular matter.

There is nothing, in my opinion, in principle or in authority to make it impossible to draft such a wide and comprehensive power to directors to refuse to transfer as to enable them to take into account any matter which they conceive to be in the interests of the company, and thereby to admit or not to admit a particular person and to allow or not to allow a particular transfer for reasons not personal to the transferee but bearing on the general interests of the company as a whole—such matters, for instance, as whether by passing a particular transfer the transferee would obtain too great a weight in the affairs of the company or might even perhaps obtain control. The question, therefore, is simply whether, on the true construction of the particular article, the directors are limited by anything except their *bona fide* view as to the interests of the company. In the present case the article is drafted in the widest possible terms, and I decline to write into that clear language any limitation other than a limitation, which is implicit by law, that a fiduciary power of this kind must be exercised *bona fide* in the interests of the company. Subject to that qualification, an article in this form appears to me to give the directors what it says, namely, an absolute and uncontrolled discretion.

That being my view on the question of law in this case, it only remains to consider the issue of fact which has been raised. It is said that on the evidence before us we ought to infer that the directors here were purporting to exercise their power to refuse a transfer, not *bona fide* in the interests of the company, but for some collateral purpose—namely, the desire of the leading director to acquire part of the shares for himself at an under-value. Speaking for myself, I strongly dislike being asked on affidavit evidence alone to draw inferences as to the *bona fides* or *mala fides* of the actors. In the present case the principal director has sworn an affidavit which, if accepted, makes it clear that, whether rightly or wrongly, the directors have *bona fide* considered the interests of the company and come to the conclusion that it would be undesirable to register the transfer of the totality of these shares.

We are invited to say that that does not represent the fact and that the real motive which influenced the deponent was not a consideration for the interests of the company but a consideration for his own personal interests. I for one, except in a clear case, am strongly opposed to drawing an inference of that kind from mere affidavit evidence. If it is desired to charge a deponent with having given an account of his motives and his reasons which is not the true account, then the person on whom the burden of proof lies should, in my judgment, take the ordinary and obvious course of requiring the deponent to submit himself to cross-examination. That does not, of course, mean that it is illegitimate to draw such inferences in a proper case. There may be on the face of the affidavit sufficient justification for doing so, but where you have the oath of the deponent, as we have it here, and the only grounds on which the court is asked to disbelieve it are matters of inference, many of them of a doubtful character, I for one must decline to give to those suggestions the weight which it is desired to give to them.

Accordingly, on the evidence I am satisfied, as the judge was satisfied, that there is no ground shown here for saying that the directors' refusal has been due to anything but a *bona fide* consideration of the interests of the company as the directors see them. That being so, and that being on the true construction of the article the only matter to which the directors have to pay regard, I am of opinion that the judge was perfectly right in the conclusion to which he came, and that this appeal fails and must be dismissed with costs.

LUXMOORE, L.J.: I agree.

ASQUITH, J.: I agree.

Solicitors: *Ward, Bowie & Co.*, agents for *A. V. Hammond & Co.*, Bradford (for the appellant); *Wynne-Baxter & Keeble*, agents for *James A. Lee & Priestley*, Bradford (for the respondent).

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

In the Estate of O'CONNOR *deceased.*

[Probate Divorce and Admiralty Division (Hodson, J.), **March 13, 1942.**]

Executors and Administrators—Probate—Grant—Joint will—Later will revoking joint will—Conditional will—Grant of administratration with joint will annexed.

Two spinster sisters, who lived together and had no surviving relatives, executed on Apr. 19, 1933, a joint will beginning as follows: "We . . . who intend at a later date making each our separate will in favour of the other, are now leaving this document . . . In the event of our death together, by accident or other cause, or, if one of us should survive the other and be incapable by illness or should die without making any later will, we . . . wish . . . that this will should stand." Later, both made wills, each in favour of the other, using a printed form containing at the beginning a revocation clause. One sister predeceased the other. After the death of the second sister the residuary legatees of the joint will applied for a grant of administration with the will annexed. Since there were no surviving relatives, the Crown would take on an intestacy, and the Crown did not oppose the grant:—

Held: (i) the later will of the surviving sister was conditional upon her predeceasing her sister and, therefore, did not take effect, and no grant could be made in respect of it.

(ii) in all the circumstances of the case, a grant of administration with the joint will annexed should issue.

[**EDITORIAL NOTE.** It has been said that a joint will is a document unknown to the law. Such documents have, however, from time to time been admitted to probate. The decision here is only that administration shall be granted with the joint will annexed and the question of the effect of the joint will is not considered. It is unlikely that any question will be raised upon the matter, since, in the normal course, the only person interested being the Crown, effect would be given to clearly expressed intentions of these ladies as a matter of grace and irrespective of any legal difficulty.

As to Grants of Administration with Will Annexed, see HALSBURY, Hailsham Edn., Vol. 14, pp. 258-261, paras. 454-457; and for Cases, see DIGEST, Vol. 23, pp. 180-189, Nos. 2051-2176.]

Case referred to:

(1) *Gladstone* v. *Tempest* (1840), 2 Curt. 650; Digest Supp.

Motion for grant of administration with will annexed. The facts are fully set out in the judgment.

J. Neville Gray, K.C. and *G. C. Tyndale* for the applicants.

Hon. Victor Russell for the respondent.

Hodson, J.: This is a motion by two of the residuary legatees named in a joint will of two sisters for a grant of letters of administration with the will annexed, or, alternatively, for a grant with this will and a later will of one sister annexed. The executor named in the joint will has renounced probate. One sister, Mary, died on Nov. 13, 1940, and the other, Margaret Philomena, died on Nov. 27, 1940. The application is made in the estate of Margaret Philomena. The respondent to the motion is the Treasury Solicitor, who is interested in the estate in the event of an intestacy and has consented to the matter being disposed of on motion and put forward no argument in opposition to the application.

The sisters, both of whom were spinsters, lived together for many years at Bournemouth and left no relatives. Their main interest, apart from their interest in one another, was in the Roman Catholic Church.

The joint will is dated Apr. 19, 1933, and begins as follows:

> We, the undersigned, Mary Anne R. O'Connor and Margaret Philomena O'Connor, who intend at a later date making each our separate will in favour of the other, are now leaving this document, to be given only after the death of both the sisters, whose names are signed at the end of this. In the event of our death together, by accident, or other cause, or, if one of us should survive the other and be incapable by illness, or should die, without making any later will, we now each of us, individually, wish and desire that this will should stand, and that all property left by the last surviving sister be disposed of, and divided as undermentioned: We therefore, leaving no living relatives, agree together and desire to appoint Lloyds Bank, Ltd. (hereinafter called the bank) as sole executor of this will.

Then follow legacies principally for Roman Catholic purposes, and a gift of residue, which is to be divided between the Little Sisters of the Poor, Southsea, Portsmouth, Mr. Pearson's Asylum for the Blind, and the Society for the Prevention of Cruelty to Animals. The applicants are St. Dunstan's, being the same institution as that described as Mr. Pearson's Asylum for the Blind, and the Society for the Prevention of Cruelty to Animals.

It is to be observed that the intention of each to make a separate will in favour of the other is clearly expressed. This intention was carried out on May 23, 1933—that is, only a little more than a month later—by each sister on printed forms which contained clauses revoking all former wills. The question is whether, in the events which have happened, the will of Margaret Philomena ought to be admitted either with the joint will or at all.

The first contention of the applicants is that the later will of each sister was conditional on that sister dying in the lifetime of the other and is otherwise inoperative and ought not to be admitted to probate. As SIR HERBERT JENNER said in *Gladstone* v. *Tempest* (1) at pp. 653, 654 :

> . . . it has been over and over again laid down that probate of a paper may be granted of a date prior to a will with a revocatory clause provided that the court is satisfied that it was not the deceased's intention to revoke that particular legacy or benefit.

In order to ascertain the intention of the deceased as to what shall operate and compose his or her will, it is permissible to examine all the circumstances of the case. They must, however, be circumstances existing at the time when the will was made. I have therefore excluded from consideration a statement made by Margaret a few days before she died to the effect that the bank would be the executor of the last will. There remain, therefore, the documents themselves, the terms upon which the two sisters lived, the fact that they had no relations, their pious and charitable interests and the fact that the only operative effect of admitting the last will of Margaret would be, on the face of it, to produce an intestacy.

All the testamentary documents are in the handwriting of Mary, the sister who died first and invariably dealt with the business affairs of both. The joint will was obviously drawn with great care, and the words used in the first two paragraphs can, I think, only have been chosen to express an intention on the part of the sisters not to alter the provisions of that will except for the purpose of benefiting each other so long as they both lived. Only after the death of one was it contemplated that the other should make a fresh will altering the dispositions contained in the joint will.

To admit Margaret Philomena's will of May 23, 1933, would be, on the face of it, to destroy the whole scheme of the joint will by a document which was contemplated by the opening words of the joint will itself as being an integral part of the scheme. This would be manifestly contrary to the intention of the testatrix and no court would willingly be driven to such a conclusion. In the result I hold that the will of Margaret Philomena dated May 23, 1933, was a conditional will to take effect only on Margaret predeceasing Mary. This event did not happen. I accept the first contention of the applicants and direct administration to issue to them with the will dated Apr. 19, 1933, alone annexed.

Order accordingly. Costs of the Treasury solicitor to be paid out of the estate.

Solicitors : *Ranger, Burton & Frost* (for the applicants) ; *Treasury Solicitor.*

[*Reported by* D. ARMSTEAD FAIRWEATHER, ESQ., *Barrister-at-Law.*]

Re HOFF, CARNLEY *v.* HOFF.

[CHANCERY DIVISION (Farwell, J.), **March 20, 24, 1942.**]

Bastardy—Legitimation per subsequens matrimonium—Special power of appointment given by will—Disposition coming into operation after date of legitimation —Will before and appointment after legitimation—"Disposition"—Legitimacy Act, 1926 (*c.* 60), *ss.* 3 (1), 10 (2), 11.

A special power of appointment among any child or children of his was vested in the appointor by the will of his grandfather who died in 1861. Four illegitimate children had been born to him some time before 1917. In 1934 he married their mother and the two survivors of those children were legitimated. On May 11, 1934, shortly after the marriage, he executed a deed whereby he exercised the power of appointment in favour of one of those survivors. The question was whether the exercise of the special power of appointment on May 11, 1934, was effective having regard to the provisions of the Legitimacy Act, 1926:—

Held: on the true construction of the will, the appointee was not an object of the power, and the provisions of sect. 10 (2) prevented his legitimation from having the effect of rendering him an object of the power.

[**EDITORIAL NOTE.** The decision herein is based upon the limited operation of a special power of appointment. Where such a power is included in an instrument, the property is either fully disposed of by the instrument itself apart from the exercise of the power or, if not so disposed of, passes under the law relating to property of which no effective disposition has been made. The exercise of the power operates merely as a selection among a class of donees or, possibly, to differentiate between the shares which such donees are to take. It is a convenient method for providing that those who will be alive at some future date can then, within the defined limits, arrange the dispositions to comply with the circumstances then existing. In the case of children provided for by will, it may be found that some have married well, others benefited under the wills of relatives, and a special power of appointment can, if thought necessary, be the means of making a more equitable distribution in the light of the events which have happened since the execution of the will. The special power, though a most useful device, has been here held not to be a disposition within the meaning of that word as used in the Legitimacy Act, 1926, s. 10 (2), and having regard to the definition contained in sect. 11. The point is one of some difficulty. "Disposition" is defined in sect. 11 of the Act as "any assurance of any interest in property." It is well-settled law that interests in default of appointment vest in the beneficiaries despite the existence of the power of appointment, and the operation of the appointment is to divest those interests and create new interests in the appointees. There is clearly a shifting of the beneficial interest. On the other hand, the will came into operation in 1861 and, upon its proper construction, from that time until 1934 the appointees were not objects of the power, and it is difficult to decide, in face of the express provision of sect. 10 (2), that the Act intended to alter the operation of an instrument which had stood for so long, though, had there been subsequent legitimate issue of the marriage of 1934, clearly such issue would have been a proper object of the power.

As to the Effect of Legitimation, see HALSBURY, Hailsham Edn., Vol. 2, pp. 566-568, para. 777; and for Cases, see DIGEST, Vol. 3, pp. 374, 375, Nos. 143-153.]

Summons to determine questions of construction arising under the Legitimacy Act, 1926. The facts are fully set out in the judgment.

J. A. Reid for the plaintiff.
Hubert Rose for the first defendant.
Wilfrid M. Hunt for the second defendant.

Farwell, J.: By his will dated Nov. 6, 1860, William Hoff the elder gave and devised all his freehold property at Bonthorpe in the parish of Willoughby in the county of Lincoln unto and to the use of his grandson William Henry Haxby for life and from and after his decease to such uses upon such trusts and in such manner for the benefit of any child or children of the said William Henry Haxby born in his lifetime as he should at any time or times by deed revocable or irrevocable or by will appoint and subject thereto to the use of such child or children of the said William Henry Haxby as should attain the age of 21 years or marry, if more than one in equal shares, and his her or their heirs and assigns for ever as tenants in common. That is not the devise with which I am concerned, but I have read it because the devise which follows, and is the one which raises the question here, is made upon trusts limited by reference to that particular gift. The testator also gave and devised all his freehold property at Grebby in the parish of Scremby in the county of Lincoln unto and to the use of his son William Gilson Hoff for his life and from and after his decease to and upon such or the like uses and trusts in favour or for the benefit of his (the testator's) grandson William Hoff and his issue as were thereinbefore limited of the said hereditaments at Bonthorpe concerning William Henry Haxby and his issue; and in case there should be no such child of his said grandson William Hoff then to and upon such and the like uses and trusts in favour and for the benefit of his grandson Henry Hoff and his issue as were thereinbefore limited of his said hereditaments at Bonthorpe concerning William Henry Haxby and his issue.

William Hoff, the elder, died on Mar. 18, 1861, and his will was duly proved by the executor, William Gilson Hoff. The testator was entitled at his death to a dwelling-house known as Grebby Hall, with gardens, farmhouse, buildings and cottages and about 355 acres of land, and that is the property which is given by the will and is the subject of these proceedings.

By his will, dated Nov. 16, 1897, William Gilson Hoff appointed his wife, Martha Hoff, and his two sons, William Hoff the younger and Henry Hoff, executors. He died on Jan. 7, 1898, and his will was duly proved. His wife died on Apr. 28, 1922. On the death of William Gilson Hoff, William Hoff became tenant for life of the Grebby property. He was unmarried and had a housekeeper, one Susan Johnson, who gave birth to four illegitimate children, of whom he was the reputed father. The four children were a son, who was killed in the last war, a son who is the first defendant, William Egglestone Hoff, another son and a daughter. Susan Johnson, on Jan. 18, 1917, married a man called Cushing, who died on Jan. 15, 1930. On May 11, 1934, William Hoff and Susan Cushing married. By that time they were both advanced in years.

By a deed of appointment dated May 11, 1934, executed after the marriage ceremony by William Hoff, after reciting (*inter alia*) that he had then only one son, namely, Henry Egglestone Hoff, who had then attained the age of 21 years, in exercise of the power for that purpose given to him by the will of William Hoff the elder and of every and any other power thereto enabling him, he appointed that from and after his death and in the meantime subject to his life interest therein the premises devised by the said will and comprised in the schedule thereto (being the Grebby property) and the income thereof should be held in trust for the defendant Henry Egglestone Hoff absolutely. Following the marriage of William Hoff and Susan Cushing the births of the first defendant and the other child, Kitty May Johnson, were re-registered. By his will dated May 11, 1934, William Hoff appointed the two plaintiffs executors and trustees. He died on Jan. 21, 1941, at the age of 90, and his will was duly proved.

Henry Hoff, by his will dated Apr. 27, 1937—he was the grandson of the original testator—appointed his son Henry Gilson Hoff, his daughter Alice Isabel Mary Gilson Pattrick and Horace Cambridge Peacock executors and trustees, and in exercise of the power for this purpose conferred on him by the will of his grandfather, William Hoff the elder, directed and appointed that the trustees of the will should stand possessed of the farm at Grebby (which he had power to appoint to his child or children on the failure of issue of his brother William Hoff) in trust for his son, the second defendant Henry Gilson Hoff absolutely. Henry Hoff died on Sept. 12, 1940, leaving two children.

The question that has now arisen for decision is whether the appointment made in 1934 by William Hoff, after his marriage with Susan Cushing, in favour of the first defendant is a valid appointment. If not, then it seems to follow that the appointment made by the will of Henry Hoff in favour of the second defendant is an effective appointment. The question really turns on the true construction of the Legitimacy Act, 1926; but I will first turn to the will of the original testator. It is, I think, quite plain that the words "child or children" used in that will, at the time when that will came into operation, meant and could only mean legitimate children; and at that time the only persons in whose favour the power could be exercised and the only persons who would become entitled in default of the exercise of the power were any children that William Hoff might have. It is said that the two children who were alive in 1934 by the marriage of their father and mother became legitimate children under and by virtue of the Act of 1926, although before that Act came into force they were not legitimate and were not, therefore, "children" within the meaning of the will of the testator. It is said that the effect of this Act was to make those children who were thus legitimated objects of the special power of appointment given by the will, and in default of appointment the persons to take under the will were the children of the connection between William Hoff and Susan Cushing because, as a result of the Act, they had been legitimated.

For the purpose of solving that question it is necessary to look at the terms of the Act itself so far as they bear on the question. The Legitimacy Act, 1926, s. 1 (1), provides:

> Subject to the provisions of this section where the parents of an illegitimate person marry or have married one another, whether before or after the commencement of this Act, the marriage shall, if the father of the illegitimate person was or is at the date of the marriage, domiciled in England or Wales, render that person, if living, legitimate from the commencement of this Act or from the date of the marriage, whichever last happens.

In the present case the father was domiciled "in England or Wales," and, therefore, as from the date of his marriage in 1934, those children became legitimate children. Sect. 3 provides:

> (1) Subject to the provisions of this Act a legitimated person and his spouse, children or more remote issue shall be entitled to take any interest (*a*) in the estate of an intestate dying after the date of legitimation; (*b*) under any disposition coming into operation after the date of legitimation; (*c*) by descent under an entailed interest created after the date of legitimation; in like manner as if the legitimated person had been born legitimate.

Sect. 10 (2), upon which this question turns, provides:

> Nothing in this Act shall affect the operation or construction of any disposition coming into operation before the commencement of this Act, or affect any rights under the intestacy of a person dying before the commencement of this Act.

The only question is, what is the meaning of "disposition" as used in that section? Sect. 11 provides:

> The expression "disposition" means an assurance of any interest in property by any instrument whether *inter vivos* or by will.

Is the will of the testator, made in 1861, the disposition in question or, as it is said on behalf of the first defendant, is this appointment, which was made by deed in 1934, after the marriage ceremony, the disposition in question? If the will is the disposition, then, as I have said, it must follow that the children who were legitimated by the marriage of William Hoff and Susan Cushing in 1934, although they became legitimated by the Act, never in fact became objects of the power of appointment or persons who would be entitled in default of appointment under the will. This result follows because, on the true construction of the will itself, "children" must necessarily be confined to legitimate children, according to the law which was in force at that date. If the will is the disposition, then, if any other meaning were to be put upon the word "children" than legitimate children, one would be doing that which the Act expressly forbids, namely, allowing the Act to affect the operation or construction of the disposition in question. On the other hand, if the appointment in favour of the first defendant, which was only made in 1934, is the disposition, then, according to the operation of the Act, the first defendant was an object of the power and that property could have been perfectly well appointed to him.

In my judgment, the answer to the question is that the word "disposition" as used in sect. 10 (2), means the will of the testator and not the appointment. It is quite true, as was pointed out, that the effect of a valid appointment under a special power is to create a new estate and to divest the estate which, up to then, was vested in the persons interested in default of appointment. The property in question is in fact disposed of by the will of the testator. It is his property, and by his will he left it in terms which disposed of the property, although he left to another person the power to select, out of the persons entitled in default of appointment, the person who should have the benefit of the property, if any. If the will itself is not the disposition, the result would seem to be an odd one, because it would come to this, that the power of appointment was exercised in favour of a person who was not a person entitled in default of appointment except by reason of this Act. To construe in that way the word "disposition," I would point out, could only result in the Act having the effect of altering the construction of the will itself, which is the disposition.

In my judgment, the answer to this question is that the word "disposition" as used in the Legitimacy Act, 1926, s. 10 (2), means the will of the testator, i.e., the will of William Hoff made in 1860, which came into effect upon his death in 1861. On the true construction of that will the children of the connection between William Hoff and Susan Cushing were not objects of the power of appointment, nor were they persons who could take in default of appointment. The result is that the appointment in favour of the first defendant which was purported to be made by the deed of 1934, was not a valid appointment, because it was an appointment to a person who was not an object of the power; and that the appointment made in favour of the second defendant is a valid appointment and takes effect accordingly. I make a declaration to that effect.

Assents to be executed in favour of the second defendant. Costs out of the estate.

Solicitors: *Cameron, Kemm & Co.*, agents for *S. B. Carnley & Tinn*, Alford (for the plaintiffs and first defendant); *Crossman, Block & Co.*, agents for *Reed, Wayman & Hyner*, Downham Market (for the second defendant).

[*Reported by* Irene G. R. Moses, *Barrister-at-Law.*]

R. *v.* MINISTER OF HEALTH, *Ex parte* STAFFORDSHIRE MENTAL HOSPITALS BOARD.

[Court of Appeal (Lord Clauson, Goddard and du Parcq, L.JJ.), **March 27, 1942**].

Lunatics—Asylum officer—Superannuation—Disputes to be settled by Minister of Health—Jurisdiction of Minister to determine whether employee " established " —Asylums Officers' Superannuation Act, 1909 (*c.* 48), *ss.* 1, 15, 17.

A. was for many years employed by the Staffordshire Mental Hospitals Board. When he left the service of the Board he claimed a superannuation allowance under the Asylums Officers' Superannuation Act, 1909. The Act gives the right to superannuation allowances to " established " officers and servants only, and the board rejected A.'s claim on the ground that, for a number of reasons, he did not come within that category. A. obtained an order under sect. 15 of the Act from the Minister of Health determining that he was entitled to a superannuation allowance. The board applied for an order of *certiorari* to quash the order of the Minister, on the ground that, as an essential preliminary to the Minister having any jurisdiction under sect. 15 to deal with the matter, it had first to be ascertained that A. was an " established " officer or servant :—

Held : the section showed in the plainest terms that the Minister's jurisdiction arose whenever there was a dispute as to the matter of a superannuation allowance between the Board and any officer or servant, and it was immaterial whether or not he was an established officer or servant.

Decision of the Divisional Court ([1942] 1 All E.R. 81) *affirmed.*

[**EDITORIAL NOTE.** The contention in this appeal was that the jurisdiction of the Minister is limited to the determination of questions arising as to the superannuation of an established officer or servant, and that he had no jurisdiction unless it appeared that the officer or servant in question was an established officer or servant. The Court of Appeal have found no difficulty in affirming the decision of the Divisional Court that the Minister's jurisdiction is not so limited and that it includes the determination of the preliminary question whether or not the officer or servant is an established one.

As to Superannuation of Asylum Officers, see HALSBURY, Hailsham Edn., Vol. 21, pp. 392, 393, para. 675 ; and for Cases, see DIGEST, Vol. 33, p. 248, Nos. 1687, 1688.]

Appeal by the Staffordshire Mental Hospitals Board from the decision of a Divisional Court (Viscount Caldecote, L.C.J., and Hilbery and Asquith, JJ.) dated Dec. 11, 1941, and reported [1942] 1 All E.R. 81. The facts are fully set out in the report of the case in the court below.

J. H. Thorpe, K.C. and *W. E. P. Done* for the appellants.

The Solicitor-General (*Sir David Maxwell Fyfe, K.C.*) and *Valentine Holmes* for the first respondent, the Minister of Health.

C. Erskine Simes for the second respondent, Averill.

Thorpe, K.C. : The Minister had no jurisdiction to decide the question in this case, since the servant was not an established servant. In 1910, by resolution of the board, it was decided that the artisan staff who were paid at trade-union rates were to be considered non-established servants. The Act does not apply to Averill, because he was not an established servant. The Minister's jurisdiction only extends to questions arising between established officers or servants and the board.

Counsel for the respondents were not called upon.

Lord Clauson : A man named Averill was for many years in the employment of the Staffordshire Mental Hospitals Board or its predecessors and, having left the service of the board, he conceived that he had a right to superannuation. It is agreed that the question whether or not he would be entitled to superannuation would depend upon his having become an established officer. It was suggested that he did not become an established officer for the following reasons. First, he was not an established officer within the definition in the Act, and, secondly, those who were responsible for making and keeping a list of established officers, which was essential, if only for the purpose of assessing the contributions, failed to enter his name on the list of established officers. At all events, there was a dispute. Averill and his advisers took the view that he was entitled to superannuation, and the board took the view that he was not.

Apart from the statute, his obvious course would have been to bring some sort of proceedings against the board which had refused to give him what he conceived to be his legal right to a superannuation allowance. However, the statute, which had set up the board and constituted the authorities which conduct asylums of this kind, contains a section specially dealing with the matter. That section is the Asylums Officers' Superannuation Act, 1909, s. 15, and is in these A
terms :

> In the case of any dispute as to the right to superannuation allowance of any officer or servant of an asylum, or as to the amount of the superannuation allowance to which any such officer or servant is entitled, such dispute shall be determined by the Secretary of State whose decision shall be final.

Accordingly, there being this dispute, the matter was referred to the Minister B
of Health. He decided as follows :

> In pursuance of sect. 15 of the Act of 1909, the Minister hereby determines that Mr. Averill is entitled to receive from the board a superannuation allowance calculated in accordance with the provisions of that Act.

Application was made to the Divisional Court of the King's Bench Division for an order of *certiorari* to quash that decision. This application was not based C
on the ground that the Minister's decision was erroneous either in point of law or in point of fact, because it is perfectly clear that, if it was within his jurisdiction to deal with the matter at all, the correctness of his law or his facts could not be questioned. It was suggested that he had no jurisdiction, and, as I understand it, the argument really comes to this. It is said that, although sect. 15 provides that the Minister shall have jurisdiction "in the case of any dispute as to the right to superannuation allowance of any officer or servant," the Act does not make sense D
unless "any officer or servant" is read as "any established officer or servant," and, therefore, as a preliminary to the Minister having any jurisdiction to deal with the matter, it must first be ascertained that the man is an established officer or servant.

The Act, in the plainest terms, gives the Minister jurisdiction whenever there is a dispute as to the matter of a superannuation allowance between the board and any officer or servant. The only preliminary, if such it be, is the E
establishment of the fact that the man is an officer or servant. There is no doubt about that in this case. Once there is an officer or servant claiming a superannuation allowance, I cannot see how there is any limit to the jurisdiction of the Minister to deal with that dispute as it stands. It was suggested that there might be reasons why the legislature, though intending the section to be restricted to established officers, thought it unnecessary and inconvenient to introduce the word "established." In my judgment we have nothing to do F
with those matters. The Act is perfectly plain, and I am bound to say that, the more I study it, the clearer I become that the section has been deliberately made quite plain so that all questions of this nature between any servant and the authority shall be plainly covered by the jurisdiction of the Minister of Health, because, in the Act itself, there are a number of provisions which might well occasion some difficulty in ascertaining whether an officer or servant is an G
established officer or servant. There may be ground for the suggestion which has been made by counsel for the appellants that a man who ought, according to the terms of the Act, to be classified as an established officer or servant, might lose his right to be so classified because his name was not put in a particular list. I do not for a moment say there would be anything in such a point, but that is a point which might be raised, since sect. 15 has been drafted in very general terms.

If my view of the true construction of sect. 15 is correct, there is obviously H
an end of the case. The matter was brought before the Divisional Court, and, as I read their judgment, they took the same view of the section as I do, although I must confess that the judgment delivered by VISCOUNT CALDECOTE, L.C.J., goes into some considerations a little beyond those which would be strictly necessary to be considered on the construction which I venture to think is the right construction of this section.

However that may be, it is clear to me that the decision of the Divisional Court that they had no right to interfere and grant an order of *certiorari* is correct.

In my judgment the appeal must be dismissed.

GODDARD, L.J.: I agree.

DU PARCQ, L.J.: I agree.

Appeal dismissed with costs.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *H. L. Underwood*, Stafford (for the appellants); *Solicitor to the Minister of Health* (for the first respondent); *W. H. Thompson* (for the second respondent).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

Dictum of LORD MERRIMAN, P., at p. 555, *approved.* COOK *v.* COOK. [1949] 1 All E.R. 384

MUMMERY *v.* MUMMERY.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P.), **March 18, 1942.**]

Divorce—Desertion—Continuance of desertion—Condonation—Resumption of cohabitation—Interruption of statutory period—Matrimonial Causes Act, 1937 (*c.* 57), *s.* 2.

The petitioner's husband deserted her in 1937. In 1940 they resumed marital intercourse on one occasion, but there was never any intention on the husband's part to cohabit with the petitioner again:—

HELD: the fact that marital relations between the parties had taken place since the desertion was not conclusive evidence of a resumption of cohabitation so as to condone the desertion and bring it to an end. In the circumstances there had been neither condonation nor a resumption of cohabitation, and a decree *nisi* of divorce ought to be granted.

[**EDITORIAL NOTE.** An act of intercourse between the parties raises a presumption of condonation of a previous matrimonial offence, but it is here shown that it is not an irrebuttable presumption. If it is shown that one of the parties had no intention of bringing a period of desertion to an end, the presumption is rebutted, and there is no interruption of the period of desertion for the purpose of establishing desertion for a period of three years immediately preceding the presentation of a petition.

AS TO CONDONATION, see HALSBURY, Hailsham Edn., Vol. 10, pp. 679-682, paras. 1004-1009; and FOR CASES, see DIGEST, Vol. 27, pp. 339, 340, Nos. 3184-3203.]

Cases referred to:

(1) *Roberts* v. *Roberts and Temple* (1917), 117 L.T. 157; 27 Digest 339, *3182*.

(2) *Pulford* v. *Pulford*, [1923] P. 18; 27 Digest 307, *2846*; 92 L.J.P. 14; 128 L.T. 256.

(3) *Rowell* v. *Rowell*, [1900] 1 Q.B. 9; 27 Digest 246, *2172*; 69 L.J.Q.B. 55; 81 L.T. 429.

UNDEFENDED PETITION for divorce by the wife on the ground of her husband's desertion for 3 years immediately preceding the presentation of the petition.

E. Holroyd Pearce for the petitioner.

LORD MERRIMAN, P.: The parties were married in 1931. There were no children. The wife, who, I say at once, gave her evidence with complete candour and, I am quite satisfied, told me the whole truth about the case, whether it told for her or against her, satisfied me that from the first her husband was inattentive and impatient. She wanted children, and he did not, and altogether it was not a happy state of things. He spent a great deal of time away from her, bought a yacht with which she had very little concern, and finally, in 1936, openly avowed that he was interested in another woman, and, when she resented it, told her that she was making a fuss about nothing. He insulted her by bringing the woman to stay at the matrimonial home against the wife's wishes, and one way or another, expressly or impliedly, he made it quite clear that he had ceased to have any interest in the wife or in her company. Consequently, she left home, partly, I think, because this state of things not unnaturally affected her health, and also perhaps in the hope that she would not merely be able to collect her own thoughts, but that it might pull her husband together. However, he made no overtures at all. He did not even supply her with money, and still carried on with this other woman.

Whether or not the husband even in 1936 had actually deserted the wife is really immaterial for present purposes. It is quite clear that by 1937, when he took a shop and went to live in rooms over it and announced to his wife that he wanted a divorce at the earliest possible moment, by then at any rate, as counsel suggests, the desertion had begun ; and I have no hesitation in finding that by that time in 1937—the precise date does not matter—when the husband took this shop he had plainly made up his mind to desert his wife. It follows that the period of three years desertion would have elapsed by Apr. 22, 1941, when the petition was presented, and there would have been no difficulty whatever about this case but for the fact which I am now about to mention.

After the beginning of the war, the husband became an ambulance driver and went with his unit to France. He was evacuated in the retreat from Dunkirk, and on his arrival in England he telephoned to his wife. The exact words I think are important. He said, " I will look in and see you on my way to my grandmother's." It will be noticed that he did not express any intention, at any time, even of coming to stay with her at all ; it was merely to be a visit on his way somewhere else. They had dinner together, and in the course of dinner the husband said, " I will stay the night, if you like." The wife told me that her reaction to that suggestion was that she thought that it was just the sort of thing she had been waiting for. I took that to mean, as I have no doubt was the case, that she had always been hoping, even up to that late hour, that the husband might repent and make a home with her, and very rightly and naturally she took this opportunity of doing her best to effect a reconciliation—the sort of opportunity which she may very well have thought would never have occurred but for the circumstances of the time in which it was made. The wife made it perfectly clear to me—and her counsel did not in the least dissent from this view—though I offered to give her an opportunity of correcting herself if she desired to do so, that she was not suggesting that her husband did or said anything actively to deceive her in asking that he should be allowed to stay the night. She said that she supposed that she was banking on his taking up a different attitude for the future as the result of their spending the night together, and that seems to me to be a perfectly natural, and, indeed, praiseworthy, attitude for the wife to take up.

However, things did not turn out like that. They spent the night together as man and wife, and the next morning she said something to him inviting him in effect to make some suggestion about a resumption of married life. She made it clear, of course, that she was not suggesting—and it would have been ridiculous to suggest, since he was still serving and there had been no preliminary discussion of ways and means—that they should instantly set up home together. What she meant was that she hoped that at least they might spend his leave together then and thenceforward, with some understanding that a better future was in store for them. She told me she could not remember the exact words she used, but that it was something to the effect, " do not you think you could consider settling down again ? " or words to that effect, to which the husband replied in terms which made his intentions clear beyond the slightest doubt. He said, " Don't be an idiot. It does not follow that, because a man stays with you, he is going to love you again." Thereupon he left her, never to return to her again.

If I had any doubt, and I have none, that the wife was telling me the truth about that story, that doubt would be completely set at rest by the correspondence which passed between them in the next year. In Mar., 1941—and of course one understands, and the wife said, that it was as a preliminary to the bringing of this petition—she wrote to him a very nice letter, which I need not read, in effect asking him what his intentions were about the future, with this sentence in it :

> When you came back from France and I stayed with you that night at the White Horse I felt so sure that this would be a beginning, but you went off again the next morning apparently quite unconcerned about my feelings.

That letter is dated Mar. 26, 1941, to which he replied on Mar. 31 :

> I am sorry you feel so upset and worried. To be quite frank with you, it has never been in my mind to settle down again. It seems pretty obvious that I am not the settling down type. I certainly did come and see you after coming back from France, but you must remember that it had been a hectic time, but I came quite on the impulse of the moment and did not expect you to take it to heart. I really do not know what else to say, but I don't think it is much good your building up false hopes, and it would be better for you to face up to facts.

Then he mentioned, incidentally, that he was actually on leave at the moment, which, of course, emphasised the fact that he had no intention of spending that or any other leave with his wife.

That seems to me exactly to summarise the true effect of the wife's evidence. Of course, it goes without saying that that night together, which, though the precise date has not been given, must have been somewhere about June, 1940, is well within the three years immediately preceding the presentation of the petition. The question, therefore, is whether there was such an interruption of the desertion as to prevent the wife from saying that she had been deserted for 3 whole years ending on Apr. 22, 1941.

It is clear beyond any possibility of argument that a resumption of cohabitation in the full sense of the word puts an end to a state of desertion, and that not merely because it condones the previous desertion for whatever time that offence has lasted, but also because a resumption of cohabitation is the exact negation of a state of desertion. The two things cannot exist together. In this case, of course, it is completely clear that, apart from whatever may be the legal effect of what happened on that particular night, the husband had not the slightest intention of resuming cohabitation in the ordinary sense of the word. On any view of the matter, even assuming that I am bound to hold that cohabitation was resumed or that the offence had been condoned on that occasion, it is plain that the husband resumed a state of desertion again the next day.

I think, as the result of counsel's very clear and careful argument, that the question for decision is whether or not the fact that they spent the night together, and for that night resumed marital relations in the usual sense, is conclusive evidence of the fact that there had been a resumption of cohabitation so as to condone the previous desertion and bring the state of desertion to an end. If the fact that sexual intercourse has taken place between the parties is conclusive, there is nothing more to be said about it. The wife does not suggest, as I have said, that her consent to that act was obtained by fraud, so that the issue raised in *Roberts* v. *Roberts* (1) does not arise. It seems to me that the whole question turns on what cohabitation means, and what a resumption of cohabitation means.

Now, LORD MERRIVALE said more than once that no judge has ever attempted a comprehensive definition of desertion and that no judge would ever succeed in doing so. Amongst the descriptions of desertion which he gave was one which has always appealed to me. He said that desertion was a withdrawal, not from a place, but from a state of things (*Pulford* v. *Pulford* (2), at p. 21). Similarly, I doubt whether any judge could give a completely exhaustive definition of cohabitation, and certainly I am not going to attempt to do so. At least a resumption of cohabitation must mean resuming a state of things—that is to say, setting up a matrimonial home together. That involves, so it seems to me, a bilateral intention on the part of both spouses so to do.

The question, then, is: Does coming together for a single night raise an irrebuttable presumption that the parties have resumed cohabitation even for that short time. Put in another way, does it raise an irrebuttable presumption that the wife, in consenting to that state of things, has condoned the previous desertion? I am bound to say that I think that it would lead to an absurd state of things if one were bound to hold that that is so. Quite clearly, it can be nothing but praiseworthy on the part of a deserted wife to make every legitimate attempt to regain her husband's affection, company and support. It would, for example, be quite ludicrous if, because during a period of desertion the parties met by arrangement to talk over their difficulties, and the deserted wife did her very best to persuade her husband to come back, while he remained obdurate, one were bound to hold that meetings of that sort, however protracted, and even if they involved spending the night under the same roof together or several nights under the same roof together, interrupted or brought to an end the state of desertion. Why, then, should a wife who goes a step further in the hopes of effecting a reconciliation, and allows her husband to sleep the night with her, be held to have condoned the offence and to have resumed cohabitation when it is clear, beyond the slightest shadow of doubt, that the husband at the same time had no intention whatever of resuming cohabitation? I do not think that I am obliged so to hold. I think the law is that, as regards the wife at any rate, an act of sexual intercourse is not conclusive on the question of condonation; and that it does not raise an irrebuttable presumption that cohabitation has been resumed. I think I am justified in holding, if not obliged so to hold, on the authority of *Rowell* v. *Rowell* (3).

It is perfectly true, as counsel pointed out, that that case raised a question whether a deed had been brought to an end by 3 or 4 intermittent acts of sexual intercourse, and therefore does not necessarily raise the same questions, at any rate, not in precisely the same form. As is well known, deeds of separation take various forms. It is quite possible to enter into a deed of separation in a form A which does not involve any question of continued separation, or which does not necessarily involve that the parties will even remain husband and wife; but on a deed of separation in the ordinary form, and with no special clauses, it is settled law that it is put an end to by the resumption of cohabitation. There was some argument in *Rowell* v. *Rowell* (3) as to the effect of the deed, but, once the court had decided, as it plainly did decide, to treat it as being merely an ordinary deed of separation, then the sole question was whether these casual B and intermittent acts of intercourse had or had not amounted to a resumption of cohabitation. That brings the case very much to the point which I have got to decide.

It is not necessary for me to quote extensively, but on that issue LORD RUSSELL OF KILLOWEN, L.C.J., said, at p. 13:

> In my judgment, if the court comes to the conclusion that there was an intention by both parties to come together again, there would be an end of the deed . . . C

Let it be observed that he stressed intention, and says that it must be the intention of both parties which puts an end to the deed. Dealing with the acts of intercourse he said, at p. 14:

> I agree that such acts are strong evidence unless explained; but it is not a necessary conclusion from them that it was intended to put an end to the deed of separation.

I think I am entitled to interpret that passage as meaning that it is not a necessary D conclusion from them that both parties intended to resume cohabitation.

At p. 13, A. L. SMITH, L.J., said:

> I agree that the proof of intercourse between the parties if unexplained is strong evidence to shew that they had come together, so as to put an end to the deed; but it is going too far to say, as the defendant's counsel was driven to say, that one act of intercourse, no matter what the surrounding circumstances were, would necessarily put an end to the deed. No case has gone that length. They have gone to the length E of saying that if there is reconciliation the covenant to pay money to the wife comes to an end. In this case has there been reconciliation? It is plain on the uncontradicted evidence of the wife that there has been no reconciliation in the full sense of that term, and that neither party intended that there should be.

I can adopt every word of that last passage as applicable to this case with the substitution in the last sentence of the phrase "and that one of the parties never intended that there should be" for the phrase "neither party intended F that there should be." Having regard to the fact that LORD RUSSELL OF KILLOWEN, L.C.J., had said that the resumption of cohabitation bringing the deed to an end is something which depends upon the intention of both parties, I think that I am justified in holding here that there has been neither condonation nor a resumption of cohabitation which interrupts this period of desertion, and that the wife is entitled to her decree.

Decree nisi granted with costs. G

Solicitors: *Kenneth Brown, Baker, Baker.*

[Reported by D. ARMSTEAD FAIRWEATHER, ESQ., *Barrister-at-Law.*]

Explained. VINEY *v.* VINEY. [1951] 2 All E.R. 204.

Re WARING, WESTMINSTER BANK, LTD. *v.* AWDRY.

[CHANCERY DIVISION (Farwell, J.), **April 15, 1942.**]

Rentcharges and Annuities—Payment—Deduction of tax—Will "made" before H *Sept.* 3, 1939—*Death of testator must be before that date and will in operation at that date—Finance Act* 1941 (c. 30), *s.* 25.

The Finance Act, 1941, s. 25, varies provisions relating to tax-free annuities contained in wills and other dispositions "made" before Sept. 3, 1939. The testator made his will on Feb. 11, 1939, and died on Aug. 3, 1940:—

HELD: since the will did not come into operation until after the testator's death, sect. 25 did not apply to it.

[**EDITORIAL NOTE**. This is the first decision under the Finance Act, 1941, s. 25, which varies the provisions of tax-free annuities. The provisions are to apply to all tax-free payments and a number of instruments and orders creating such payments are named. The only one among them which does not usually come into force at once is a will, which, of course, operates only from death, and, in practice, from the grant of probate. It is decided that, although the section states in plain terms any will made before Sept. 3, 1939, it does not affect a will made before that date, if the testator died after that date. The date the instrument comes into operative effect seems to be held to be the material date. The decision, it will be noted, deprives the words of the section—"has not been varied on or after that date"— of any effect in the case of a will, for, if the words refer to the date of coming into operation, it would be impossible for the will to be varied on or after that date. Whether the decision applies in any way to other instruments not coming into operative effect until a date subsequent to their execution is not clear, but similar reasoning would seem to apply to such a document or order.

As to Tax-Free Payments, see HALSBURY, Hailsham Edn., Vol. 28, pp. 214-217, paras. 386-391; and for Cases, see DIGEST, Vol. 39, pp. 165-168, Nos. 562-593.]

Summons to determine questions of construction arising out of a will. The testator made his will on Feb. 11, 1939. Two codicils thereto were made on Mar. 8, 1939, and Jan. 27, 1940. He died on Aug. 3, 1940, and the will was proved at the Principal Probate Registry on Nov. 11, 1940. By cl. 7 of his will the testator gave a number of annuities "free of income tax," and the executors asked, by the present summons, whether the Finance Act, 1941, s. 25, applied to those annuities.

J. A. Wolfe for the plaintiffs.

D. L. Oliver for the first defendant.

R. Cozens-Hardy Horne for the second defendant.

Sir Norman Touche for the third defendant.

W. F. Waite for the fourth defendant.

H. King for the fifth defendant.

J. V. Nesbitt for the sixth defendant.

Farwell, J.: The Finance Act, 1941, s. 25, is in these terms:

> Subject to the provisions of this section, any provision, however worded, for the payment, whether periodically or otherwise, of a stated amount free of income tax, or free of income tax other than surtax, being a provision which (*a*) is contained in any deed or other instrument, in any will or codicil, in any order of any court, in any local or personal act, or in any contract, whether oral or in writing; and (*b*) was made before Sept. 3, 1939; and (*c*) has not been varied on or after that date, shall, as respects payments falling to be made during any year of assessment, the standard rate of income tax for which is 10s. in the £, have effect as if for the stated amount there were substituted an amount equal to 20/29ths thereof.

The testator made his will on Feb. 11, 1939, and that date is prior to the coming into force of the Act. Then he made subsequent codicils, the second of which was made after that date, and he died on Aug. 3, 1940.

This is a case of a will which was made before Sept. 3, 1939. The will is a document which in itself, so far as the question I have to decide is concerned, has no effect whatever. It is not until the will is proved that the provisions in it come into operation and have effect. Accordingly, in my judgment, this is a provision contained in a will which only operates as a will after Sept. 3, 1939, because it does not come into operation until after the testator's death. Up to that time it is a document, no doubt bearing date before Sept. 3, 1939, but it is a document which can have no effect at all so long as the testator is alive, and it only becomes effective on his death.

I propose, therefore, to say that the Finance Act, 1941, s. 25, does not apply.

Declaration accordingly.

Solicitors: *Ouvry & Co.* (for the plaintiffs and first, second and fourth defendants; *Preston, Lane-Claypon & O'Kelly* (for the third defendant); *Corbould, Rigby & Co.* (for the fifth defendant); *Lee & Pembertons* (for the sixth defendant).

[*Reported by* Irene G. R. Moses, *Barrister-at-Law.*]

MURRAY *v.* PARKES.

[King's Bench Division (Viscount Caldecote, L.C.J., and Humphreys and Singleton, JJ.), **March 18, 19, 20, 30, 1942.**]

Emergency Legislation—Military service—Person domiciled in Eire—Whether subject to be called up for service—British Nationality and Status of Aliens Act, 1914 (*c.* 17). *s.* 1 (1) (*a*)—*Irish Free State* (*Agreement*) *Act,* 1922 (*c.* 4)—*Irish Free State Constitution Act,* 1922 (*c.* 1)—*Eire* (*Confirmation of Agreements*) *Act,* 1938 (*c.* 25)—*National Service* (*Armed Forces*) *Act,* 1939 (*c.* 81), *s.* 1.

The appellant was born in 1908 within his Majesty's dominions and allegiance in that part of Ireland now Eire and had resided in England continually since 1934. He was served with a notice under the National Service (Armed Forces) Act, 1939, requiring him to submit himself to medical examination. On being charged with failing to comply with the notice, the appellant claimed that at all material times he was a citizen of Eire and not a British subject, and, therefore, that the Act did not apply to him. He contended that, by virtue of the Eire Constitution, enacted in 1937 in exercise of powers conceded by the Statute of Westminster, Eire had become separated from the British Commonwealth of Nations, which separation had been recognised by the United Kingdom Government when it entered into the agreements with Eire scheduled to the Eire (Confirmation of Agreements) Act, 1938; that thereby Eire became a sovereign independent state; and that persons domiciled in Eire ceased to be British subjects:—

Held: the appellant was a natural-born British subject by virtue of the British Nationality and Status of Aliens Act, 1914, s. 1 (1) (*a*). The legislation creating the Irish Free State in 1922 did not alter that status, and the enactment of the Eire Constitution of 1937 did not involve its secession from the British Commonwealth. The appellant was, therefore, rightly served with the notice under the National Service (Armed Forces) Act, 1939.

[**EDITORIAL NOTE.** The substantial point here is whether the various Acts and agreements which have constituted the Irish Free State and Eire and have regulated the relations between that country and the United Kingdom have had the effect of causing a secession of that country from the British Commonwealth of Nations. The decision is against such a secession, but it must be noted that, had there been a secession, it should have been followed by a cession by the United Kingdom and the Dominions, and the appellant would have had to prove an election to become an alien, for the inhabitants of ceded territory have a choice whether they retain their nationality or adopt the nationality of the new state.

As to British Nationality and Cession of Territory, see HALSBURY, Hailsham Edn., Vol. 1, pp. 471, 472, para. 797; and for Cases, see DIGEST, Vol. 2, pp. 190-192, Nos. 526-538.

For the National Service (Armed Forces) Act, 1939, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 32, p. 1041; BUTTERWORTHS EMERGENCY LEGISLATION, Statutes volume, p. 508.]

Cases referred to:

(1) *Moore* v. *A.-G. for Irish Free State,* [1935] A.C. 484; Digest Supp.; 104 L.J.P.C. 50; 153 L.T. 266.

(2) *Doe d. Thomas* v. *Acklam* (1824), 2 B. & C. 779; 2 Digest 123, *18*; 2 L.J.O.S. K.B. 129.

(3) *Doe d. Auchmuty* v. *Mulcaster* (1826), 5 B. & C. 771; 2 Digest 127, *45*; 4 L.J.O.S. K.B. 311.

(4) *Udny* v. *Udny* (1869), L.R. 1 Sc. & Div. 441; 11 Digest 309, *19*;

Appeal by way of case stated from the decision of the magistrates at Leicester, dated Sept. 9, 1941. The facts are fully set out in the judgment of Viscount Caldecote, L.C.J.

Serjeant A. M. Sullivan, K.C. and *L. F. Reuben* for the appellant.

The Attorney-General (*Rt. Hon. Sir Donald Somervell, K.C.*) and *W. Arthian Davies* for the respondent.

Viscount Caldecote, L.C.J.: The question which we have to consider in this case, which is an appeal by way of case stated, appears at first sight to be a simple one, namely, whether the appellant is a British citizen. In order to answer that question we have been invited to decide questions of far-reaching importance and worthy of consideration by the highest tribunal. This court, however, is a final court so far as the present proceedings are concerned, and, for that reason, it seems to me desirable that my observations on those questions should go no whit further than is necessary to decide the particular question raised by this appeal.

The appellant was served with a notice under the National Service (Armed Forces) Act, 1939, s. 3, requiring him to submit himself to medical examination by a medical board at the medical board centre at the Drill Hall, Leicester, on May 7, 1941. The appellant did not comply with the notice, and, by way of justifying his refusal, he claimed to be at all material times a citizen of the Irish Free State, or Eire, and not a British subject. The National Service (Armed Forces) Act, 1939, s. 1, empowered His Majesty by proclamation to direct that every male person who at the date of the proclamation was a British subject and who fulfilled other requirements mentioned in the section, should become liable to be called up for service in the armed forces of the Crown. Sect. 3 of the same Act provided that any person liable under the Act to be called up for service should submit himself to medical examination upon having been served with a written notice in the prescribed form requiring him so to do. The appellant was found guilty of the offence with which he was charged under sect. 3, of failing to submit himself to medical examination, and was fined £1. From that decision he now appeals by way of case stated by the court of summary jurisdiction for the city of Leicester before which he was charged.

The appellant was born on Dec. 23, 1908, in that part of Ireland which is now known as Eire; in other words, within His Majesty's dominions and allegiance. That is not disputed. The appellant came to England in 1934 and has resided in England continually up to the present time. He neither owns nor is the tenant of any property in Eire. He is the tenant of a house in the county of Leicester. He intended at some future date to make a home in Eire, and on Oct. 15, 1941, as we were informed, the appellant applied for a permit to return to Eire. The magistrates, after stating that under the National Service Act, 1941, s. 11, the onus of proving that the appellant was not a British subject lay upon him, found that he was born a British subject and that he had not satisfied them that there was such a break of the common tie of allegiance between the citizens of Eire and the Crown as would make the appellant an alien and that he remained a British subject. They further found that he was ordinarily resident in Great Britain and was subject to the National Service Acts, 1939-41.

It is plain that, unless the appellant was a British subject at the time when the notice served upon him to submit himself to medical examination, he was not liable to be served with the notice. Counsel for the appellant, taking the facts as found in the special case, put the case for the appellant in this way, stated shortly. He said, first, that by virtue of legislation of the Irish Free State passed in 1937, in exercise of the powers conceded by the Statute of Westminster, and providing a constitution for the former Irish Free State, thenceforward to be called Eire, Eire became separated from the British Commonwealth of Nations, and in particular from the United Kingdom of Great Britain and Ireland. The next step in his argument was that the United Kingdom Government, by entering into the agreements with Eire which were scheduled to the Eire (Confirmation of Agreements) Act, 1938, recognised the breach between Eire and the other members of the British Commonwealth of Nations, including the United Kingdom. Thereupon, it was said, Eire became, as the constitution of 1937 had already in terms provided, a sovereign and independent state. The combined effect of these various enactments, according to the argument, was to make the community of people domiciled in Eire cease to be what they had been, namely, British subjects. They became instead citizens of Ireland. The argument was reinforced by reference to a case decided in the Privy Council of *Moore* v. *A.-G. for Irish Free State* (1), where the position with regard to the powers of the legislature of the Irish Free State was stated by LORD SANKEY, L.C., in his judgment as follows, at p. 498:

> The effect of the statute was to lift the fetter which lay upon the Irish Free State Legislature by reason of the Colonial Laws Validity Act. That Legislature can now pass Acts repugnant to an Imperial Act.

This argument seems to me to break down at more than one point. There can be no doubt whatever that by the Irish Free State Constitution Act, 1922, and the Irish Free State (Agreement) Act, 1922, the Irish Free State was given a position as a dominion in the community of nations known as the British Empire or the British Commonwealth of Nations. This legislation clearly in no way affected the status as British subjects of persons who, up till that time, had been of that nationality. That status was determined in any particular case by the provisions of the British Nationality and Status of Aliens Act, 1914, s. 1 (1) (*a*), which provides that any persons born, as the appellant was, within His Majesty's dominions and allegiance shall be deemed to be natural-born British subjects. The Constituent Act scheduled to the Irish Free State Constitution Act, 1922, and the constitution of the Irish Free State themselves " derived their validity," as the Privy Council declared in the case of *Moore* v. *A.-G. for Irish Free State* (1), " from the Act of the Imperial Parliament, the Irish Free State Constitution Act, 1922." It cannot be supposed that the United Kingdom Parliament by this Act intended to deprive persons resident in the newly constituted Dominion of their British nationality. At any rate, there is nothing in the Act that expresses any such intention, and I did not understand counsel for the appellant to contend otherwise. The removal, by the Statute of Westminster in 1931, of any restriction upon the power of the legislature of the Irish Free State to pass legislation, whether repugnant or not to an Imperial Act, did not, either expressly or by implication, provide for any separation, described sometimes as the right to secede, from the British Commonwealth of Nations. Nor at any time, so far as I am aware, after listening to the argument for the appellant, has it ever been declared in terms by the government of Eire, that the so-called right to secede has in fact been exercised. I am reluctant, for the reason I have already mentioned as to the finality of the judgment of this court in the present proceedings, to pronounce upon matters of such importance, but, having regard to the argument submitted to us, an expression of my opinion on this point cannot be avoided. If I am wrong in the opinion I have thus expressed, it would still be a matter for consideration whether secession by Eire could be effective unless and until the other members of the British Commonwealth of Nations had given recognition to Eire as a foreign state, so as to make the whole of its residents at the time of the secession, together with a number of persons born in Ireland and not resident there, though having an intention some day to return to Eire, aliens in the dominions of the Crown. Counsel for the appellant seemed, unless I misunderstood him, to assume that recognition of Eire as seceding, at least by the United Kingdom, would be necessary, for he laid great stress upon his submission that the Act of 1938, recognising Eire after it had enacted its new constitution in which the Crown found no place, produced the result for which he contended before us. Whether or not this view is right I do not find it necessary to decide. In deference to the argument on behalf of the appellant I may, however, say that, as I read the agreements and the Act of 1938 confirming them, even including the provisions of the agreements regarding the treaty ports dealt with by arts. 6 and 7 of the Articles of Agreement dated Dec. 6, 1921, I can see nothing, either in the terms of the Act or in the agreements themselves, which does more than record and confirm agreements entered into between two sovereign members of the British Commonwealth. The fact that the new name " Eire " of the territory of the Irish Free State received statutory recognition in sect. 1 of the Act seems to me to carry the matter no further. Sect. 1 of the Act was a machinery provision for construing enactments which used the old name, " Irish Free State." It would not be proper for me, particularly in this case, to attempt to anticipate or imagine what steps would be necessary to make effective and complete any secession. It is sufficient to say that I am not satisfied that this has already taken place.

I must, however, deal with the contention on behalf of the appellant, as I understood it, on the assumption that there has been a complete separation of Eire from the United Kingdom and the other members of the British Commonwealth of Nations. The contention was that in that case the appellant ceased to be a British subject whenever the separation took place, because he is domiciled in Eire. The finding of fact that the appellant had the intention of returning to Eire at some future date was relied on, as showing that the domicil of origin said to have been possessed by the appellant had not been exchanged for a domicil of choice. There can be no doubt that, apart from some treaty provision to the contrary, a British subject becomes an alien by the cession of British territory in which he is resident at the time of cession. (See DICEY, CONFLICT

OF LAWS, 5th Edn., p. 173). Two decisions were relied upon on behalf of the appellant: *Doe d. Thomas* v. *Acklam* (2) and *Doe d. Auchmuty* v. *Mulcaster* (3). These decisions seem to me to illustrate clearly the principles applicable to such a case as the present. The first case arose out of the new state of affairs consequent upon a treaty of peace signed between His then Majesty and the United States of America on Sept. 3, 1783. The right of the plaintiff to inherit land in England was in issue, and the question turned upon the nationality of her father at the time of her birth, which took place in 1784. The plaintiff's father had been at one time admittedly a natural-born British subject. Before the treaty he resided in the colonies, as they then were, and he continued, after the treaty, to reside there. The plaintiff, according to the finding of ABBOTT, C.J. [p. 795]:

> . . . was born after the independence of the colonies was recognised by the Crown of Great Britain; after the colonies had become united states and their inhabitants generally, citizens of those states; and her father, by his continued residence in those states, manifestly became a citizen of them.

The opposite conclusion was reached in *Doe d. Auchmuty* v. *Mulcaster* (3), where the person on whose status the decision turned was found not to have been, at the time of the treaty in 1783, adhering to the United States. He in fact fought in the forces of the Crown and adhered to His then Majesty after the treaty.

In the present case, so far as the facts show, there is no ground on which the appellant can derive any support for his contention from *Doe d. Thomas* v. *Acklam* (2). He came to the United Kingdom in 1934 before the date of the suggested severance and he has resided here continually ever since. He is found by the special case to have been ordinarily resident in Great Britain since he came to England in 1934. The fact that he has a domicil of origin in Eire and has never acquired a new domicil of choice does not, in my opinion, touch the present question. Domicil is wholly different from nationality, and, in my opinion, is not even a relevant consideration in determining a man's nationality. The true position is stated by LORD WESTBURY in *Udny* v. *Udny* (4), where he said, at p. 457:

> The law of England, and of almost all civilised countries, ascribes to each individual at his birth two distinct legal states or conditions; one by virtue of which he becomes the subject of some particular country, binding him by the tie of natural allegiance, and which may be called his political status; another, by virtue of which he has ascribed to him the character of a citizen of some particular country, and as such is possessed of certain municipal rights, and subject to certain obligations, which latter character is the civil status or condition of the individual, and may be quite different from his political status. The political status may depend on different laws in different countries; whereas the civil status is governed universally by one single principle, namely, that of domicil, which is the criterion established by law for the purpose of determining civil status.

On this contention also I think the appellant fails. Upon the whole matter I come back to the proposition which I have already stated. The appellant was admittedly up to 1922, and, indeed, up to 1937, a British subject by virtue of the British Nationality and Status of Aliens Act, 1914. Nothing in my opinion has deprived him of that status. The legislation which made him a citizen of the Irish Free State (Irish Free State Constitution Act, 1922) did no more than confer upon him a national character as an Irish citizen within the wider British nationality. The same is true, in my opinion, of the Constitution of 1937. In the United Kingdom the appellant retains the status which is consequent upon the Act of 1914. That status is that of a British subject. It follows that he was rightly convicted of the offence with which he was charged. In my opinion this appeal fails and must be dismissed.

HUMPHREYS, J.: I agree. Michael Murray is a natural born British subject by virtue of the British Nationality and Status of Aliens Act, 1914, s. 1 (1), he having been born on Dec. 23, 1908, within His Majesty's dominions and allegiance. He is, and has been since 1934, ordinarily resident in Great Britain. Being a man of military age, he was required, on May 7, 1941, by a written notice in the prescribed form, to submit himself to medical examination in accordance with the terms of the National Service (Armed Forces) Act, 1939. He failed to comply with the requirements of that notice and was duly summoned to attend the court of summary jurisdiction at Leicester, where he was living, to answer an information charging him with having committed an offence against sect. 3 (4) of the last-mentioned Act. It then occurred for the first time to Michael Murray, or to his advisers, that he was no longer a British subject and was, therefore, not liable for service in the armed forces of the Crown. Indeed, if we are to accept the argument of his counsel, he had been for over three years an alien incurring penalties day by day for breaches of the Aliens Order, 1920.

How had that metamorphosis been achieved? It is not suggested that Michael Murray had evinced any desire or taken any step to change his nationality. A
The British Nationality and Status of Aliens Act, 1914, ss. 13, 14 and 15, provide for the loss of British nationality by British subjects who take certain steps for that purpose there referred to. It is not suggested that any of those sections meet the case of Michael Murray.

So far as I am aware, there is only one other way in which a natural-born British subject can lose his British nationality, namely, by loss of territory by the British Crown. If the Crown, with the consent of the Imperial Parliament, B
cedes to a foreign country or approves the secession of a portion of British territory, I think it is correct to say that the cession or secession involves a relinquishment, not only of sovereignty over the soil of the territory, but also of the right to the allegiance of such of its inhabitants as elect to adhere to the new state. The word "inhabitants" in this connection must receive its ordinary meaning—namely, the people residing in the territory lost to the Crown or, to use the expression of Abbott, C.J., in *Doe d. Thomas* v. *Acklam* (1), "the C
people composing the state."

It has been argued that the Irish Free State, in which part of the British dominions Michael Murray was born, has ceased to be a part of the British dominions, so that the inhabitants of that country, now called Eire, no longer owe allegiance to the Crown and are, therefore, no longer British subjects; and that is said to have happened, if I rightly understood the argument, in 1937. D
Assuming that argument to be correct, what effect would such secession have upon the nationality of Michael Murray? In my opinion, none whatever. He was not and is not an inhabitant of Eire and owes no allegiance to any government which may have been set up in that country. The question of his domicil, though strongly relied upon by his counsel, is, in my opinion, quite irrelevant to the consideration of his nationality. He was and remains a natural-born British subject, and was rightly convicted by the justices of E
Leicester.

The question whether the important constitutional change contended for by counsel for the appellant has in law taken place is one which, in my opinion, does not call for decision in order to dispose of this case. For that reason, as well as for the reasons mentioned by my Lord, I am reluctant to express any final opinion upon that matter, and I content myself with saying that, having had the advantage of reading the judgment delivered by my Lord, I see no F
reason to differ from the view which he has expressed upon that part of the case. I agree that the appeal should be dismissed.

Singleton, J.: This is an appeal by way of case stated from the decision of magistrates at Leicester under which Michael Murray was convicted, that he, on May 7, 1941, being a person liable under the National Service (Armed Forces) Act, 1939, to be called up for service, did fail to comply with the requirements G
of a written notice in the prescribed form duly served on him requiring him to submit himself to medical examination contrary to sect. 3 (4) of the Act. The sole question for the decision of this court is whether, at the material time, Michael Murray was a British subject and, as such, liable to be called up under the National Service (Armed Forces) Act, 1939. Under the National Service Act, 1941, s. 11, the onus lies on the appellant to show that he is not a British subject. It is of interest to observe that the same test is applicable to the later H
Act and that, as the law stands, the appellant cannot be called on to perform any services, civil or military, under these Acts unless he is a British subject.

The British Nationality and Status of Aliens Act, 1914, s. 1 (1), provides:

> The following persons shall be deemed to be natural-born British subjects, namely: (*a*) Any person born within His Majesty's dominions and allegiance.

It is common ground that the appellant was one to whom this applied in the first instance. Sects. 13 to 16 of the Act show how loss of British nationality may occur. The statute is one to consolidate and amend the enactments relating to British nationality and the status of aliens. It does not envisage anything in the nature of loss of status through cession of territory. It is refreshing to see that the legislature does not contemplate such a position. At the same time, it must be recognised that loss of status as British subjects may follow on the cession of territory. That appears clearly from *Doe d. Thomas* v. *Acklam* (2) and *Doe d. Auchmuty* v. *Mulcaster* (3).

After the War of American Independence a treaty was made between the Crown and the United States under which the Crown recognised the United States "to be free sovereign and independent states; that he (His Majesty the King) treats with them as such and for himself, his heirs and successors relinquishes all claims to the government . . . of the same and every part thereof." There was cession of territory by the Crown to the United States, and this was after Stat. (1782), 22 Geo. III, c. 46, "whereby His Majesty was authorised to treat of and conclude a peace or truce with the several American Colonies therein named." (See *Doe d. Thomas* v. *Acklam* (2), *per* ABBOTT, C.J., at p. 795). Subsequent legislation recognised the United States as free and independent. It was decided by the court of King's Bench in those two cases that thereupon those who were British subjects and inhabitants of the ceded territory had a right to elect. If they elected to remain in the ceded territory, they lost their status as British subjects and became nationals of the United States; if, on the other hand, they showed by their actions an election to the contrary, they retained their status as British subjects.

It is unnecessary for the purposes of the present case to go further back than the Irish Free State Constitution Act, 1922, under which the constitution of the Irish Free State was established. Under art. 1 of sched. I, the Irish Free State is a co-equal member of the community of nations forming the British Commonwealth of Nations. Art. 3 states who are citizens of the Irish Free State. It was admitted by counsel for the appellant that such persons were at that time, and until 1937, British subjects. In 1931 the Statute of Westminster was passed. It was argued by counsel for the appellant that that Act gave the Irish Free State the right to secede from the British Commonwealth of Nations. I do not regard it as necessary for the purposes of this case to express a decided opinion upon that submission. I venture to point out, however, that the whole fabric of the Act is based upon all the dominions (including the Irish Free State) being and remaining members of the British Commonwealth of Nations. The single-handed departure of one is not within the conception of the statute, as appears clearly from the preamble. I doubt whether it was within the power of one dominion to alter the status of British subjects within or without that dominion without agreement of the others, but for reasons which appear later it is unnecessary to decide that question.

It is clear from the Statute of Westminster itself and from the decision of the Privy Council in *Moore* v. *A.-G. for Irish Free State* (1) that the legislature of one of the dominions can now pass Acts repugnant to an Imperial Act. That is far from saying that they can alter the status of British subjects wherever they may be.

Counsel for the appellant proceeded to argue that the Government of Ireland or of that part of it formerly called the Irish Free State, being authorised to do so by the Statute of Westminster, enacted the Constitution of Ireland, 1937, and that thereupon those who were British subjects (and at the same time subjects of the Irish Free State) ceased to be British subjects and became subjects of Eire.

We were referred to the Constitution of Ireland, arts. 1, 2, 3, 4, 5, 9 and 12. Of these I will read the following:

> (4) The name of the State is Eire, in the English language, Ireland. (5) Eire (Ireland) is a sovereign, independent, democratic State. (6) All powers of government, legislative executive and judicial, derive under God from the people, whose right it is to designate the rulers of the State and in final appeal to decide all questions of national policy according to the requirements of the common good. These powers of government are exerciseable only by or on the authority of the organs of State established by this Constitution. (9) As from the coming into operation of this Constitution, any person who was a citizen of Saorstat Eireann immediately before the coming into operation of this Constitution shall become and be a citizen of Ireland.

It was submitted on behalf of the appellant that, by reason of this constitution, he ceased to be a British subject and became a citizen of Eire. It is common ground that the appellant and those in the like case have not been treated as aliens, but have been accorded the rights and privileges of British subjects. Art. 62 provides how and when the constitution is to come into operation, and on the cover there are the statements "Enacted by the People, July 1, 1937" and "In operation as from Dec. 29, 1937."

It was argued further by counsel for the appellant that this measure or constitution had been recognised by the Parliament of the United Kingdom, and he referred us to the Eire (Confirmation of Agreements) Act, 1938. I confess that I wholly fail to find in the 1938 Act any recognition of Eire as a sovereign, independent, democratic state, or any recognition of its departure from the British Commonwealth of Nations (if it has so departed), or, indeed, any recognition of the Constitution of 1937. There is no recital of the measure nor any reference to it. There is in sect. 1 a recognition of change of name to Eire and that is all. Statutory force is given to two agreements which are such as might be made between the United Kingdom and any of the Dominions, and there is nothing more. It seems to me that there is no substance in counsel's point as to recognition. I fail to find anything to show me that the government which was set up in that part of Ireland which was formerly the Irish Free State has been recognised by His Majesty's Government as a sovereign, independent democratic state.

If I am right in that conclusion, counsel for the appellant must fall back entirely on the Statute of Westminster followed by the Constitution of 1937. He claims that there was a secession. Now, assuming that, having regard to the structure of the British Commonwealth of Nations, there could be a secession by one part or dominion, what is the effect of it on those who were British subjects ? It is clear that cession of territory of itself does not rob a person of his status as a British subject. On cession he still has the right to elect what he will do. Cession involves the agreement of two parties, the one who cedes and the one to whom the cession is granted. Is it not clear above all that secession cannot have a greater effect than cession ? I find it impossible to see how and when the subject is to exercise his choice unless there has been either agreement or recognition. If Great Britain ceded territory (as in 1783), the subject was not deprived of his status as a British subject unless he had shown by his action (e.g., by remaining in the ceded territory) that he elected so to do. In the case of Eire, when have British subjects had the right or opportunity to elect ? How could it arise in the absence of agreement or recognition by His Majesty's Government ? I cannot accept the argument that a British subject can be deprived of his status as such merely by the Act of some government, state or dominion elsewhere. He always has the right to elect, and there must be some certainty as to the position, else he cannot be called upon to do that. In any event, the onus of showing he is not a British subject is on the appellant. He has wholly failed to satisfy me of any recognition by His Majesty's Government of the position which he claims, and until that is shown I do not think that British subjects are called on to exercise their option.

There is a further difficulty. Counsel for the appellant claimed that all those who were British subjects (and at the same time subjects of the Irish Free State) had ceased to be British subjects. I suppose he based this on art. 9 of the Constitution of 1937, but he did not make this very clear. The change of status which may follow on cession of territory is one which affects inhabitants of that territory. The appellant has lived in England since 1934. He cannot be said to have shown any desire to cease to be a British subject. It is true that, when he was called up under the National Service (Armed Forces) Act, 1939, he claimed to be no longer a British subject. The appellant was a British subject resident in this country. He did not cease to be so by reason of the Constitution of Ireland. If the Constitution of 1937 had the effect which was claimed for it, the appellant could thereupon have elected. As Bayley, J., said in *Doe d. Auchmuty* v. *Mulcaster* (3), the law did not enable him to do so at some future time. In my view the appellant was at the material time (namely, May 7, 1941) a British subject resident in this country. He had not ceased to be so by reason of the Constitution of Ireland. I agree that this appeal fails.

Appeal dismissed.

Solicitors : *Bryan O'Connor & Co.* (for the appellant) ; *Solicitor to the Ministry of Labour and National Service* (for the respondent).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

SUTCLIFFE *v.* MINISTER OF HEALTH

[KING'S BENCH DIVISION (Charles, Lewis and Oliver, JJ.), **April 14, 1942.**]

Work and Labour—National health insurance—Widow's pension—Man in excepted employment—Marriage with insured woman—Man accepted and paying contributions as voluntary contributor—Whether widow entitled to pension—Widows', Orphans', and Old Age Contributory Pensions Act, 1925 (*c.* 70), *ss.* 13 (4), 15 (7). A

A police officer retired in 1919 and received a superannuation allowance. As a police officer he was in an excepted employment within the Widows', Orphans', and Old Age Contributory Pensions Act, 1925, s. 15 (7), and on Jan. 4, 1926, was neither an insured nor an exempt person. In 1933 he married the appellant who was an insured woman in respect of whom 104 B contributions had been duly paid. The husband then gave notice to an approved society of his desire to become a voluntary contributor under sect. 13 (4) of the Act, and was admitted as such, and thereafter paid all contributions due from a voluntary contributor. The husband died on May 7, 1939, and the widow thereupon claimed a pension under the Act:—

HELD: the provisions of sect. 15 (7) prevented the husband from becoming an insured person in any circumstances, and the widow was not entitled C to a pension.

[**EDITORIAL NOTE.** This is a short point upon the construction of the 1925 Act relating to widows' pensions. The two subsections of the Act appear to be in direct conflict, and the court has decided that the provisions of sect. 15 (7) are absolute in their nature and that a person who is within its terms is incapable in any circumstances whatever of becoming an insured person. The subsections referred to have been replaced by later statutes, and sect. 13 (4) is now the National Health Insurance Act, D 1936, s. 3 (3), and sect. 15 (7) is now the Widows', Orphans', and Old Age Contributory Pensions Act, 1936, s. 17 (5).

AS TO PERSONS WHO MAY BECOME VOLUNTARY CONTRIBUTORS, see HALSBURY, Hailsham Ed., Vol. 34, p. 621, para. 775; and FOR CASES, see DIGEST, Vol. 44, pp. 1308-1315, Nos. 140-176.]

Case referred to:

(1) *Wood* v. *Riley* (1867) L.R. 3 C.P. 26; 42 Digest 658, *666*.

E SPECIAL CASE stated by a referee under the Widows', Orphans', and Old Age Contributory Pensions Act, 1936. The facts are fully set out in the judgment of CHARLES, J.

D. A. Scott Cairns for the appellant.

Valentine Holmes for the respondent.

Cairns: Sect. 15 (7) has no overriding effect in the circumstances of this case. F Sect. 13 (4) is general in its application and expressly gives an uninsured man who marries an insured woman the right to become a voluntary contributor. There are many cases under the Act to which sect. 15 (7) can apply apart from this one. The section which gives a right should prevail.

Holmes: The case is concluded by the fact that the husband was in an excepted employment. The rule is that, in the case of two conflicting sections, the later section is given preference to an earlier section. [Counsel referred to G *Wood* v. *Riley* (1)].

CHARLES, J.: The case involves a decision as to the meaning of two sections in the Widows', Orphans', and Old Age Contributory Pensions Act, 1925, and the matter arises in this way. James Herbert Sutcliffe who, on Jan. 4, 1926, had not attained the age of 70, and died on May 7, 1939, was a man who had served as a constable until Sept. 30, 1919, but on that date he retired from his H employment, and, retiring from his employment, he became a man entitled to, and actually received, a superannuation allowance. That employment was an excepted employment within the Widows', Orphans', and Old Age Contributory Pensions Act, 1925, s. 15 (7). After his retirement from the police he married the appellant in the matter now before the court. She was an insured woman, had paid 104 contributions, and had done all that was necessary, she says, within sect. 13 (4) of the 1925 Act. The question thus arises whether or not in such circumstances she is entitled to a pension under and by virtue of the terms of sect. 13 (4).

Sect. 13 (4) is a perfectly general one, and provides as follows :

> Where an uninsured man marries an insured woman by or in respect of whom 104 contributions have been paid under this Act, he may if he gives notice within the prescribed time after the marriage and in the prescribed manner become a voluntary contributor under the Insurance Act.

The Insurance Act referred to is the National Health Insurance Act, 1924. Everything seems to have been done which would, upon the face of it, accord with the requirements of that section, and so the appellant in this matter says : "I rely upon that section, and I ask for my pension." In a subsequent section—sect. 15 (7)—there are, however, certain excepted employments particularly singled out as employments in respect of which a man shall not in any circumstances be capable of becoming an insured person for the purposes of this Act.

Sect. 15 (7), so far as relevant, provides as follows :

> Where a person who has been employed in an excepted employment to which this section applies has, on retirement from such employment whether before or after the commencement of this Act, been granted a superannuation allowance, then (*a*) if he was a person in respect of whom no contributions were, or would had he continued to be so employed after the commencement of this Act have been, payable under this Act whilst he was so employed, he shall not be capable of becoming an insured person for the purposes of this Act or of the Insurance Act or the Unemployment Insurance Acts, 1920 to 1924, and shall not be entitled to any benefits under any of those Acts, but for the purposes of the provisions of those Acts relating to contributions, he shall as from the appointed day be treated as if he were a person who had attained the age of sixty-five . . .

Sutcliffe came directly within the terms of that section, and so was, with absolute particularity, declared to be incapable of becoming an insured person for the purposes of the Act. It therefore follows that he was not a person who was in any way capable of coming within the ambit of sect. 13 (4), which is the general section.

Counsel for the respondent has called the attention of the court to the general principle that, if two sections are conflicting, the later of the two sections is the section which would generally prevail, and that is a matter, I think, that no one would doubt is very well decided law. Rightly or wrongly, in my view these sections do not conflict. Sect. 13 (4) is a general provision, and Sutcliffe has been, as I have already said, with absolute particularity by reason of his occupation, calling and position, excluded from any benefit, and his widow is, therefore, thereby excluded from any benefit under that subsection.

Para. 5 of the special case states the question which we have to decide as follows :

> The question of law for the decision of the court is whether on the true construction of the said sects. 13 (4) and 15 (7) of the Act of 1925, the said James Herbert Sutcliffe was, on Apr. 28, 1933, entitled to become insured by virtue of the provisions of the said sect. 13 (4).

For the reasons which I have given, I have come to the conclusion that he was not capable of being so insured and was not so insured.

LEWIS, J. : I agree. The contention of the respondent is set out in the case in para. 3, as follows :

> It was contended on behalf of the Minister that by reason of the provisions of sect. 15 (7) of the Act of 1925, the late James Herbert Sutcliffe was not entitled after his retirement from the Lancashire Constabulary in 1919 to become an insured person for the purposes of any pension under the Act of 1925.
>
> On the other hand, it was contended by the appellant that the provisions of sect. 13 (4) of the Act of 1925 prevail over these of sect. 15 (7) of the Act of 1925, and, notwithstanding the provisions of that subsection, entitled the late James Herbert Sutcliffe to become so insured on Apr. 28, 1933.

Those contentions set out in the case have been argued before us by counsel, and I have come to the conclusion, I confess after some hesitation, that the proper view of the two sections is this. Sect. 13 (4), to which CHARLES, J., has already referred, is of general application. Sect. 15 (7), however, is an exception to that section of general application, the effect of which is to disqualify a person in the position in which Sutcliffe was from becoming, or being capable of becoming, an insured person. I think that sect. 15 (7) is a particular exception to the section of general application, and, therefore, in my view, the proper answer to the question which we are asked is that Sutcliffe was not entitled to become insured by virtue of the provisions of sect. 13 (4).

OLIVER, J. : I agree. I think that sect. 13 (4) in its terms specifies a method of "becoming an insured person," namely, by marrying a woman who has paid the requisite number of contributions. Sect. 15, which comes two sections later, says that a person in the position of the deceased in this case, is not capable of becoming an insured person for the purposes of this Act. The respective positions of the two sections in the Act and the principle of construction referred to make it, I think, clear that sect. 15 (7) governs the matter and makes this case an exception from the general rule laid down in sect. 13 (4).

Solicitors : *Bolton, Jobson & Yate-Lee* (for the appellant) ; *Solicitor to the Ministry of Health* (for the respondent).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

RODGER *v.* VAREY.

[KING'S BENCH DIVISION (Viscount Caldecote. L.C.J., and Humphreys and Singleton, JJ.), **March 26, 1942.**]

Emergency Legislation—Billeting—Girl of 14 *years of age—Whether child within the regulations—Child—Defence* (*General*) *Regulations, reg.* 22.

An information was preferred against the respondent for failing to care for a child, who had been billeted with him, to the best of his ability, contrary to the Defence (General) Regulations, reg. 22 (11). The girl who had been billeted with the respondent attained the age of 14 years on Dec. 21, 1940. The billeting notice was served on Mar. 17, 1941. The information was dismissed on the ground that the girl was not a "child" within the meaning of the regulation :—

HELD : the girl was a child within the meaning of the regulation.

[**EDITORIAL NOTE.** For certain purposes the words "child" and "young person" have been defined by statute, but such definitions do not apply to the billeting regulations, which are worded in non-technical language and intended to be read and understood by ordinary people unacquainted with technical definitions. The meaning of the word "child," therefore, in the regulations is a matter to be decided by the application of common sense and not of legal definitions.

FOR THE DEFENCE (GENERAL) REGULATIONS, reg. 22, see BUTTERWORTHS EMERGENCY LEGISLATION SERVICE, [13] 33.]

APPEAL, by way of case stated, from a decision of a court of summary jurisdiction, sitting at Chapel-en-le-Frith, Derbyshire, dated June 26, 1941. An information was preferred against the respondent for failing to care for a child evacuee, contrary to reg. 22 of the Defence (General) Regulations. A billeting notice in respect of the child was served on the respondent on Mar. 17, 1941. The child reached the age of 14 years on Dec. 21, 1940, and the magistrates dismissed the information on the ground that she was not a child under any statutory definition cited to them.

Valentine Holmes for the appellant.

The respondent did not appear.

VISCOUNT CALDECOTE, L.C.J. : The respondent was charged with a breach of the Defence (General) Regulations, reg. 22 (11), which provides that :

> . . . it shall be the duty of the occupier of any premises in which accommodation for any child not accompanied by a person otherwise responsible for his care is so furnished as aforesaid to care for the child to the best of the occupier's ability.

In this case a person of 14 years of age, a girl, was billeted upon the respondent and his wife. The point was taken that the person in question, Rita Waltham, was 14 on Dec. 21, 1940, and, therefore, not a child within the meaning of the regulation. The magistrates expressed the opinion that the girl was over 14 years of age and not a child under any statutory definition cited to them. They accordingly dismissed the information. They have not addressed their mind to the question whether, assuming she was a child, the respondent did not care for her to the best of his ability.

The matter lies in a very small compass indeed. These regulations for billeting are not framed in highly technical language, no doubt partly because they are intended to be read and understood by people who will be required to perform a duty arising out of the war, in which it is supposed that everybody is anxious to do his best. I must say about this regulation and the billeting arrangements that, in general, a quite remarkable exhibition of public spirit has been shown by the people who have undertaken to care for both adult and young persons and children. Cases arise, however, where a different disposition is exhibited, and this seems to be a case in which a point has been taken in order to defeat the intention of the Defence (General) Regulations, reg. 22 (11). I think the point taken by the magistrates is a bad one. They came to the conclusion, judging from their finding, that before they could find that a girl of 14 years of age was a child within the meaning of the regulation, it was necessary to have some statutory definition making her a child. I think that no statutory definition was necessary to cover such a case as this. In the ordinary use of the English language, I think that a person of 14 years of age is a child. Everybody would understand him or her to be a child, and to find to the contrary seems to me to be perverse and to misapply a word which is perfectly well understood. In my opinion, a girl of 14 is so plainly a child that it is not open to magistrates to hold otherwise. They were wrong in supposing that they must be supplied with a definition before they could find a young person a child. What they had to do really was to use their common sense and apply a word which is perfectly well understood in its proper and ordinary meaning.

We have been invited in this case to go beyond anything that is necessary for the decision of the point that is raised and to express some opinion as to when a person ceases to be a child. I do not propose to embark upon that voyage, which might take one into very remote places. I believe, as I have said in the course of the argument, that, in general, it will be found that neither parties concerned nor magistrates will come to anything but common sense decisions in applying the provisions of reg. 22 and particularly para. (11), with which we are here concerned.

I think the magistrates came to a wrong decision, and the case must go back to them for hearing and decision, taking into account the expression of our opinion.

Humphreys, J.: I agree with the judgment proposed by Viscount Caldecote, L.C.J., and with the reasons which he has given for it.

Singleton, J.: I agree.

Appeal allowed with costs.

Solicitors: *Robinson & Bradley*, agents for *Cooper, Sons & Co.*, Buxton (for the appellant).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

R. *v.* GENERAL MEDICAL COUNCIL, *Ex parte* SPACKMAN.

[King's Bench Division (Viscount Caldecote, L.C.J., and Humphreys and Singleton, JJ.), **March 27, 30, 1942**].

Medicine and Pharmacy—General Medical Council—Erasure of names from medical register—" Infamous conduct in a professional respect "—Practitioner found guilty by Divorce Court of adultery—Refusal by council to hear evidence not given before divorce court—" Due inquiry "—Medical Act, 1858 (c. 90), *s.* 29.

On the hearing of a petition for divorce S. was found to have committed adultery with a married woman. The General Medical Council found that he stood in professional relationship to her at all material times and adjudged him to have been guilty of infamous conduct in a professional respect. In accordance with the council's standing orders, S. was invited " to state his case and produce the evidence in support of it " to a meeting at which the erasure of his name from the medical register was to be considered. At the meeting S. sought to tender evidence to negative the court's finding of adultery which, though available, was not called in the divorce proceedings. The council refused to hear fresh evidence on the subject, and, after S. had presented his case, directed the erasure of his name from the register. S. contended that, by reason of the council's refusal to hear the evidence, the "due inquiry" required by the Medical Act, 1858, s. 29, had not been held and there had been a failure of natural justice:—

HELD (SINGLETON, J., *dissenting*): the refusal to hear the evidence did not prevent there being the "due inquiry" required by the Medical Act, 1858, s. 29, nor did it result in a failure of natural justice. The council, being satisfied that a full investigation had already been made by a competent court of a particular question of fact, was entitled to accept the decision of that court without a fresh hearing.

[**EDITORIAL NOTE.** The question in this case is whether there was a due inquiry. The principles to be considered in answering this question are in one way rather similar to those arising upon the question whether a discretion has been properly exercised. A council of professional men entrusted by statute to hold such inquiries must lay down a body of general rules to regulate their procedure, but, on the other hand, they must not lay down a rule that, in a particular class of case, they will hear such and such evidence and no more or no less. Each case must be judged on its own merits and the exclusion of any line of inquiry as a hard-and-fast rule would not be a due inquiry. The dissenting judgment of SINGLETON, J., is based on this principle, while that of the majority is based upon the fact that, so far as the present case is concerned, there was a due inquiry in fact.

AS TO INQUIRIES BY GENERAL MEDICAL COUNCIL, see HALSBURY, Hailsham Edn., Vol. 22, pp. 301-303, paras. 565-571; and FOR CASES, see DIGEST, Vol. 34, pp. 543-545, Nos. 22-31.]

Cases referred to:

(1) *Local Government Board* v. *Arlidge*, [1915] A.C. 120; 38 Digest 97, *708*; 84 L.J.K.B. 72; 111 L.T. 905.

(2) *Leeson* v. *General Council of Medical Education & Registration* (1889), 43 Ch.D. 366; 34 Digest 544, *30*; 59 L.J.Ch. 233; 61 L.T. 849.

(3) *Partington* v. *Partington & Atkinson*, [1925] P. 34; 27 Digest 367, *3537*; 94 L.J.P. 49; 132 L.T. 495.

APPLICATION for an order of *certiorari* to quash a direction given by the General Medical Council to erase the applicant's name from the medical register. The facts are fully stated in the judgment of VISCOUNT CALDECOTE, L.C.J.

Cecil Havers, K.C., and *H. C. Dickens* for the applicant.

Gilbert Beyfus, K.C., and *D. C. Bartley* for the respondents.

VISCOUNT CALDECOTE, L.C.J.: On Feb. 3, 1941, LANGTON, J., adjudged the applicant to have committed adultery with a married woman, and pronounced a decree *nisi* on the husband's petition for divorce. On Aug. 26, 1941, the decree was made absolute. On Oct. 2, 1941, a letter was written to the applicant on behalf of the council in the following terms:

> On behalf of the General Medical Council we give you notice that information and evidence have been received by the council from which it appears: 1. You committed adultery with Barbara Pepper, a married woman, of which adultery you were found guilty by the decree of the Probate, Divorce and Admiralty Division (Divorce) of the High Court of Justice, dated Feb. 3, 1941, and made absolute on Aug. 26, 1941. in the case of *Pepper* v. *Pepper* (*Spackman cited*), in which you were in the respondent's answer to the petition cited as co-respondent. 2. You stood in professional relationship with the said Barbara Pepper at all material times. And that in relation to the facts so alleged you have been guilty of infamous conduct in a professional respect. And we are directed further to give you notice that on Wednesday Nov. 26, 1941, a meeting of the General Medical Council will be held at 66, Portland Place, London, W.1., at 11.30 a.m. to consider the above-mentioned charge against you and decide whether or not they should direct your name to be removed from the Medical Register, pursuant to the Medical Act, 1858, s. 29. You are requested to answer in writing the above charge and to attend before the General Medical Council at the above-named place and time to establish any denial or defence that you may have to make to it.

A copy of the Medical Act, 1858, s. 29, and of chapter XIV of the standing orders of the council was enclosed with the letter. The applicant retained a solicitor, Mr. Oswald Hempson, to act for him at the meeting of the council, of which the applicant had thus received notice. Mr. Hempson had not acted for the applicant in the divorce proceedings.

The council is a statutory body owing its existence to the Medical Act, 1858. It now consists of 39 members and is charged with the duty of regulating the registers required to be kept under this and later Acts. Section 15 of the 1858

Act entitles every person possessed of any one or more of the qualifications scheduled to the Act to be registered. Sect. 29 provides as follows:

> If any registered medical practitioner shall be convicted in England or Ireland of any felony or misdemeanour, or in Scotland of any crime or offence, or shall after due inquiry be judged by the General Council to have been guilty of infamous conduct in any professional respect, the General Council may, if they see fit, direct the registrar to erase the name of such medical practitioner from the register.

Chapter XIV of the standing orders, including rules scheduled to chapter XIV, are with regard to the procedure for penal erasure from the medical register. The rules provide for an opportunity being given to the practitioner to "state his case and to produce the evidence in support of it."

The council considered the case of the applicant at its meeting on Nov. 28, 1941. The solicitor to the council opened his statement of the facts of the case and referred to the decree pronounced by LANGTON, J., as establishing the fact that the applicant had committed adultery as alleged in the charge. Thereupon Mr. Hempson admitted professional relationship, but submitted that he should be allowed to call certain evidence, which was not before the divorce court, with a view to going behind the decree. He stated that the evidence which he desired to call was available at the hearing of the petition and could, with reasonable diligence, have been called. If he had then been advising the applicant, the witnesses would have been called in the divorce proceedings. The legal assessor informed the solicitor that it was the practice of the council to accept *prima facie* at least the decree *nisi* as evidence of adultery, and that the onus was on the applicant to show some special grounds why the council should not accept it as such. The council then deliberated *in camera* and afterwards informed Mr. Hempson that the council was not prepared to hear fresh evidence on the question of adultery. Mr. Hempson then addressed the council and called one witness. The council again deliberated *in camera*, and then announced its decision to direct the registrar to erase the applicant's name from the medical register.

Counsel for the applicant submitted before us that "due inquiry" as required by sect. 29 had not been held and that there had been a failure of natural justice. His contention was that the council was bound to hear the evidence tendered by the applicant's solicitor on the question of adultery, even though this might lead to a complete re-hearing of all the evidence. The applicant, he said, was contesting the evidence given in the divorce proceedings and was entitled to answer it before the council.

On the other hand, it was submitted on behalf of the council that nothing had been done contrary to natural justice, and that "due inquiry" had been made. In refusing to hear the new witnesses the council had acted in accordance with the view taken by LORD CHELMSFORD as to the circumstances in which the Court of Appeal would allow fresh evidence to be called, and was not required by sect. 29 to do more than satisfy itself by just means as to matters of fact in issue. We were referred to a statement by LORD SHAW in *Local Government Board* v. *Arlidge* (1).

In deciding between these two views I cannot find much guidance from the fact that the council bases its practice on what is said to be the practice of the Court of Appeal. It would not be proper for me, even if I had any desire, which I have not, to criticise any practice or decision of the Court of Appeal. The council is not an appellate court, and it seems to me immaterial that the council has only done what the Court of Appeal would do in a case in which an appellant was asking for leave to call further evidence. It is better to consider the terms of sect. 29, and to see whether the council has complied with its provisions, for everything turns upon this section.

Counsel for the applicant quite rightly called our attention to the distinction between the case of a conviction for felony or misdemeanour and a charge of infamous conduct in a professional respect. In the former case all that has to be proved is the fact of the conviction. In the latter case there must be "due inquiry" before a direction to erase the name of a medical practitioner from the register can be given. So much is plain, but the question still has to be answered: What is due inquiry? or, to put the question more conveniently: Was due inquiry made in the case before us? That is the whole question.

The council is what is sometimes called a domestic tribunal. To it is entrusted the duty of safeguarding the good name of the medical profession to the extent of having power to remove from the register the names of medical practitioners in certain circumstances. I cannot believe that Parliament intended to compel the council in all cases under sect. 29 to act as if it were a court of law trying a criminal charge. For one thing, Parliament has clearly put no such duty upon the council in what perhaps are the more serious cases that come before it, namely, convictions for felony or misdemeanour. For another thing, the council has not been equipped for any such task. It is unable either to compel the attendance of witnesses or to administer the oath to such witnesses as can be called. So far as I can see, it is not bound by the rules of evidence. If, then, the council is not constituted as or equipped with the powers of a court, I think it is reasonable and right to suppose that Parliament meant to leave the council to devise its own means of ascertaining the facts on which its decisions must depend. A charge of " infamous conduct " might be made in such circumstances as to require the council to try for the first time the allegation contained in the charge. Then I should hope the council would do its best to weigh the evidence in order to arrive at a just decision, and it could not discharge this duty properly if it shut out evidence which in fairness ought to be heard. Such a case was *Leeson* v. *General Council of Medical Education* (2). A very different position is reached if the council finds that a more experienced, and, as it thinks, a better fitted tribunal than itself has, after a full and fair hearing, found the accused person guilty of the conduct alleged. If the council takes pains to ascertain these facts, I do not know why that should not be held to be " due inquiry." Sect. 29 uses those words which suggest to me something different from a formal full dress trial. It is said that " due inquiry " means at least that witnesses who are tendered must be heard by the council, and reliance was placed on the standing order and the rules scheduled to it. The objection to such a course is obvious. If evidence on one side is heard, the evidence on the other side must be heard. Such evidence, however, may not be available as it was at the trial. What is to happen then ? Counsel for the applicant apparently takes the view that the council must do the best it can with the material before it, which might include notes of evidence previously given. This seems to me to be a very unsatisfactory procedure. The ends of justice are much more likely to be served, in my opinion, by the course followed by the council in the present case. It goes without saying that the council must act honestly and with no corrupt motive. To use the words of LORD SHAW, " it must do its best to act justly, and to reach first ends by just means." I see nothing that can be said to be contrary to justice, whether it is called natural justice or merely justice, if this body, largely composed of medical men charged to make due inquiry, honestly decides to rely on the findings of one of His Majesty's judges, especially when, as in this case, all the evidence was available at the trial. It does not offend anyone's sense of justice that Parliament has made the verdict of a jury on a charge of felony conclusive. Equally, I find nothing to shock my sense of justice, if I find that the council, being satisfied that a full investigation has already been made by a competent court of a particular question of fact, chooses to accept the decision of that court as to that question of fact without a fresh hearing.

Nothing I have said must be taken to suggest that the council should close its eyes to evidence which shows that a decision relied on was obtained by fraud. Fraud, when proved, reopens everything. What I have said is subject to that qualification, and to other exceptional cases, which it is better not to attempt to define. I think that the council cannot be said in this case to have neglected its duty under the Medical Act, 1858, s. 29. I ought to add that I do not agree with the submission of counsel for the respondents that the decree in the divorce proceedings was a judgment *in rem* binding on the applicant as an estoppel. In the result I think this application should be refused.

HUMPHREYS, J. : The sole question raised in this case is whether the General Medical Council, which directed the registrar to remove the name of the applicant from the register, did so after due inquiry as required by the Medical Act, 1858, s. 29. That the council held an honest and impartial inquiry is not disputed. At that inquiry the only question said to be in dispute was this : Had Dr. Spackman committed adultery with Barbara Pepper, a married woman ? That question had been heard and determined in the divorce court by LANGTON, J., after a hearing extending over at least 7 days, at the close of which that judge found the adultery proved and pronounced a decree *nisi* against Barbara Pepper at the instance of her husband on the ground of her adultery with Dr. Spackman. At that hearing Dr. Spackman was represented by solicitors and counsel and called such evidence as he desired. From that finding there was no appeal, and in due course the decree was made absolute. We are now invited to hold that the inquiry before the General Medical Council was not a due inquiry on the ground that the council refused to hear fresh evidence called A by Dr. Spackman to negative the finding of adultery, although that evidence was admittedly available to Dr. Spackman and could have been called in the divorce proceedings.

It is to be observed that the Medical Act, 1858, which created the General Medical Council, did not attempt to dictate to that body how such an inquiry should be held. The General Medical Council is not a court of law, but a domestic forum left to manage its own affairs as it considers best in the interests of the B profession. It is not bound by rules of evidence, and it has no power to administer an oath or to compel the attendance of witnesses. It may receive and act upon hearsay evidence. Its rules permit the reception of written depositions or statements as well as oral evidence. In short, the council is free to adopt its own procedure and to decide upon its own methods of proof, so long as it obeys the dictates of natural justice. In my opinion, therefore, this court has no duty and no right to dictate to the General Medical Council what C witnesses it must hear unless the refusal to hear them constitutes a violation of the principles of natural justice.

The General Medical Council could, of course, have heard the evidence tendered if it desired, and I do not doubt that it would have done so if it had thought that justice required such a course to be taken. We have it in evidence that it would have done so if any special circumstances could have been shown, but D we are asked to say that the practitioner had an absolute right to insist upon the whole question being reopened, and counsel for the applicant agreed that logically his contention would cover the case of a practitioner who did not desire to call fresh evidence, but who required the council to rehear the case in the hope of inducing it to differ from the finding of the judge or jury in the divorce court. I cannot think that the principles of natural justice require the General Medical Council to adopt a course which would, I believe, have been refused, E in the circumstances, by any court of justice in the kingdom, appellate or otherwise. I agree that the application should be refused.

SINGLETON, J.: The charge or complaint against Dr. Spackman is contained in a letter from the solicitors to the General Medical Council, dated Oct. 2, 1941. It falls into two parts: (i) An allegation of adultery:

> . . . of which adultery you were found guilty by the decree of the Probate, Divorce F and Admiralty Division (Divorce), dated Feb. 3, 1941, and made absolute on Aug. 26, 1941, in the case of *Pepper* v. *Pepper* (*Spackman cited*).

(ii) An allegation that the applicant stood in professional relationship with Mrs. Pepper at all material times. It was said that in relation to the facts so alleged the applicant had been guilty of infamous conduct in a professional respect.

As the letter shows, it was an essential part of the charge that adultery should be proved. In most such cases there may be no dispute as to this. In G the present case it was intimated to the council by the solicitor who appeared for the applicant that he disputed the allegation of adultery and desired to call witnesses who had not been called when the petition was heard before LANGTON, J., in the Divorce Division. The transcript shows quite clearly that the General Medical Council refused to hear fresh evidence on the question of adultery. They based their decision on this point on their general practice in a case of this nature not to hear any witnesses who were available at the hearing of the H petition but who were not called. It appears that they have a practice which is similar to the rule laid down by the Court of Appeal and quoted in the ANNUAL PRACTICE in notes to Ord. 58, r. 4, as to the allowing of new evidence. As to this, it is to be remembered that the General Medical Council is not an appellate tribunal, and, further, that the parties to the dispute were not the same.

Under the Medical Act, 1858, s. 29, the council may direct the registrar to erase from the register the name of a practitioner who has been convicted of felony or misdemeanour. The council may also direct erasure from the register of the name of a practitioner

> . . . who shall after due inquiry be judged by the General Council to have been guilty of infamous conduct in any professional respect.

In the first case they can act upon proof of the conviction. In the other cases they cannot act until after due inquiry, which means until after due inquiry by them.

It is obviously undesirable that there should be a second hearing on the issue of adultery after the question has been fully investigated by a judge of the Divorce Division, and there may be good reason for the amendment in that respect of the Medical Act, 1858, s. 29. As the section stands, there must be due inquiry as to whether infamous conduct in any professional respect is proved, and in the circumstances of the present case the first stage was proof of adultery. In some cases the council might be satisfied of that by proof of the decree coupled with transcript of the judgment. If there is no dispute on the facts, that may well be sufficient for them. At the same time, they are under a duty to make due inquiry, and, if the facts are in dispute, according to the ordinary principles of the administration of justice, they must hear the one against whom an accusation is made and any witnesses whom he desires to call.

The standing orders of the council show the procedure normally followed, and I do not know why they should not apply to this case. Para. 9 of the schedule to chapter XIV of the standing orders lays down what should be done. After the solicitor or counsel representing the council, has stated the facts of the case and produced the evidence in support of so much of it as is not admitted,

> . . the practitioner will then be called upon by the president to state his case, and to produce the evidence in support of it. He may address the council either before or at the conclusion of his evidence, but only once.

Paragraph 10 says:

> "Evidence may be taken by the council by oral statement, or by written deposition or statement . . ."

It may well be said to be inconvenient to have some part of the evidence in one form and some in another, but that difficulty is not insurmountable.

The answer to the problem with which we are confronted can be expressed in a few words. The legislature has made proof of a conviction conclusive. It has not done so in the case of a decree or order of a judge sitting in divorce. The council does not hold due inquiry (when there is a dispute as to the facts) merely by ascertaining that someone else has made due inquiry and has come to a decision in a cause or suit between different parties. The whole professional future of the practitioner is at stake, and the council is charged with the duty of making due inquiry. It cannot delegate the duty.

Partington v. *Partington* (3) was cited as showing that a finding in one suit that a man had committed adultery is not conclusive in another suit between different parties in the same Division of the High Court. The production of the decree is evidence of adultery, but it does not preclude the alleged adulterer from denying it. I regard the present case as an *a fortiori* case. It is possible (though not likely) that a man, for what might seem to him good reason, would allow a suit in which he was cited as co-respondent to go through without strenuous opposition, and yet desire to contest the facts if he was attacked later in a professional capacity. In my view he is entitled so to do under the terms of the statute. It was pointed out to us, on behalf of the General Medical Council, how inconvenient it would be to have a re-hearing on the issue of adultery and how difficult it would be for a large number of professional men who form the council. These are matters for the legislature and not for us. Members of the medical profession desire to be, and they ought to be, masters within their own household, but they are governed by the terms of the Act which gives them their powers.

A further consideration arises. The evidence of witnesses not called in the divorce court might have weighed with the council on the question as to whether they should order the practitioner's name to be erased from the register even if they had been satisfied of adultery. We do not know what the witnesses would have said. The council refused to hear them because of their practice, to which I have already referred. In this I think they were wrong. I do not overlook the affidavit of the registrar of the council in para. 14 of which he deposes that the decree is accepted, "unless some special circumstances are shown to exist." So far as I can find, no question of this kind was raised, and the evidence was rejected because of the practice not to hear witnesses who were available (but not called) on the hearing of the suit in the Divorce Division.

For the reasons I have given I do not consider that the council made due inquiry within the meaning of the Medical Act, 1858, s. 29, and, that being so, the applicant is entitled to the relief for which he asks. Thus I find myself, to my regret, differing from Viscount Caldecote, L.C.J., and Humphreys, J.

Application refused, with costs.

Solicitors: *Hempsons* (for the applicant); *Waterhouse & Co.* (for the respondents).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

Re LANNOY.

[King's Bench Division (Viscount Caldecote, L.C.J., and Humphreys and Singleton, JJ.), **March 18, 31, 1942**].

Aliens—Detention—Admission into United Kingdom—Refusal of leave to land—Absence of request—Aliens Order, 1920, *arts.* 1 (1) (*a*), 3 (4), 5A.

The applicant, a Belgian national, was prevented by the British naval authorities from entering the Belgian Congo. He was brought to England under arrest, arriving on Dec. 21, 1941. The ship was boarded on arrival by an immigration officer, who informed the applicant that he had been refused permission to land in the United Kingdom. He was removed from the ship in custody and detained in prison under the Aliens Order, 1920, art. 3 (4), which empowers the detention of aliens to whom leave to land is refused. On Mar. 13, 1942, the Home Secretary made an order for the applicant's detention under the Aliens' Order, 1920, art. 5A. At no time did the applicant make any request for leave to land in England, and he claimed that his detention between Dec. 21, 1941, and Mar. 12, 1942, could not be justified under art. 3 (4) since, in the absence of any request, leave to land could not be refused:—

Held (Viscount Caldecote, L.C.J., *dissenting*): there could be a refusal of leave to land within the meaning of art. 3 (4) without any previous request. The applicant's detention accordingly came within the terms of that article.

[**EDITORIAL NOTE.** The question at issue here is the construction of an article in the Aliens Order, 1920. As a matter of pure logic, it may be a nice question whether there can be a refusal apart from a previous request, but the rules of construction allow a certain latitude in order that the thing may not perish. The court have not found it possible to come to a unanimous decision on the question of construction, but the difference appears to be whether sufficient latitude can be given to the words of the article to embrace the circumstances of this case. The majority have come to the conclusion that there can be an anticipatory refusal where there is in fact no request. The difficulty of the case has been increased by the fact that the regulations have been added to from time to time and are not now capable of being construed as a whole.

As to Detention of Aliens, see HALSBURY, Hailsham Edn., Vol. 1, p. 478, para. 807; and for Cases, see DIGEST, Vol. 2, pp. 193-197, Nos. 540-553.]

Application for a writ of *habeas corpus*. On Feb. 27, 1942, Roger Henri Lannoy applied to Asquith, J., for a writ of *habeas corpus*. The application was adjourned for hearing by a Divisional Court, but on Mar. 13, before date of the hearing, the Home Secretary, acting under the Aliens Order, 1920, art. 5A, gave a direction for the applicant's detention. In the light of this direction it was conceded that there were no grounds for the issue of the writ, but the applicant asked for costs on the ground that he would have been entitled to succeed but for the direction of Mar. 13.

G. O. Slade for the applicant.

The Attorney-General (*Rt. Hon. Sir Donald Somervell, K.C.*) and *Valentine Holmes* for the respondent.

Viscount Caldecote, L.C.J.: The applicant is a Belgian national by birth. On Nov. 7, 1941, while he was on his way from Lisbon to the Belgian Congo via Angola, he was taken off the ship on which he was travelling and placed under arrest on one of His Majesty's ships. On the same evening he was put on shore at

Freetown, Sierra Leone, and handed over to the authorities there. On the following day an expulsion order was made against him by the deputy governor of Sierra Leone under the provisions of the Aliens (Expulsion) Ordinance, 1939, s. 3. On Nov. 29, having meanwhile been detained in custody, he was put on board a Dutch steamship and taken to Avonmouth, where he arrived on Dec. 21, 1941. On the same day an immigration officer at Avonmouth saw the applicant on board the Dutch ship and informed him that he would be refused leave to land, and that arrangements would be made to remove him from the ship in custody. What was called a " refusal slip " was then handed to the applicant. No request for leave to land had been made by the applicant, and he had not attempted and was not proposing to land without leave. The " refusal slip " was a written intimation, given under the Aliens Order, 1920, to the effect that leave to land had been refused in the case of the applicant. The ground of refusal was given as : " Art. 1 (1) (*a*) (for removal to Brixton Prison) ". The article referred to was contained in the Aliens Order, 1920. It was in these circumstances that the applicant made the application for a writ of *habeas corpus*. The Attorney-General sought to justify the detention of the applicant between Dec. 21, 1941, and Mar. 12, 1942, by reference to the Aliens Order, 1920, art. 3 (4).

That order, in its present form, is a composite document, consisting of a number of paragraphs made at various times, as occasion demanded. Some parts of the order are difficult to fit in with other parts. Art. 1 (1) (*a*), so far as material to the present case, provides as follows :

> Subject to any exemptions which may be granted under Art. 14 of this Order, an alien coming by sea to a place in the United Kingdom . . . (*a*) shall not land in the United Kingdom without the leave of an immigration officer . . .

Art. 3 (4), so far as material, provides as follows :

> Where leave to land is refused to an alien, the alien may either (*a*) with the leave of the immigration officer, be placed temporarily on shore and detained at some place approved by the Secretary of State ; or (*b*) be removed from the ship by, or under the directions of, an immigration officer and so detained . . .

If the applicant was refused leave to land within the meaning of art. 3 (4), it is not in dispute that his detention was throughout lawful. The question, therefore, for our decision is whether the applicant was so refused leave to land.

The substance of the argument of the Attorney-General was that the language of art. 3 (4) should be read as if the word " refused " meant " not given," and that, if art. 3 (4) does not cover the present case, there is no power to detain an alien, apart from the new art. 5A. The interpretation of art. 3 (4) for which the Attorney-General contended would have the effect of giving power to an immigration officer at a port in the United Kingdom to take into custody aliens who happened to be passengers on a ship calling there, even though they had no intention of landing and made no application for leave to land. The immigration officer would, on that footing, only have to say that leave to land was refused in the case of any aliens whom he desired to arrest in order to give himself the necessary power. Such a power might conceivably, in time of war, be taken under authority given by Parliament to the Home Secretary or other Minister of the Crown, and it would be easy to find plain words. I find it difficult, however, to believe that the words which we have to construe were designed to have the effect suggested by the Attorney-General. It is no doubt true that unusual and far-reaching powers are necessary in war-time for the defence of the realm. The Aliens (No. 2) Order, 1941, art. 2, which added art. 5A to the Aliens Order, 1920, empowered the Secretary of State to give the direction for the detention of the applicant, and illustrates the extent to which Ministers have been armed with extraordinary powers. Defence (General) Regulations, 1939, reg. 18B, is another illustration. In construing the Aliens Order, 1920, art. 3 (4), I have the misfortune to differ from the other members of the court, and that fact naturally makes me hesitate to express the opinion which nevertheless I have formed. Leave to land can, in my judgment, only be said to be " refused " within the meaning of art. 3 (4) to someone who has asked for leave to land, or is seeking or attempting to land without leave, or whom it is proposed to put on shore against his wish. The Attorney-General's argument could not, as I think, succeed unless different words are substituted for the words used in the article. Having formed this opinion, I think that the applicant should have his costs.

Humphreys, J. : I regret that I have arrived at a different conclusion from that of my Lord. If nothing more were involved than a question of costs, I should have deferred to his view, since costs are always a matter of discretion. However, our decision may affect other cases, past or future, and the case has been fully argued, and I therefore think it my duty to state my own opinion.

The short facts of the case upon which I found my judgment are as follows. The applicant is a Belgian national. He is regarded by the executive as a person whose detention is necessary for securing the defence of the realm. He has been, if not so regarded, at least under strong suspicion since Nov. 7, 1941, when he was prevented by the action of a naval authority from entering the Belgian Congo. He was brought to England under arrest in a ship which arrived at an English port on Dec. 21, 1941. The legality of his detention up to this point is not questioned in these proceedings. That ship was boarded on arrival by an immigration officer, who informed the applicant that he had been refused leave to land in the United Kingdom and that he would be removed from the ship in custody. He was then, while still in the ship, handed over to a constable, who took him in custody to a prison from which he was subsequently transferred to Brixton Prison, where he now is. He did not, at any time, apply for leave to land in the United Kingdom. Since Mar. 13, 1942, the applicant has been detained under an order of that date made by the Secretary of State in pursuance of the Aliens Order, 1920, art. 5a. The legality of that detention is not challenged. The question for our determination is whether the detention of the applicant between Dec. 21, 1941, and Mar. 13, 1942, was legal or otherwise. The Crown seeks to justify the detention during that period under the Aliens Order, 1920, art. 3 (4).

If I rightly understood the argument of the Attorney-General, it was that art. 3 (4) (*a*) is intended to apply to the case of an alien who is removed from the ship at the request or with the approval of the master with a view to his being returned to the ship when she is ready to sail (see cl. (5), which imposes upon the master of the ship in which the alien arrives the duty of removing him from the United Kingdom, and explains the use of the word " temporarily ") while art. 3 (4) (*b*) is designed to deal with an undesirable alien who cannot be allowed either to be at large in this country or to continue his voyage, until inquiries about him are complete. It may, for instance, be necessary to consult the representatives in this country of the country of which the alien is a national. In such a case, it is argued, it is essential that power should be given to the immigration officer to detain the alien pending inquiries, and such power is conferred by art. 3 (4) (*b*). If that is so, it is unfortunate that the power of detention was not conferred in simple and unambiguous language instead of in words making it appear that the ground of detention is the refusal of leave to land, whereas that refusal is merely a preliminary step. The Attorney-General expressly disclaimed any right of permanent detention under art. 3 (4), claiming only the power to detain the alien pending a final decision on his case, and the affidavit of Sir Alexander Maxwell, permanent under-secretary of state for home affairs, suggests that this was the view acted upon in this case.

Counsel for the applicant argues that it is absurd to speak of a person as having been refused leave to do something which he has never asked or desired permission to do, and he contends that the word " refusal " postulates a request. I am not prepared to go that length. I see no reason why a landowner who puts up the familiar notice " Trespassers will be prosecuted " cannot accurately be described as refusing leave to the public to go upon his land, though no member of the public has ever applied for such leave. No doubt the word is commonly used in connection with a previous request, and it may well be that such was the intention of the draftsman here, seeing that the article is one dealing, at least in part, with aliens who are seeking to land in the United Kingdom. That, however, is a different thing from holding that there can be no such thing as an anticipatory refusal. That there was in fact a refusal of leave to land in this case is beyond dispute, and I am not prepared to hold that the refusal was without validity or effect merely on account of the absence of a request. Our attention was drawn in argument to the apparent inconsistency to be found in art. 3 (4) and (5), the former providing that any alien to whom leave to land is refused may be removed from the ship and detained, while the latter appears to require that any such alien *shall* be removed from the United Kingdom by the master of the ship in which he arrived. A possible explanation of this may be found in the fact that art. 3 (5) became part of the order in 1923, while art. 3 (4) was apparently not added until Sept. 1, 1939.

Counsel for the applicant indulged in some further destructive criticism of the order which, to my mind, was not altogether successfully met by the Attorney-General. The conclusion, however, at which I have arrived is that the Aliens Order, 1920, in its present form, cannot be regarded as a single piece of legislation. It is rather a patchwork which has been so frequently added to, altered, amended and in parts revoked that little of the original pattern remains, and any attempt to harmonise the various parts is foredoomed to failure. The courts cannot, on that account, refuse to give effect to those parts of the order which are essential to the defence of the realm in time of war, and, in my view, the only safe canon of construction to be adopted in such a case is to see whether the words in the order relied upon are wide enough to cover the facts of the case, without giving to those words a strained or unnatural meaning. Applying that test, I think that there was in this case a refusal to the applicant by the immigration officer of leave to land in the United Kingdom within the meaning of art. 3 (4). It follows that the applicant is deemed to have been in legal custody at the material time.

SINGLETON, J.: The applicant, Roger Henri Lannoy, is a Belgian national by birth. On Nov. 7, 1941, he was removed by an officer of H.M. Navy from a Portuguese ship on its way to the Belgian Congo. He was landed at Freetown and handed over to the authorities at that port. An expulsion order was made against him by the deputy governor of Sierra Leone on Nov. 28, 1941. He was placed on a Dutch ship which arrived at Avonmouth on Dec. 21, 1941. On the arrival of that ship the immigration officer at the port went aboard and saw Lannoy and informed him that he would be refused leave to land and that arrangements would be made to remove him from the boat in custody. He was handed a slip (the usual form in such a case) informing him that leave to land had been refused. He was taken to Bristol Prison and thence to Brixton Prison, which is one of the prisons in which an alien who has been refused leave to land may be detained.

At the time of the original application Lannoy was detained, and no further order had been served upon him, though his solicitor had received from the Home Office the letter dated Feb. 13, 1942, which is exhibited to the applicant's affidavit.

On Mar. 13, 1942, an order was made by the Home Secretary under the Aliens Order, 1920, art. 5A. Counsel for the applicant admitted that he had nothing to say against the validity of that order, and no question arises as to the legality of the detention of the applicant as from that date. Further, counsel agreed that for the purposes of this case he was not making any attack on the action of those who removed Lannoy from the Portuguese ship and who caused him to be brought to the port of Avonmouth. The only question for our consideration, then, is as to the legality of the detention of Lannoy between Dec. 21, 1941, and Mar. 12, 1942.

Sir Alexander Maxwell, the permanent under-secretary of state for home affairs, in his affidavit sworn on Mar. 14, puts the matter in this way. In para. 2 he says:

> After his arrival in this country the said Lannoy was detained under the Aliens Order, 1920, art. 3 (4). The Secretary of State had to consider whether he should direct that the said Lannoy should be detained under the Aliens Order, 1920, art. 5A, and investigations into the case were being carried out. Within the last few days information has been received upon which the Secretary of State decided to make an order under that article a copy of which is now produced to me and marked "A.M.1."

The Attorney-General, on behalf of the respondent, the governor of Brixton Prison, submitted that leave to land had been refused to the applicant as shown by the affidavit of the immigration officer, and that that being so, he could be detained under the Aliens Order, 1920, art. 3 (4). Counsel for the applicant submitted that there could be no refusal of leave to land unless there had been a previous request by the applicant for leave to land and that there had been none. In fact, the applicant did not wish to land in England at all.

The Aliens Order, 1920, has been amended on a number of occasions, one of which was on Sept. 1, 1939, (which amendment included art. 3 (4)), and it is reasonable to assume that the amendments of that date were made in anticipation of war. Art. 1 provides that an alien shall not land in the United Kingdom without the leave of an immigration officer. Art. 3 (1) and (2) deal with the case of an alien who is seeking to land in the United Kingdom. Art. 3 (3) is not so limited in terms, but there can be no doubt as to the strength of the argument that the whole of art. 3 is directed to the case of a man who wishes to land in the United Kingdom.

At the same time one must remember that the amendment by art. 5A was made on Nov. 27, 1941, and, if the argument on the part of the applicant is right, there was no power whatever to detain him in this country while the Secretary of State was considering whether or not an order should be made under art. 5A. As I have said, the validity of his detention on the ship was not attacked for the purposes of this case. We are to regard him as properly removed from the Portuguese ship and properly on the Dutch ship, but, once he sets foot on shore at Avonmouth, it is submitted that his detention was illegal.

It may well be that the ship was at the end of her voyage, and possibly show as due to start on another voyage at an early date. The master would naturally desire to be relieved of the applicant, who had been handed over to his charge. No doubt he would desire to put him ashore. The immigration officer, apprised of the position, refused to give leave to land. He knew of the master's desire. Why is an application from the applicant himself necessary before the immigration officer can refuse leave to land ? Why can there not be a refusal in anticipation of a request ? Consider the case of a party of alien refugees on a ship arriving at a port in the United Kingdom. They wish to land somewhere, but not necessarily at that port. They do not put forward a request to land there. The master of the ship wishes to get them off his ship. The ship is required urgently. In such circumstances can it be said that an immigration officer is not justified in saying in advance and without any request from them : " I shall refuse—and I do refuse—permission to them to land " ? Are they not then persons who fall within art. 3 (4) of the order ? If so, they can be dealt with under that order, that is, detained temporarily. That is not to say that they will always be so dealt with.

It was put to us that, if the Attorney-General's submission was right, an immigration officer could, without any request, refuse permission to land to Dutch subjects on a ship calling at Southampton during a voyage from New York to Rotterdam in peace time and thus take off the ship passengers who did not wish to land and cause them to be dealt with under art. 3 (4). This does not really help towards deciding the point before the court. One must think that officials entrusted with duties under this order will act reasonably, and one must remember that the country is at war. The applicant was, so far as we are concerned, properly detained on the ship. The immigration officer deposes to the fact that he refused him leave to land. *Prima facie*, then, the applicant can be dealt with under art. 3 (4), and he was in lawful custody at all material times. The article is wide enough to cover this case, and I am of opinion that we ought to hold that it does so. It was obviously a more convenient course to deal with the applicant in this way rather than to leave him on the ship while the Home Secretary was considering whether to make an order under art. 5A, and it is reasonable to think that in most cases a decision will be arrived at more speedily, for art. 3 (4) contemplates a temporary detention. In my view, this application should be refused.

Application dismissed with costs.

Solicitors : *Buckeridge & Braune* (for the applicant) ; *Treasury Solicitor* (for the respondent).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

Re ROYAL MUTUAL BUILDING SOCIETY'S APPLICATION (TURNER).

[Chancery Division (Simonds, J.), **February 17, 1942.**]

Emergency Legislation—Mortgages—Appointment of receiver—Mortgagor nominee of third party—Addition of third party as respondent to application—Person "liable to perform the obligation"—Courts (Emergency Powers) Act, 1939 (*c.* 67), *s.* 1 (4).

Where a mortgagor is merely a nominee of a third party, the latter cannot be joined as respondent to an application by the mortgagees under the Courts (Emergency Powers) Acts, 1939-1941, for leave to proceed to exercise any remedy which may be available to them. Such third party is not a person "liable . . . to perform the obligation" within the meaning of s. 1 (4) of the Act.

[**EDITORIAL NOTE.** There have been a number of decisions as to who is a proper party to a summons for the appointment of receiver in the circumstances of this case. It has consistently been decided that only persons liable under the covenant to pay can be made respondents. To the list of persons not liable to pay is now added a company where the mortgage has been entered into by a nominee.

FOR THE COURTS (EMERGENCY POWERS) ACT, 1939, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 32, p. 946. See also BUTTERWORTHS EMERGENCY LEGISLATION SERVICE, Statutes, Vol. p. 206.]

APPLICATION by the Royal Mutual Benefit Building Society under the Courts (Emergency Powers) Acts, 1939-1941 for leave to proceed to exercise any remedy which may be available to them by way of appointing a receiver or taking possession of the property, of the mortgagor. It was stated that the mortgagor was only a nominee of the Saltdean Estate Co., Ltd., and that the mortgagees, the building society, were aware of that fact at the time the mortgages were executed. The mortgagor asked that the Saltdean Estate Co., Ltd., should be added as respondents to the application, in order that the company might show that their inability to pay was due to circumstances arising directly or indirectly out of the war.

G. Dare for the applicants, the building society.

I. J. Lindner for the respondent, the mortgagor.

SIMONDS, J.: In this case, it is urged that, since the mortgagor, Turner, was, to the knowledge of the society, a nominee for a company known as the Saltdean Estate Co., Ltd., that company should be added as respondents to these proceedings and given an opportunity of urging that its inability to pay was due to the war and that its inability to pay was a matter material to the decision of the court in these proceedings.

I am unable to accede to that contention. When I look at sect. 1 (4) of the 1939 Act I find these words:

> If, on any application for such leave as is required under this section for the exercise of any of the rights and remedies [therein mentioned], the appropriate court is of opinion that the person liable to satisfy the judgment or order, or to pay the rent or other debt, or to perform the obligation, in question is unable immediately to do so by reason of circumstances directly or indirectly attributable to any war in which His Majesty may be engaged, the court may refuse leave . . .

It appears to me that I only have to consider the position of the person who is "liable to satisfy the judgment or order, or to pay the rent or other debt, or to perform the obligation," and in this case that is the person who has entered into the obligation of a mortgage debt, and to observe the several covenants and obligations which are contained in the mortgage deed. It appears to me to be quite irrelevant either that he was then, or that he is now, the nominee for and trustee of some other person. I cannot think that that other person has any right to appear and argue before this court that relief should be granted under the Act. In saying that, I am saying it without prejudice to this contention, which I understand it is desired at some stage in these proceedings to put forward, that the nominee may himself plead that he is unable to pay by reason of circumstances attributable to the war, in that, to the knowledge of the society, his ability to pay depended upon the ability of his known principal, the society, to pay. I do not say for one moment that that is valid. I only say that my present decision is that the application that the Saltdean Estate Co. should be added as a respondent must be refused.

Application to add third party refused.

Solicitors: *Simmons & Simmons* (for the applicants); *D. Woodward Davey* (for the respondents).

[*Reported by* IRENE G. R. MOSES, *Barrister-at-Law.*]

Re LEICESTER TEMPERANCE AND GENERAL PERMANENT BUILDING SOCIETY'S APPLICATION.

[Chancery Division (Morton, J.), **March 31, 1942.**]

Emergency Legislation—Mortgages—Application for appointment of receiver—Transfer of property subject to mortgage—No covenant between mortgagee and transferee—Courts (Emergency Powers) Act, 1939 (*c.* 67), *s.* 1 (4).

The transferees of certain properties which were subject to mortgages covenanted to indemnify the mortgagor in respect of the payments due and to become due under the mortgages, but entered into no covenant with the mortgagees. The mortgagees applied under the Courts (Emergency Powers) Acts, 1939-1941, for leave to appoint a receiver, and the mortgagor, and later the transferees, were made respondents to the application :—

Held : (i) neither the mortgagor nor the transferees were persons liable "to perform the obligation" within the Courts (Emergency Powers) Act, 1939, s. 1 (4), and leave to appoint a receiver ought to be granted.

(ii) *semble :* the transferees, being the assignees of the equity of redemption in the property, ought to be made respondents to the application.

[**EDITORIAL NOTE.** As it is suggested that this matter is being taken to the Court of Appeal, it is unnecessary to say more than that Morton, J., if the matter had not been previously decided, would have been inclined to hold that the assignee of an equity of redemption was a person within the provisions of sect. 1 (4). This view, both from the point of view of construction of the statute and the practical necessities of the case, has much to recommend it.

For the Courts (Emergency Powers) Act, 1939, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 32, p. 946. See also BUTTERWORTHS EMERGENCY LEGISLATION SERVICE, Statutes Vol., p. 206.]

Cases referred to :

(1) *Re Woolwich Equitable Building Society's Application* (*Haywood*), [1942] 1 All E.R. 284 ; Digest Supp. 111 L.J.Ch. 105 ; 160 L.T. 146.

(2) *National Provincial Bank, Ltd.* v. *Liddiard,* [1941] 1 Ch. 158 ; [1941] 1 All E.R. 97 ; Digest Supp. 110 L.J.Ch. 25.

(3) *Re Midland Bank Ltd.'s Application,* [1941] 1 Ch. 350 ; *sub nom. Franklin* v. *Midland Bank, Ltd.*, [1941] 2 All E.R. 135 ; Digest Supp. 110 L.J.Ch. 209 ; 166 L.T. 121.

(4) *Wilkes* v. *Goodwin,* [1923] 2 K.B. 86 ; 31 Digest 530, *7080* ; 92 L.J.K.B. 580 ; 129 L.T. 44.

(5) *Wood* v. *Carwardine,* [1923] 2 K.B. 185 ; 31 Digest 530, *7075* ; 92 L.J.K.B. 593 ; 129 L.T. 314.

(6) *Re Abbey Road Building Society* (*Pomeroy's Trustee*), [1940] Ch. 239 ; 109 L.J. Ch. 123 ; 162 L.T. 324 ; Digest Supp.

(7) *Re Hearts of Oak Permanent Building Society's Application,* [1942] 1 All E.R. 46 ; Digest Supp.

(8) *Re Midland Bank Ltd.'s Application* (*Waller's Trustee*), [1942] 1 Ch. 61 ; [1941] 3 All E.R. 299 ; Digest Supp. 111 L.J.Ch. 81 ; 106 L.T. 101.

Application by the mortgagees under the Courts (Emergency Powers) Acts, 1939-1941, for leave to proceed to exercise any remedy which may be available to them by way of appointing a receiver. The facts are fully set out in the judgment.

A. J. Belsham for the applicants.

G. H. Crispin for the respondents.

Morton, J. : This summons raises questions of considerable importance in regard to the true construction of the Courts (Emergency Powers) Act, 1939, s. 1 (4). The applicants, Leicester Temperance & General Permanent Building Society, are the mortgagees of 54 properties in Middlesex, on which there is secured by certain mortgages, all made in June, 1938, an aggregate sum of £24,250. There is payable under the provisions of these mortgages a total sum £1,729 6*s.* 6*d.* per annum. In each case the mortgagor was one Thomas Joseph Gough. By an agreement of Jan. 20, 1939, Gough agreed to sell the mortgaged properties together with certain other properties to a company called Smith Bros. (Swansea), Ltd. (therein called the purchaser), and transfer as directed by the said company subject to the mortgages thereon. Cl. 5 of that agreement provides :

> As from Feb. 3, 1939, the purchaser shall discharge all outgoings including the instalments under the said mortgages.

Cl. 10 provides:

> The premises are sold subject to the mortgages referred to in cl. 1 hereof and the purchaser shall in the assurances of the said premises enter into a covenant with the vendor to repay the sums secured by the said mortgages and to observe the covenants therein contained so far as applicable and to give the vendor the usual indemnity in respect thereof.

Cl. 11 is as follows:

> Mr. Walter N. Williams of 78, New Oxford Street, W.C.1. will undertake to guarantee the repayment of the said mortgages and the observance of the covenants in the said mortgages and he will also give the vendor an indemnity against all liability in respect thereof in the event of any of the [mortgagee societies] making any claim against the vendor in respect of the said mortgages.

It would appear from the evidence before me that the purchasing company must have been a nominee of a company called Acacia Estates, Ltd., and that Williams must have entered into the covenant which I have read as a representative of the last-mentioned company. There is evidence, first, that the applicants on this summons knew of this agreement, secondly, that the applicants looked to Acacia Estates, Ltd., for payment of the instalments, and thirdly, that the applicants corresponded with Acacia Estates, Ltd., in regard thereto. On Jan. 30, 1942, i.e., after these proceedings had started, there was a transfer by Gough, the mortgagor, to Acacia Estates, Ltd., of the mortgaged properties subject to the mortgages and to the aggregate sum of £24, 250 secured thereby. On that transfer Acacia Estates, Ltd., and Williams jointly and severally covenanted with Thomas Gough in the following terms:

> That they will at all times hereafter duly and punctually pay all moneys which now are or shall hereafter become owing or payable under the said charges or any of them respectively at the times and in manner by the said charges or rules of the said society provided and will in all other respects observe and perform all the convenants on the part of the transferor in the said charges expressed or implied.

Then there was a covenant to keep Gough and his estates and effects effectually indemnified in respect of the monies owing under the charges. The applicants were not parties to that transfer, but it would appear that Acacia Estates, Ltd.. thereby become liable to Gough to pay the mortgage debts and to perform the obligations imposed on Gough by the mortgages. The applicants issued this summons on Dec. 24, 1941, and by it asked leave to proceed with exercising any remedy which is available to them by way of appointing a receiver of the mortgaged properties, and they named Gough, and no other person, respondent. This application, of course, was rendered necessary by reason of the Courts (Emergency Powers) Act, 1939, s. 1 (2). Before the application was heard by MASTER HOLLAND, *Re Woolwich Equitable Building Society's Application (Haywood)* (1) was decided by FARWELL, J. At the hearing before the master, Acacia Estates, Ltd., attended by counsel, and they produced an affidavit sworn on Feb. 18, 1942, by a Mr. Harry Landy, one of their directors, deposing to the facts which I have already stated, and they asked to be heard as a person entitled to relief under the Courts (Emergency Powers) Act, 1939, s. 1 (4). That subsection is as follows:

> If, on any application for such leave as is required under this section for the exercise of any of the rights and remedies mentioned in subsects. (1), (2) and (3) of this section, the appropriate court is of opinion that the person liable to satisfy the judgment or order, or to pay the rent or other debt, or to perform the obligation, in question is unable immediately to do so by reason of circumstances directly or indirectly attributable to any war in which His Majesty may be engaged, the court may refuse leave for the exercise of that right or remedy, or give leave therefor subject to such restrictions and conditions as the Court thinks proper.

Landy's affidavit also contains a number of statements which are, I understand, directed to proving that his company was unable to keep up the instalments due under the mortgages by reason of circumstances directly or indirectly attributable to the present war. Having regard to the decision of FARWELL, J., to which I have already referred, the master took the view that he could not hear either Gough or Acacia Estates, Ltd., and he was willing to give the applicants the leave which they sought. At the request of Acacia Estates, Ltd., however, he adjourned the summons to me. In chambers I heard the solicitors for the applicants and counsel for Acacia Estates, Ltd., and, for reasons which I shall state later, I directed the applicants to add Acacia Estates, Ltd., as respondents to the summons. That has been done. I then adjourned the summons into court as a procedure summons, and I have now to consider whether the applicants ought to have the relief which they seek.

I propose, in the first place, to consider what was decided by FARWELL, J., in *Re Woolwich Equitable Building Society* (1). In that case FARWELL, J., had A before him the mortgagee applicant, the mortgagor, and an assignee of the equity of redemption. As in the present case, the assignment contained a covenant by the assignee with the mortgagor that the assignee would pay the mortgage debt. In that case, as in the present case, the assignee had entered into no covenant with the mortgagee. FARWELL, J., decided two points. First, he held that neither the mortgagor nor the assignee was a person liable to pay the debt or to perform the obligation in question within the meaning of B sect. 1 (4). That decision went considerably further than the same judge's decision in *National Provincial Bank, Ltd.* v. *Liddiard* (2), a case which I followed in *Re Midland Bank, Ltd.'s, Application* (3). In the two last-mentioned cases, the owner of the equity of redemption was under no liability to anyone to pay the mortgage debt.

In the present case, I need not consider the position of Gough, the mortgagor. C He was made a party and he has not sought to contend that he comes within the provisions of the Courts (Emergency Powers) Act, 1939, s. 1 (4). I must, however, consider the position of Acacia Estates, Ltd., since this assignee is now a respondent, claims that he is within the subsection and that I ought not to give the applicants the leave which they seek. In the absence of any authority covering the point, I confess I should have felt inclined to construe the words "the person liable to pay the debt or to perform the obligation in question" as D applying to the assignee in the present case. The opening words of the subsection make it clear that it applies to a case where a building society is seeking a remedy in respect of the mortgaged properties such as the appointment of a receiver. What is the debt or obligation in question in such a case? It seems to me that the mortgage debt is the debt in question, and the obligation in question is the obligation to pay that debt by the instalments provided for in the mortgage. Can Acacia Estates, Ltd., properly be described as the person E liable to pay that debt or to perform that obligation? I should have been inclined to answer that question in the affirmative. It is true that this company has entered into no covenant with the mortgagee, but, as between the mortgagor and the company, the company is the person primarily liable to pay the debt. In substance, it is the company's failure to perform that obligation which has given rise to the present application. My attention has been drawn by counsel for the company to the observations of YOUNGER, L.J., in *Wilkes* v. *Goodwin* (4), F at p. 108, and to the observations of McCARDIE, J., in the case of *Wood* v. *Carwardine* (5), at p. 192, as to the construction of legislation, and counsel points out that this is an emergency Act passed with the object of protecting debtors. He pointed out also that I have evidence in the present case that the applicants have looked to the Acacia Estates, Ltd., for payment of the instalments and have corresponded with the company in regard thereto. I do not think, G however, that this is an unusual state of affairs. In fact, I think it is a very usual state of affairs when a mortgagee knows of an assignment, and it may well have been the state of affairs in the *Woolwich* case (1). I have formed the view that, so far as regards the first point decided by FARWELL, J.,—namely, that the assignee is not a person who comes within the provisions of sect. 1 (4) of the Act—the present case cannot properly be distinguished from the *Woolwich* case (1), on the ground that I have just mentioned, or on any other ground, and H that the right course for me to adopt is to follow the decision of FARWELL, J., on this point.

There is, however, another point in this case. FARWELL, J., decided, secondly, that it was not proper to make either the mortgagor or the assignee of the equity of redemption a party to the application, and that the application ought to be made by the mortgagee *ex parte*. This decision stands on a different footing from the decision of FARWELL, J., on the first point, and I did not feel bound to follow it in the present case when the matter came before me in chambers. So

far as the assignee is concerned, and so far as it decides that the assignee should
not be made a respondent, it seems to me difficult to reconcile with the views
expressed by myself in *Re Abbey Road Building Society* (*Pomerroy's Trustee*) (6)
and *Re Hearts of Oak Permanent Building Society's Application* (7), and by
UTHWATT, J., in *Re Midland Bank, Ltd.'s Application* (*Waller's Trustee*) (8).
in regard to the propriety of making the person entitled to the equity of redemp-
tion a respondent. The reports of the decision of FARWELL, J., in the *Woolwich*
A case (1), to which I have been referred, do not reveal whether or not these three
cases were cited to him. In the present case, counsel for Acacia Estates, Ltd.,
intimated that his clients desire to have the opportunity of testing the decision
of FARWELL, J., in the *Woolwich* case (1), by taking the present case to the
Court of Appeal, and, without laying down any general rules as to who should
be made respondent in an application such as the present one, I thought it would
be unjust to deprive Acacia Estates, Ltd., of that opportunity. It was for this
B reason that I directed that company to be made a respondent. No doubt the
decision of the Court of Appeal in the present case will dispose of all doubts as
to whether the assignee should be made a respondent, in addition to deciding
whether the assignee is or is not a person liable to pay the debt or to perform
the obligation within the meaning of sect. 1 (4). Since I propose simply to
follow the decision of FARWELL, J., on the first point in the *Woolwich* case, it
C would serve no useful purpose for me to consider the evidence that the assignee
in the present case has put in for the purpose of showing his inability to pay the
debt or to perform the obligation is due to the present war. That evidence
only becomes material if it is held that Acacia Estates, Ltd., come within the
terms of sect. 1 (4). In view of the decision in the *Woolwich* case (1), I feel
bound to give the applicants the leave for which they ask on the summons.

Leave to appoint a receiver granted to the applicants.

D Solicitors: *Bracewell & Leaver* (for the applicants); *R. Raymond Pollard & Co.* (for the respondents).

[*Reported by* IRENE G. R. MOSES, *Barrister-at-Law.*]

owed. *Re* BIDIE (*decd.*). [1948]
ll E.R. 885.

Re WOOLGAR, WOOLGAR *v.* HOPKINS.

E [CHANCERY DIVISION (Simonds, J.), **April 21, 1942.**]

Executors and Administrators—Administration action—Right to bring—Arrears of alimony due to plaintiff—Whether a debt due from the estate—R.S.C., Ord. 42, *r.* 24—*Matrimonial Causes Rules*, 1937, *rr.* 62, 81.

The plaintiff claimed administration as a creditor of the estate of her
deceased husband. She obtained an order of the court for the payment
F of permanent alimony to her in 1928. At the date of his death there were
arrears of the payments due under that order:—

HELD: arrears of alimony were not recoverable in the administration of the estate of a deceased person, and consequently the plaintiff could not maintain an action for administration.

[**EDITORIAL NOTE.** The point here decided has been the subject of conflicting
authorities, but it has generally been assumed, since the decision in *Re Hedderwick* (3)
G in 1933, that *Re Stillwell* (2) must be treated as an authority that it is out of line with
previous authorities and not one which would be followed. The only other question
raised was whether the alterations in the Matrimonial Causes Rules had affected the
position and this contention was based upon the provisions of r. 81 of the 1937 rules.
This contention is shown to be untenable, and the result is that, although a court of first
instance cannot overrule the decision in *Re Stillwell* (2), that decision has now been
rejected as an authority on two occasions and must be regarded as unlikely to be
followed in the future.

H AS TO PAYMENT OF ALIMONY AFTER DEATH OF HUSBAND, see HALSBURY, Hailsham Edn., Vol. 10, pp. 794, 795, para. 1260; and FOR CASES, see DIGEST, Vol. 27, pp. 540, 541, Nos. 5900-5904.]

Cases referred to:

(1) *Morse* v. *Muir*, [1939] 2 K.B. 106; [1939] 2 All E.R. 40; Digest Supp.; 108 L.J. K.B. 369; 160 L.T. 293.

(2) *Re Stillwell, Brodrick* v. *Stillwell*, [1916] 1 Ch. 365; 27 Digest 541, *5901*; 85 L.J.Ch. 314; 114 L.T. 604.

(3) *Re Hedderwick, Morten* v. *Brinsley*, [1933] Ch. 669; Digest Supp.; 102 L.J.Ch. 193; 149 L.T. 188.

ADJOURNED SUMMONS to determine whether a widow to whom arrears of alimony were due could maintain a claim for administration of her deceased husband's estate as a creditor. The facts are fully stated in the judgment. The defendant, the executrix of the deceased husband, contended that the arrears of alimony were not recoverable from the estate of the deceased and that, since, if that were so, there was no debt due to the plaintiff, the latter was not a creditor and had no right to claim administration.

F. C. Watmough for the plaintiff.

A. P. Vanneck for the defendant.

SIMONDS, J.: The plaintiff's claim arises in this way. By an order of the Probate, Divorce and Admiralty Division, in divorce, made on Jan. 25, 1928, the late Robert Woolgar was ordered, out of his income and until further order of the court, to pay or cause to be paid to the plaintiff in this action, therein called the petitioner, permanent alimony at and after the rate of £120 per annum. That order was made in 1928. In 1929 and 1935 the plaintiff took advantage of bankruptcy proceedings in order to obtain, under a judgment summons, an order for payment of certain monthly sums due to her. It is clear, from the authority of *Morse* v. *Muir* (1), that, so far as the arrears of alimony ordered by the divorce court are covered by any order in bankruptcy made upon judgment summons, the plaintiff must be deemed to have made her election, and those arrears are no longer capable of being enforced. It is conceded on the part of the executrix, the defendant to these proceedings, that there are certain arrears which have not been the subject of proceedings in bankruptcy, and, so far as they are concerned, the case of *Morse* v. *Muir* (1) is not an objection to these proceedings.

In regard to those arrears of alimony, I have to determine the question whether a person to whom arrears of alimony are due is able to maintain, in this court, a claim for administration as a creditor. On that two points arise. First of all, there is a conflict of judicial authority between *Re Stillwell* (2) decided by SARGANT, J., and *Re Hedderwick* (3), decided by LUXMOORE, J. Those cases were both decided under the Matrimonial Causes Rules which were in force before 1937. The second point which I have to determine is whether the alteration made in those rules in 1937 has made any difference.

In *Re Stillwell* (2), SARGANT, J., decided that:

> Where an order has been made against a husband for judicial separation and for payment of alimony his widow may recover against his estate, if solvent, any arrears of alimony due at his death.

The judge questioned whether such arrears were recoverable if the husband's estate were insolvent.

If the matter stood there, I should, of course, follow the decision of SARGANT, J., but in *Re Hedderwick* (3), precisely the same question came before LUXMOORE, J., and the judge was invited to review all the authorities and to say that the decision of SARGANT, J., was out of line with the authorities and ought not to be followed. LUXMOORE, J., reserved his judgment, and after reviewing all the authorities, he came to the conclusion that an order for alimony, assuming it was enforceable during the testator's lifetime, ceased to be so upon his death, and consequently the person who there claimed alimony was not entitled to recover anything against the testator's estate. The judge was further of the opinion that the position was the same whether the estate was solvent or insolvent.

I do not think it necessary to add any more than this, that having read and considered the judgment of LUXMOORE, J., I am content to adopt both his reasoning and his conclusion. In my judgment, the arrears of alimony are not recoverable in the administration of the estate of a deceased person in this division, whether the estate is solvent or insolvent, and, of course, it follows that, if they are not so recoverable, the person who claims them cannot maintain an action for administration.

The next question is whether any difference has been made by the alteration in the Matrimonial Causes Rules, 1937. The suggestion is that r. 81, which is a new rule, has made a difference, and that, to use a neutral word, a liability not hitherto provable in the administration of an estate is now provable.

Rule 81 provides as follows:

> Subject to the provisions of these rules and of any statute, the Rules of the Supreme

Court shall, notwithstanding the provisions of ord. 68 thereof, apply with the necessary modifications to the practice and procedure in any matrimonial cause or matter to which these rules relate.

And it is said that the result of r. 81 is to introduce the provisions of R.S.C., Ord. 42, r. 24. That rule is as follows :

> Every order of the court or a judge in any cause or matter may be enforced against all persons bound thereby in the same manner as a judgment to the same effect.

It is said that here there is an order for alimony made by the divorce court, and that that order can be enforced as if it were a judgment to the same effect. A judgment, of course, can be enforced by way of proof in the administration of the estate. Therefore, it is said, under this rule, the order of the divorce court can be enforced in this way.

However, r. 81 begins with these words :

> Subject to the provisions of these rules . . .

I turn, therefore, to r. 62, which is the rule which deals with the enforcement of orders, and that rule prescribes the way (and, as I think, the only way) in which an order of the divorce court may be enforced.

Rule 62 prescribes :

> In default of payment to any person of any sum of money at the time appointed by any order of the court for the payment thereof, a writ of *fieri facias*, sequestration or *elegit* shall be sealed and issued as of course out of the Divorce Registry upon an affidavit of service of the order and of non-payment.

That rule would be wholly unnecessary if the result of r. 81 was to substitute, as a means of enforcing the orders of the divorce court, the provisions of R.S.C., Ord. 42, r. 24. Accordingly, I must come to the conclusion that r. 81 has not made any difference in this respect, and that the decision of LUXMOORE, J., in *Re Hedderwick* (3), must still be regarded as an authority. In those circumstances I can do no other than dismiss this application.

Application dismissed, without costs.

Solicitors : *Alfred Nisbet & Son* (for the plaintiff) ; *Radcliffes & Co.* (for the defendant).

[*Reported by* IRENE G. R. MOSES, *Barrister-at-Law.*]

HUMPHREYS *v.* TYLER.

[KING'S BENCH DIVISION (Viscount Caldecote, L.C.J., and Humphreys and Singleton, JJ.) **March 26, 1942.**]

Emergency Legislation—Billeting—Service of billeting notice—Service by police constable in presence of billeting officer—Defence (General) Regulations, reg. 22.

A billeting notice under the Defence (General) Regulations, reg. 22, was prepared by the billeting officer and handed to the respondent by a police constable in the presence of the billeting officer. On an information for failing to comply with the notice, the respondent contended that, since it had not been served by the billeting officer personally, the service of the notice did not comply with the regulation :—

HELD : the notice was properly served upon the respondent.

[**EDITORIAL NOTE.** The service of billeting notices has been the subject of some discussion and the decision herein will, perhaps, avoid any difficulty in future. It must be admitted, however, that the regulation is not very happily drafted and a specific regulation dealing with the service of such notices might well be included in the regulations. There are well-known limitations to the principle *delegatus non potest delegare*, and it is not usually applied to purely ministerial acts, but here the regulation in plain terms requires the person serving the notice to be authorised by the Minister of Health or the Commissioner of Works.

FOR THE DEFENCE (GENERAL) REGULATIONS, see BUTTERWORTHS EMERGENCY LEGISLATION SERVICE [13] 31.

APPEAL by way of case stated from a decision of the justices for the county of Flint sitting at Caergwle, dated July 3, 1941. The magistrates dismissed an information against the respondent for failing to comply with a billeting notice served under the Defence (General) Regulations, reg. 22, on the ground that the notice had not been properly served. The relevant provision of the regulations is the Defence (General) Regulations, reg. 22 (1), which provides as follows:

> Any person acting under the authority of the Minister of Health or the Commissioner of Works may serve upon the occupier of any premises a written notice (hereinafter referred to as "a billeting notice") . . . .

Valentine Holmes for the appellant. The respondent did not appear and was not represented.

Viscount Caldecote, L.C.J.: On May 23, 1941, a billeting officer, as found by para. 5 of the case, prepared and made out a billeting notice against the respondent and handed the billeting notice to a police constable for service upon the respondent. Another billeting notice was then issued, and this notice was served by the police constable upon the respondent in the presence of the billeting officer. The magistrates have held that the police constable, not being a billeting officer, had no power to serve the billeting notice; that the billeting officer had no power to authorise the police constable to serve the billeting notice; and that the notice had not, therefore, been validly served upon the respondent.

The mere statement of the facts and of the point which was taken on behalf of the respondent and accepted by the magistrates is enough to show that the respondent's contention was singularly devoid of any merits. The Defence (General) Regulations are drawn and are intended to provide for the circumstances, sometimes emergencies, arising out of the defence of the realm. The requirements for what are called billeting facilities are a necessary part of the steps which have been taken to safeguard people, chiefly children, who would otherwise be exposed to risk of death or injury. In this particular case, there is no doubt whatever, in my judgment, upon the facts as stated, that the billeting notice was properly served upon the respondent, for the simple reason that the person who in fact handed the notice to the respondent was authorised to do so by the billeting officer. The police constable, in other words, was the person deputed by the billeting officer to serve the notice. I cannot see why anybody should say that that is not a service by the billeting officer. It is self-evident that it could not have been the intention of the regulation to require a single billeting officer himself, or, indeed, any number of billeting officers themselves, personally to serve these notices, provided that everything which was necessary to put the notice into the hands of the person upon whom it was to be served was done. In this case, the police constable, being expressly authorised, as the case says, by the billeting officer and acting in the presence of the billeting officer. put the notice into the hands of the respondent. It is sufficient for me to say that the point taken by the respondent was a bad point and the preliminary objection taken before the magistrates should have been overruled. Therefore, this appeal ought to be allowed.

We have been asked by counsel for the appellant whether we will consider making any observation on the question, which we are informed has sometimes been raised, as to whether the notice is bad or is not served unless it is served in the presence of the billeting officer. Any observation upon that point is merely an *obiter dictum* on my part. Provided the billeting officer has authority to act as a billeting officer, I can see no reason at all why he should not authorise some person to serve the billeting notice which has been prepared, even though he himself, the billeting officer, is not present when the notice is served. That, however, is an observation which is not necessary for the determination of this case. On the facts of this case it is clear, to my mind, that the notice was properly served.

Humphreys, J.: I agree with the judgment of my Lord, and I also agree with the observation which he has just made, although that may be described as an *obiter dictum*.

Singleton, J.: I agree.

Appeal allowed.

Solicitors: *Maples, Teesdale & Co.*

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

DUNCAN *v.* CAMMELL LAIRD & CO., LTD.

[HOUSE OF LORDS (Viscount Simon, L.C., Lord Thankerton, Lord Russell of Killowen, Lord Macmillan, Lord Wright, Lord Porter and Lord Clauson), **March 13, 14, 17, April 27, 1942.**]

Discovery—Objection to produce documents—Privilege—Production contrary to public interest.

The appellants asked for an order for the production of certain documents. The First Lord of the Admiralty had made an affidavit in which he stated that such production would be contrary to the public interest. Some of the documents had already been produced before a tribunal of inquiry into the loss of one of His Majesty's ships and reference was made to parts of them in the report issued as a command paper. It was contended that the court should have the document produced and exercise its judgment upon the matter :—

HELD : (i) an order for production ought to be refused. Documents otherwise relevant and liable to production need not be produced if, owing to their actual contents, or the class of documents to which they belong, the public interest requires that they should be withheld. An objection to the production of documents duly taken by the head of a government department should be treated by the court as conclusive.

(ii) the limited circulation of the document at the inquiry and the limited reference to them in the report was not a matter which ought to be taken into consideration in deciding the right to refuse production.

Decision of the Court of Appeal ([1941] 1 All E.R. 437) *affirmed.*

[**EDITORIAL NOTE.** The main contention in this case, both in the Court of Appeal and in the House of Lords, has been that the court ought to inspect the documents in order to satisfy itself that the claim of privilege was rightly made. It has hitherto been stated to be the practice of the courts to accept the statement of one of His Majesty's ministers that production would be prejudicial to the public interest, but, with the present decision of the House, what has been a matter of practice will become a matter of law. It should be noticed that the documents were given some limited publication at the inquiry into the loss of the Thetis, but it is held to be so limited as not to be a matter which ought to influence the decision.

AS TO THE PRODUCTION OF DOCUMENTS WHERE DISCLOSURE IS CONTRARY TO PUBLIC INTEREST, see HALSBURY, Hailsham Edn., Vol. 10, pp. 397, 398, para. 479 ; and FOR CASES, see DIGEST, Vol. 18, pp. 166-169, Nos. 1202-1223.]

Cases referred to :

(1) *Commissioners of the Board of Customs for Scotland* v. *Vass* (1822), 1 Sh. Sc. App. 229 ; 18 Digest 168, *m*.
(2) *Home* v. *Bentinck* (1820), 2 Brod. & Bing. 130 ; 22 Digest 394, *4027*.
(3) *Thomas* v. *R.* (1874), L.R. 10 Q.B. 44 ; 18 Digest 60, *166* ; 44 L.J.Q.B. 17.
(4) *Deare* v. *A.-G.* (1835), 1 Y. & C. Ex. 197 ; 18 Digest 60, *165*.
(5) *A.-G.* v. *Newcastle-upon-Tyne Corpn.*, [1897] 2 Q.B. 384 ; 18 Digest 59, *162* ; 66 L.J.Q.B. 593 ; 77 L.T. 203.
(6) *Marks* v. *Beyfus* (1890), 25 Q.B.D. 494 ; 22 Digest 396, *4039* ; 59 L.J.Q.B. 479 ; 63 L.T. 733.
(7) *Anderson* v. *Hamilton* (1816), 2 Brod. & Bing. 156, n. ; 22 Digest 394, *4025*.
(8) *Young* v. *Excise Comrs.* (1816), 19 Fac. Coll. 102 ; 18 Digest 394, *a*.
(9) *Wyatt* v. *Gore* (1816), Holt. N.P. 299 ; 22 Digest 394, *4024*.
(10) *Smith* v. *East India Co.* (1841), 1 Ph. 50 ; 18 Digest 169, *1218* ; 11 L.J.Ch. 71.
(11) *Wadeer* v. *East India Co.* (1856), 8 De. G.M. & G. 182 ; 18 Digest 168, *1213* ; *sub nom. Coorg (Rajah)* v. *East India Co.*, 25 L.J.Ch. 345 ; *sub nom. Veer Rajundur Wadeer (ex-Rajah of Coorg)* v. *East India Co.*, 27 L.T.O.S. 30.
(12) *H.M.S. Bellerophon* (1874), 44 L.J. Adm. 5 ; 18 Digest 167, *1203* ; 31 L.T. 765.
(13) *Hastings* v. *Chalmers* (1890), 28 S.L.R. 207.
(14) *Muir* v. *Edinburgh Tramways Co., Ltd.*, [1909] S.C. 244.
(15) *Spigelman* v. *Hocken*, *Goldblatt* v. *Hocken* (1933), 150 L.T. 256 ; Digest Supp.
(16) *Beatson* v. *Skene* (1860), 5 H. & N. 838 ; 22 Digest 392, *4013* ; 29 L.J. Ex. 430 ; 2 L.T. 378.
(17) *Dickson* v. *Wilton (Earl)* (1859), 1 F. & F. 419 ; 32 Digest 156, *1881*.
(18) *Hennessy* v. *Wright* (1888), 21 Q.B.D. 509 ; 18 Digest 168, *1210* ; 57 L.J.Q.B. 530 ; 59 L.T. 323.
(19) *Kain* v. *Farrer* (1877), 37 L.T. 469 ; 18 Digest 83, *372*.
(20) *Asiatic Petroleum Co., Ltd.* v. *Anglo-Persian Oil Co., Ltd.*, [1916] 1 K.B. 822 ; 18 Digest 166, *1202* ; 85 L.J.K.B. 1075 ; 114 L.T. 645.
(21) *Admiralty Comrs.* v. *Aberdeen Steam Trawling & Fishing Co.*, [1908] S.C. 335 ; 18 Digest 168, *o*.

(22) *Ankin* v. *London & North Eastern Ry. Co.*, [1930] 1 K.B. 527 ; Digest Supp. ; 99 L.J.K.B. 293 ; 142 L.T. 368.
(23) *Robinson* v. *South Australia State* (*No.* 2), [1931] A.C. 704 ; Digest Supp. ; 100 L.J.P.C. 183 ; 145 L.T. 408.
(24) *The Zamora*, [1916] 2 A.C. 77 ; 37 Digest 652, *1071* ; 85 L.J.P. 89 ; 114 L.T. 626.
(25) *Chatterton* v. *Secretary of State for India in Council*, [1895] 2 Q.B. 189 ; 18 Digest 168, *1212* ; 64 L.J.Q.B. 676 ; 72 L.T. 858.

APPEAL from a decision of the Court of Appeal (MACKINNON, GODDARD and DU PARCQ, L.JJ.), dated Mar. 13, 1941, and reported [1941] 1 All E.R. 437, A
dismissing an appeal against an order of HILBERY, J., dated Feb. 21, 1941. The facts are fully set out in the opinion of VISCOUNT SIMON, L.C.

H. J. Wallington, K.C., and *F. D. L. McIntyre* for the appellant.

F. A. Sellers, K.C., and *R. Marven Everett* for the respondents.

VISCOUNT SIMON, L.C. : My Lords, the question to be determined in this appeal is as to the circumstances in which it may be validly claimed on behalf B
of the Crown that documents, the production of which is demanded by regular process in a civil action, should not be produced on the ground that it would be contrary to the public interest to produce them, and as to the proper procedure to be followed if this claim is to be made good. This question is of high constitutional importance, for it involves a claim by the executive to restrict the material which might otherwise be available for the tribunal which is trying the case. This material one party, at least, to the litigation may desire in his own interest C
to make available, and without it, in some cases, equal justice may be prejudiced. The question may arise, as in the present instance, in an action between private parties ; but it may also arise in a case where the Crown itself, or the Crown's representative, is a party to the suit and declines to produce a document or objects to the production of a document by the other side. In framing my opinion, I have had the advantage of consultation with, and contribution from, D
the six noble and learned Lords who sat with me at the hearing of the appeal, and, while what I am about to say is the expression of my own view, I have reason to think that it also expresses the judgment of my colleagues.

It is first necessary to state the facts which give rise to the question in the present case. On June 1, 1939, the submarine "Thetis," which had been built by the respondents under contract with the Admiralty, was undergoing her submergence tests in Liverpool Bay, and, while engaged in the operation of E
a trial dive, sank to the bottom, owing to the flooding of her two foremost compartments, and failed to return to the surface, with the result that all who were in her, except four survivors, were overwhelmed. Ninety-nine men lost their lives in this lamentable disaster. A large number of actions have been instituted by those representing, or dependent upon, some of the deceased against the respondents and three other persons claiming damages for negligence. All of these actions, except two, have been stayed until after the trial of two F
test actions, which have been consolidated, and it is the plaintiffs in these two test actions who are the appellants to your Lordships' house.

The respondents in their affidavit of documents object to produce a number of documents listed under para. (B) of the second part of the first schedule for the reason which they set out in their affidavit as follows :

> . . . because they have been acquired and are held by them or are copies of documents which came into their custody in their capacity of contractors and agents for the G
> Lords Commissioners of the Admiralty and subject to the directions of the First Lord of the Admiralty and not otherwise, and the attention of the First Lord having been drawn to the nature and contents of the said documents the Treasury Solicitor has by his letter to the London agents of their solicitors dated Aug. 13, 1940 . . . directed the defendant company not to produce the said documents and copies and to object to production thereof in these actions except under the order of this honourable court on the ground of Crown privilege.

H
The letter from the Treasury solicitor therein referred to contained the following passage :

> The question of the production of the documents has been considered by Mr. Alexander, the First Lord of the Admiralty, and I am instructed to inform you that Crown privilege is claimed for all those in your list numbered 1-16 other than those numbered 4, 7, and 8, and, with these three exceptions, the documents must accordingly not be produced.
>
> I assume that you will produce this letter to the plaintiffs' solicitors, and if necessary to the master, and, if it is not accepted as sufficient to found a claim for privilege, I will obtain an affidavit from Mr. Alexander making the claim formally.

On Jan. 29, 1941, Mr. Alexander, as First Lord of the Admiralty, swore an affidavit referring to the documents above referred to and stating :

> All the said documents were considered by me with the assistance of my technical advisers and I formed the opinion that it would be injurious to the public interest that any of the said documents should be disclosed to any person. I accordingly instructed the Treasury solicitor to write on behalf of the Lords Commissioners to the solicitors to the said defendants not to disclose the documents set out in the said list or their contents to the plaintiffs or either of them or to anyone on their behalf nor produce them A for inspection in this action and to require them to claim privilege for the documents on the ground that it would be injurious to the public interest that the same should be disclosed or produced for inspection. A copy of the said list together with a copy of the said letter written by the Treasury solicitor on my said instructions are now produced and shown to me and marked " A.V.A."
>
> On the above grounds I object on behalf of the Lords Commissioners to the said documents or any of them or their contents being disclosed or inspected by the plaintiffs B or either of them or by anyone on their behalf in this action.

The appellants took out a summons, which came before MASTER HORRIDGE, calling on the respondents to give inspection of the documents. The master refused to order inspection, and his decision was confirmed by HILBERY, J., sitting in chambers. In the Court of Appeal MACKINNON, GODDARD, and DU PARCQ, L.JJ., unanimously affirmed the judge's order, but gave leave to appeal to this House.

C The nature of the documents, to the production of which objection is thus taken, is described in the respondents' affidavit. They include (either in original or as a copy) the contract for the hull and machinery of the " Thetis," letters written before the disaster relating to the vessel's trim, reports as to the condition of the " Thetis " when raised, a large number of plans and specifications relating to various parts of the vessel, and a notebook of a foreman painter D employed by the respondents.

It was urged before us that, whatever the true principles upon which production of documents should be refused on the ground of public interest, some of these documents could not be validly withheld because they had already been produced before the tribunal of inquiry into the loss of the " Thetis," over which BUCKNILL, J., presided, and because some reference was made to them in his report (Cmd. 6190 of 1940). I am not convinced that in all cases a claim, E validly made in other respects, to withhold documents in connection with a pending action on the ground of public policy, is defeated by the circumstance that they have been given a limited circulation at such an inquiry, for special precautions may have been taken to avoid public injury, and some portion of the tribunal's sittings may have been secret. Moreover, in point of fact, BUCKNILL, J., does not set out these documents *in extenso*, and there must be other entries in them which have not been reproduced. The appeal should be F determined without being affected by this special circumstance.

We have been referred to a large number of reported cases dealing with the claim to withhold documents on the ground that their production would be injurious to the public interest, and some of these I must examine. The argument before us proceeded on the assumption that there was no recorded decision of this House on the subject. This, however, is not so. My noble and learned friend LORD THANKERTON has called my attention to the decision in *Com-* G *missioners of the Board of Customs for Scotland* v. *Vass* (1), pronounced by LORD ELDON in this House in 1822, which is very much in point. The pursuer Vass had been a paymaster in the Berwickshire regiment of North British militia, and the Earl of Home, who was defender, was colonel of the regiment. Vass was hoping to be appointed comptroller of customs at the port of Grangemouth, and Lord Home, in answer to a letter from the collector of customs at that port, H had made, as Vass alleged, an adverse report as to Vass' conduct when with the regiment, which, in turn, had given rise to correspondence between the Board of Customs, the Lords of the Treasury, and Lord Home. Vass was suing Lord Home for damages for defamation, and, after pleadings were closed, the Lord Ordinary granted to Vass " a diligence for recovery of the writings founded on by him in the condescendence." Vass, therefore, summoned the Commissioners of Customs and their secretary to produce the documents which the condescendence alleged to be in their hands, and the Commissioners objected [p. 229]:

> . . . that they were neither bound nor entitled to produce the papers called for, as

they had come into their hands on behalf of the public, and in the course of an investigation as to the fitness of Vass to hold an official and confidential situation. The Lord Ordinary repelled this objection, and he was confirmed by the Inner House of the Court of Session. The Commissioners of Customs appealed to the House of Lords. No case was lodged on behalf of Vass, and this House ordered and adjudged that the interlocutors complained of be reversed.

The question raised was described by LORD ELDON, L.C., at p. 230, as being:

> . . . whether the appellants can be compelled to produce in evidence in a court of law, in an action depending between third parties, and in which they have no interest, officially or otherwise, the documents coming to their hands in the discharge of their official duty, and remaining in their custody.

In the course of his judgment he said, at p. 230:

> I apprehend, in all the cases in which it has been held, upon the principles of public policy, that you shall not be compellable to give evidence of, or produce such instruments—that is, wherever it is held you are not, on grounds of public policy, to produce them—you *cannot* produce them, and that it is the duty of the judge to say, you *shall not* produce them. This question is not, whether they can be permitted to produce them, but whether they can be compelled to produce them.

After giving a detailed account of the pleadings, LORD ELDON, L.C., reaches his decision thus, at pp. 236, 237:

> Your Lordships will see that this is a case in which it becomes necessary, in order, if any justice whatever can be done, that not only the correspondence which is in the hands of the Board of Customs, but also all that has passed with the Secretary of War—and not only all that has passed with the Secretary of War, but all that has passed with the officers of the regiment—and not only all that has passed with the officers of the regiment, but all that has passed with respect to the Treasury, must all be set out. The Board of Customs are to be called upon to produce the documents they have in their hands relative to this transaction, going through so many public officers, inquiring into the conduct of an individual under all the circumstances in which Mr. Vass stood. The question is, whether, upon the grounds stated, the Board of Customs, as the servants of the Crown, having these papers in their hands, are at liberty to produce them? So I must put the question. If they were at liberty to produce them, they might be compellable to produce them. There are many cases that bear upon this, which it is not necessary to go through. In the case of an information in the Court of Exchequer, where a man gives information as to smuggled goods, they will not allow you to ask who gave the information. So, as to cases of high treason, they will not allow a party to tell who gave the information. They will not allow it; and in a late case which I have in my hand, this matter was very much discussed, as far as the War Office was concerned, and which came very near to this. It is the case of *Home* v. *Lord William Bentinck* (2) in the Exchequer Chamber in 1820, which refers to another case in the King's Bench, in LORD ELLENBOROUGH's time. There the principle is laid down—not that the right is, as here discussed, to withhold a document, because it is the property of the individual who has it—but because it is against public policy that you should be compelled to produce instruments and papers, which if persons are compelled to produce, it must shut out the possibility of the public receiving any information as to a person's fitness to be appointed to an office. Upon these grounds it has been held, in this part of the country, we can enforce no such direction. I took the liberty to communicate with the Lord Chief Justice upon this case. I showed him the papers; and he stated, without the least hesitation, that he would not have permitted any such production as is here called for, upon the grounds I have stated. . . . Upon the whole, it does appear to me it would be a dangerous thing indeed, if this were permitted; and therefore it does seem to me that this judgment ought to be reversed.

There is thus express authority in this House that a court of law ought to uphold an objection, taken by a public department when called on to produce documents in a suit between private citizens, that, on grounds of public policy, the documents should not be produced. It is important to note what are the circumstances in which this specific objection may arise. When the Crown (which for this purpose must be taken to include a government department, or a minister of the Crown in his official capacity) is a party to a suit, it cannot be required to give discovery of documents at all. No special ground of objection is needed. The common law principle is well established: see *Thomas* v. *R.* (3). There is also the authority of ABINGER, L.C.B., for the view that the former process in equity of a bill of discovery was not regarded as available against the Crown: *Deare* v. *A.-G.* (4), at p. 208. However, that judge went on to say:

> At the same time it has been the practice, which I hope never will be discontinued, for the officers of the Crown to throw no difficulty in the way of any proceeding for the purpose of bringing matters before a court of justice, where any real point of difficulty that requires judicial decision has occurred.

Similarly, in *A.-G.* v. *Newcastle-upon-Tyne Corpn.* (5), Rigby, L.J., said, at p. 395 :

> . . . the law is that the Crown is entitled to full discovery and that the subject as against the Crown is not. That is a prerogative of the Crown, part of the law of England, and we must administer it as we find it. . . . Now I know that there has always been the utmost care to give to a defendant that discovery which the Crown would have been compelled to give if in a position of a subject, unless there be some plain overruling principle of public interest concerned which cannot be disregarded.

Where the Crown is a party to a suit, therefore, discovery of documents cannot be demanded from it as a right, though in practice, for reasons of fairness and in the interests of justice, all proper disclosure and production would be made. The question which we have to decide can only arise as a matter of law in England in cases where a *subpoena* is issued to a minister or department to produce a document (usually, but not necessarily, in a suit where the Crown is not a party), or where it intervenes in a suit between private individuals (as is the present case), to secure, on the ground of public interest, that documents in the hands of one of the litigants should not be produced. A similar situation might conceivably arise in litigation between the Crown and a subject where it was considered necessary to prevent the subject from producing a document in his possession on the ground that this would be injurious to public interests.

In the decision above cited, Lord Eldon treated the rule to be applied as already well-established. His reference to high treason may have been a recollection of the trial of *Thomas Hardy* in 1794 (24 State Trials, p. 199), for he (as Sir John Scott) was the Attorney-General who prosecuted on that occasion and he may well have recalled the ruling of Eyre, C.J., reported at p. 808. The judgment of the House in the present case is limited to civil actions and the practice, as applied in criminal trials where an individual's life or liberty may be at stake, is not necessarily the same. Indeed, Eyre, C.J., in the passage referred to, appears only to be restricting needless cross-examination. He said :

> . . . there is a rule which has universally obtained on account of its importance to the public for the detection of crimes, that those persons who are the channel by means of which that detection is made, should not be unnecessarily disclosed : if it can be made to appear that really and truly it is necessary to the investigation of the truth of the case that the name of the person should be disclosed, I should be very unwilling to stop it.

A statement to much the same effect was made by Abbott, J., and confirmed by Lord Ellenborough, at the trial of *James Watson* (1817) 32 State Trials, at p. 101. See also *Marks* v. *Beyfus* (6).

In civil proceedings, early examples of the application of the rule may be found in *Anderson* v. *Hamilton* (7)—the case before Lord Ellenborough to which Lord Eldon referred—(correspondence between the colonial department and the governor of Heligoland) ; *Young* v. *Excise Commissioners* (8) (investigation by Board of Excise and communications by the Board to the Lords of the Treasury) ; *Wyatt* v. *Gore* (9) (communications between the governor and the attorney-general of Upper Canada) ; and the case quoted by Lord Eldon, *Home* v. *Lord William Bentinck* (2). This last was an action for libel. The conduct of the plaintiff, who was an army officer, had been the subject of a military court of inquiry, of which the defendant was president, and at the trial the plaintiff called for the production of the minutes of the court of inquiry. Abbott, C.J., ruled that the minutes ought not to be admitted and read in evidence, and Dallas, C.J., giving judgment in the Exchequer Chamber, upheld this ruling. The language of Dallas, C.J., has been quoted with approval in subsequent decisions, and I set out the following extract from it. He said, at pp. 162, 163 :

> It is agreed that there are a number of cases of a particular description in which, for reasons of state and policy, information is not permitted to be disclosed. To begin with the ordinary cases, and those of a common description in courts of justice. In these courts, for reasons of public policy, persons are not to be asked the names of those from whom they receive information as to frauds on the revenue. In all the trials for high treason of late years, the same course has been adopted ; and, if parties were willing to disclose the sources of their information, they would not be suffered to do it by the judges. What is the ground upon which these cases stand, except it be the ground of danger to the public good, which would result from disclosing the sources of such informations ?—for no person would become an informer if his name might be disclosed in a court of justice, and if he might be subjected to the resentment of the party against

whom he had informed. Does not this reasoning apply closely to the case now before us? This is an enquiry directed to be made by the commander-in-chief, with a view to ascertain what the conduct of the party suspected might have been; in the course of which a number of persons may be called before the court, and may give information as witnesses, which they would not choose to have disclosed: but, if the minutes of the court of enquiry are to be produced in this way, on an action brought by the party, they reveal the name of every witness and the evidence given by each. Not only this, but they also reveal what has been said and done by each member of the existing court of enquiry. It seems, therefore, that the reception of the minutes would tend directly A to disclose that which is not permitted to be disclosed; and, therefore, independently of the character of the court, I should say, on the broad rule of public policy and convenience, that these matters, secret in their natures, and involving delicate enquiry and the names of persons, stand protected.

It will be observed that the objection is sometimes based upon the view that the public interest requires a particular class of communications with, or within, a public department to be protected from production on the ground that the B candour and completeness of such communications might be prejudiced if they were ever liable to be disclosed in subsequent litigation, rather than upon the contents of the particular document itself. Several cases have been decided on this ground protecting from production documents in the files of the East India Company held in its public capacity as responsible for the government of India: see *Smith* v. *East India Co.* (10) and *Wadeer* v. *East India Co.* (11). In the former case Lord Lyndhurst, L.C., said, at p. 55: C

> Now it is quite obvious that public policy requires, and looking to the Act of Parliament it is quite clear that the legislature intended, that the most unreserved communication should take place between the East India Company and the Board of Control, that it should be subject to no restraints or limitations; but it is also quite obvious that if, at the suit of a particular individual, those communications should be subject to be produced in a court of justice, the effect of that would be to restrain the freedom of the communications, and to render them more cautious, guarded and reserved. I think, D therefore, that these communications come within that class of official communications which are privileged, inasmuch as they cannot be subject to be communicated, without infringing the policy of the Act of Parliament and without injury to the public interests.

On the same principle, it has been held in *H.M.S. Bellerophon* (12) that where a collision occurs between a ship of the Royal Navy and a ship belonging to a private owner, the Admiralty cannot be required to produce the report made by the officer who is in command of the former ship. Another example is the view E which has been taken that reports made by a police officer to his superior as to a street accident are protected from production though requested by a party to subsequent litigation for fixing liability between private individuals: see *Hastings* v. *Chalmers* (13), *Muir* v. *Edinburgh Tramways Co., Ltd.* (14), and *Spigelman* v. *Hocken* (15). The practice in the metropolitan police district is, I believe, in the case of a street accident where no criminal proceedings are F being taken, to provide, on the application of persons interested in a possible civil claim, an abstract of any report that has been made by the policeman on the spot to his superiors, including the names of witnesses so far as known to the police. This seems an admirable way of reconciling the requirements of justice with the exigencies of the public service. The principle to be applied in every case is that documents otherwise relevant and liable to production must not be produced if the public interest requires that they should be withheld. This G test may be found to be satisfied either (*a*) by having regard to the contents of the particular document or (*b*) by the fact that the document belongs to a class which, on grounds of public interest, must as a class be withheld from production.

Two further matters remain to be considered. First, what is the proper form in which objection should be taken that the production of a document would be contrary to the public interest? Secondly, when this objection is taken in proper form, should it be treated by the court as conclusive, or are there H circumstances in which the judge should himself look at the documents before ruling as to their production?

On the first question, it is to be observed that the matter may arise at either of two stages in the course of a civil suit. It may arise (as in the present instance) before the trial begins, out of an application for inspection of documents referred to in the affidavit of one of the parties. It may also arise at the trial itself when a *subpoena* or corresponding process has been served calling for the production of the documents and there is a refusal to comply on the ground that production would be contrary to the public interest. An example of the latter class of case will be found in *Beatson* v. *Skene* (16), where Mr. Sidney Herbert, the secretary for war, had been subpoenaed to produce the minutes of a military court of inquiry and attended personally to object on the ground that this would be prejudicial to the public interest. In this he was upheld by the trial judge, BRAMWELL, B., and by the full court. POLLOCK, C.B., observed, at p. 854 :

> If, indeed, the head of the department does not attend personally to say that the production will be injurious, but sends the document to be produced or not as the judge may think proper, or as was the case in *Dickson* v. *Earl of Wilton* (17) before LORD CAMPBELL, where a subordinate was sent with a document with instructions to object but nothing more, the case may be different.

In *Hennessy* v. *Wright* (18), which was an action for libel brought by the governor of a colony against the publisher of a newspaper which accused him of sending garbled reports to the colonial secretary, the plaintiff, on the instructions of the Secretary of State, objected to the production of a number of official communications on the ground of the interest of the state and of the public service, but there was no affidavit or statement made by the Secretary of State himself. A divisional court consisting of FIELD and WILLS, JJ., considered that the statements in the plaintiff's affidavit might be accepted as true, but it is noteworthy that WILLS, J., said, at p. 518, that, where further assurance is necessary :

> . . . I think it ought to appear that the Secretary of State has seen and considered the documents, and has formed a real judgment as to the propriety of their being produced. . . . In such a case there should, in my opinion, be a statement on oath, either by the Secretary of State himself, or by some person duly commissioned by him to make on his behalf such a statement, that the matter has been considered by the Secretary of State, and that he assures the court in one of these ways that the production would, in his opinion, be prejudicial to the public service.

See also *Kain* v. *Farrer* (19), where the court, before being satisfied, required the responsible minister's oath.

The essential matter is that the decision to object should be taken by the minister who is the political head of the department, and that he should have seen and considered the contents of the documents and himself have formed the view that on grounds of public interest they ought not to be produced, either because of their actual contents or because of the class of documents—e.g., departmental minutes—to which they belong. Instances may arise where it is not convenient or practicable for the political minister to act (e.g., he may be out of reach, or ill, or the department may be one where the effective head is a permanent official), and in such cases it would be reasonable for the objection to be taken, as it has often been taken in the past, by the permanent head. If the question arises before trial, the objection would ordinarily be taken by affidavit, and a good example is provided by the affidavit of the First Lord of the Admiralty in the present case. If the question arises on *subpoena* at the hearing, it is not uncommon in modern practice for the minister's objection to be conveyed to the court, at any rate in the first instance, by an official of the department who produces a certificate which the minister has signed, stating what is necessary. I see no harm in that procedure, provided it is understood that this is only for convenience and that, if the court is not satisfied by this method, it can request the minister's personal attendance.

The remaining question is whether, when objection has been duly taken, the judge should treat it as conclusive. There are cases in the books where the view has been expressed that the judge might properly probe the objection by himself examining the documents. For example, FIELD, J., said, in *Hennessy* v. *Wright* (18), at p. 515 :

> . . . I should consider myself entitled to examine privately the documents to the production of which he [the head of the department] objected, and to endeavour by this means and that of questions addressed to him, to ascertain whether the fear of injury to the public service was his real motive in objecting.

In *Asiatic Petroleum Co., Ltd.* v. *Anglo-Persian Oil Co., Ltd.* (20), SCRUTTON, J., when sitting in chambers, looked at the documents (see p. 826), and so did MACNAGHTEN, J., in *Spigelman* v. *Hocken* (15). On the other hand, it has been several times laid down that the court ought to regard the objection, when validly and formally taken, as conclusive. Thus, in *Beatson* v. *Skene* (16), POLLOCK, C.B., observed, at pp. 853, 854 :

> We are of opinion that, if the production of a State paper would be injurious to the public service, the general public interest must be considered paramount to the individual interest of a suitor in a court of justice; and the question then arises, how is this to be determined?
>
> It is manifest it must be determined either by the presiding judge, or by the responsible servant of the Crown in whose custody the paper is. The judge would be unable to determine it without ascertaining what the document was, and why the publication of it would be injurious to the public service—an inquiry which cannot take place in private, and which taking place in public may do all the mischief which it is proposed to guard against.
>
> It appears to us, therefore, that the question whether the production of the documents would be injurious to the public service must be determined, not by the judge but by the head of the department having the custody of the paper; and if he is in attendance and states that in his opinion the production of the document would be injurious to the public service, we think the judge ought not to compel the production of it. The administration of justice is only a part of the general conduct of the affairs of any State or nation, and we think is (with respect to the production or non-production of a state paper in a court of justice) subordinate to the general welfare of the community.

The same principle, subject to differences of procedure, is recognised and applied in Scotland. For example, in *Admiralty Comrs.* v. *Aberdeen Steam Trawling & Fishing Co.* (21), the Inner House of the Court of Session, overruling LORD JOHNSTON, insisted that the view of the government department was final. LORD DUNEDIN, the Lord President, said, at p. 340:

> It seems to me that if a public department comes forward and says that the production of a document is detrimental to the public service, it is a very strong step for the court to overrule that statement by the department. The Lord Ordinary has thought that it is better that he should determine the question. I do not there agree with him, because the question of whether the publication of a document is or is not detrimental to the public service depends so much upon the various points of view from which it may be regarded, and I do not think that the court is in possession of these various points of view. In other words, I think that, sitting as judges without other assistance, we might think that something was innocuous, which the better informed officials of the public department might think was noxious. Hence, I think the question is really one for the department, and not for your Lordships.

The judgment of LORD KINNEAR in the same case is especially noteworthy:

> I agree that we cannot take out of the hands of the department the decision of what is or what is not detrimental to the public service. There are only two possible courses, we must either say that it is a good ground of objection, or we must overrule it altogether. I do not think that we should decide whether it would be detrimental to the public service or not; and I agree with what your Lordships have said as to the position of the court in reference to that question. We do not know the conditions under which the production of the documents would or would not be injurious to the public service. I think it is not improbable that even if an officer of the department were examined as a witness we should not get further forward, because the same reasons which induced the department to say that the report itself ought not to be produced might be thought to preclude the department from giving the explanations required. A department of government to which the exigences of the public service are known as they cannot be known to the court must, in my judgment, determine a question of this kind for itself, and therefore I agree we ought not to grant the diligence.

In many cases there is a further reason why the court should not ask to see the documents, for where the Crown is a party to the litigation, this would amount to communicating with one party to the exclusion of the other, and it is a first principle of justice that the judge should have no dealings on the matter in hand with one litigant save in the presence of and to the equal knowledge of the other.

Therefore, SCRUTTON, L.J., was misinformed when he was told, as recorded in *Ankin* v. *London & North Eastern Ry. Co.* (22), at p. 533, by "a very high authority" that the practice on this point in Scotland differed from that in England. LORD THANKERTON gave warning of the error in the course of the argument in *Robinson* v. *State of South Australia* (*No.* 2) (23), at p. 708. The practice in Scotland, as in England, may have varied, but the approved practice in both countries is to treat a ministerial objection taken in proper form as conclusive. The reasons given by POLLOCK, C.B., by LORD DUNEDIN and by LORD KINNEAR cannot be gainsaid. As LORD PARKER said in another connection, in *The Zamora*, (24) at p. 107: "Those who are responsible for the national security must be the sole judges of what the national security requires."

In *Robinson* v. *State of South Australia* (*No.* 2) (23), the Judicial Committee reversed the decision of the Supreme Court of South Australia, which had refused to order the inspection of documents which the minister in charge of the department objected to produce on grounds of public policy, and remitted the case to the Supreme Court with the direction that it was one proper for the exercise of the court's power of inspecting documents in order to determine whether their production would be prejudicial to the public welfare. I cannot agree with this view. Their Lordships' conclusion was partly based on their interpretation of a rule of court which was in the same terms as R.S.C., Ord. 31, r. 19A (2). This sub-rule provides :

> . . . where on an application for an order for inspection privilege is claimed for any document, it shall be lawful for the court or a judge to inspect the document for the purpose of deciding as to the validity of the claim of privilege.

In my opinion, the Privy Council was mistaken in regarding such a rule as having any application to the subject-matter. The doubt expressed on the point by du Parcq, L.J., in the present case is fully justified. The withholding of documents on the ground that their publication would be contrary to the public interest, is not properly to be regarded as a branch of the law of privilege connected with discovery. "Crown privilege" is for this reason not a happy expression. Privilege, in relation to discovery, is for the protection of the litigant and could be waived by him. The rule that the interest of the state must not be put in jeopardy by producing documents which would injure it is a principle to be observed in administering justice, quite unconnected with the interests or claims of the particular parties in litigation, and, indeed, is a rule upon which the judge should, if necessary, insist, even though no objection is taken at all. This has been pointed out in several cases, e.g., in *Chatterton* v. *Secretary of State for India* (25), *per* A. L. Smith, L.J., at p. 195.

Although an objection validly taken to production on the ground that this would be injurious to the public interest is conclusive, it is important to remember that the decision ruling out such documents is the decision of the judge. Thus, in the present case, the objection raised in the respondents' affidavit is properly expressed to be an objection to produce "except under the order of this honourable court." It is the judge who is in control of the trial, not the executive, but the proper ruling for the judge to give is as above expressed.

In this connection, I do not think it is out of place to indicate the sort of grounds which would not afford to the minister adequate justification for objecting to production. It is not a sufficient ground that the documents are "state documents" or "official" or are marked "confidential." It would not be a good ground that, if they were produced, the consequences might involve the department or the government in Parliamentary discussion or in public criticism, or might necessitate the attendance as witnesses or otherwise of officials who have pressing duties elsewhere. Neither would it be a good ground that production might tend to expose a want of efficiency in the administration or tend to lay the department open to claims for compensation. In a word, it is not enough that the minister or the department does not want to have the documents produced. The minister, in deciding whether it is his duty to object, should bear these considerations in mind, for he ought not to take the responsibility of withholding production except in cases where the public interest would otherwise be damnified, e.g., where disclosure would be injurious to national defence, or to good diplomatic relations, or where the practice of keeping a class of documents secret is necessary for the proper functioning of the public service.

When these conditions are satisfied and the minister feels it is his duty to deny access to material which would otherwise be available, there is no question but that the public interest must be preferred to any private consideration. The present opinion is concerned only with the production of documents, but it seems to me that the same principle must also apply to the exclusion of verbal evidence which, if given, would jeopardise the interests of the community. Indeed, the language of Lord Eldon, above quoted, implies this. After all, the public interest is also the interest of every subject of the realm, and while, in these exceptional cases, the private citizen may seem to be denied what is to his immediate advantage, he, like the rest of us, would suffer if the needs of protecting the interests of the country as a whole were not ranked as a prior obligation. I move that the appeal be dismissed, with costs.

My Lords, I am authorised by my noble and learned friends Lord Thankerton, Lord Russell of Killowen and Lord Clauson, who are not able to be present, to say that they concur in this opinion.

Lord Macmillan: My Lords, I also concur.

Lord Wright: My Lords, I also concur.

Lord Porter: My Lords, I concur.

Appeal dismissed with costs.

Solicitors: *Evill & Coleman* (for the appellants); *Carpenters*, agents for *Laces & Co.*, Liverpool (for the respondents).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

MIDDLESEX COUNTY COUNCIL *v.* KIVERSTEIN.

[Court of Appeal (MacKinnon, Luxmoore and Goddard, L.JJ.), **April 20, 1942.**]

Public Health—Hospital treatment—Recovery of expenses—Claim against deceased's estate—Right of action in contract against deceased's husband—"Expenses not recoverable from any other source"—Public Health Act, 1936 (c. 49), *s.* 184 (1).

A woman was admitted to a hospital maintained by the county council and remained there as a patient until her death. Under the Public Health Act, 1936, s. 184 (1), a county council is under a duty to recover from a patient or his estate expenses of maintenance in hospital, "not being expenses recoverable from any other source." In answer to a claim against the deceased's estate her executor contended that the expenses could be recovered in contract against her husband, and that, therefore, there was no right of action under the subsection:—

Held: the words of limitation in the subsection did not prevent the county council from recovering from the deceased's estate the cost of her maintenance.

[**EDITORIAL NOTE.** The Public Health Act, 1936, s. 184 (1) gives a local authority the right to recover the expenses of the maintenance of a patient from a number of alternative sources. In such a case, it would normally be the right of the creditor to choose which party so made liable he would sue, but the words "not being expenses recoverable from any other source" have given occasion for the argument adduced in this case. The Court of Appeal have decided that these latter words apply to a case where an arrangement has been made with an association for the provision of hospital treatment. The court also indicates that they may have some application to recovery of hospital expenses in an action for personal injuries.

As to Recovery of Cost of Maintenance in Hospital, see HALSBURY, Hailsham Edn., Vol. 26, p. 379, para. 761; and for Cases, see DIGEST, Vol. 38, p. 199, Nos. 346-353.]

Appeal from a decision of His Honour Judge Drucquer, sitting at Brentford County Court, dated Dec. 11, 1941.

On July 8, 1940, a Mrs. Black became a patient at the Middlesex County Hospital, and after being an inmate for 102 days died on Oct. 18, 1940. She left estate valued at £1,700 which was disposed of by will. The expenses of her maintenance, calculated in accordance with the Public Health Act, 1936, amounted to £74 16*s.* 1*d.* The county council sued the executor named in Mrs. Black's will in the county court. The judge found for the defendant on the ground that the liability of the patient, or of her estate, under the Public Health Act, 1936, was dependent upon there being no other source from which the debt could be recovered. The county council appealed.

W. H. Cartwright Sharp, K.C. and *G. H. Crispin* for the appellants.

W. A. L. Raeburn for the respondent.

MacKinnon, L.J.: The plaintiffs in this case are a county council. By the Public Health Act, 1936, s. 181, a county council may provide hospital accommodation for persons in their county who are sick. The plaintiffs did provide a hospital. On July 8, 1940, there was brought to that hospital a Mrs. Black, otherwise Schwartz, suffering from cirrhosis of the liver. She remained in the hospital until her death on Oct. 18, 1940. She left some estate and a will. The defendant in this case was granted probate of her will as her executor on Mar. 17, 1941. The plaintiff county council had expended in the maintenance and care of Mrs. Black during her stay in the hospital a sum of £74 16*s.* 1*d.*

It is provided by the Public Health Act, 1936, s. 184 (1), that, in regard to certain complaints,

> . . . a county council . . . shall, recover from the patient, or from any person legally liable to maintain him, or from the patient's estate, if he has died, any expenses incurred . . . in providing for his maintenance . . . not being expenses recoverable from any other source . . .

The county council, therefore, is put under a duty to recover these expenses for the maintenance of a sick person and is given an alternative to recover them either from the patient, if he is alive, or from his estate, if he has died, or from any person legally liable to maintain him, provided that they are not expenses recoverable from any other source.

In this case, the patient having died, the county council adopted the alternative that seems to be plainly given to them, namely, to claim the expenses from the patient's estate. *Prima facie* it would be difficult to see how there could be any defence to that claim. However, the ingenuity of the advocate who appeared in the county court for the defendant suggested an answer to that very clear claim to the county court judge which, I regret to say, the judge accepted. The argument was that the claim against the patient's estate was excluded by the subsequent words "not being expenses recoverable from any other source," and it was said that these expenses could be recovered in contract against the husband of the deceased.

It is true that any person legally liable to maintain the patient is one of the alternative sources mentioned in the substantive part of the section. The judge was persuaded that that did not include any husband or the husband of Mrs. Black, because, for some reason, it was said to be limited to the husband of a pauper, and Mrs. Black was not a pauper. Therefore, it was said, there is only one alternative in the earlier part of the section—the patient or the patient's estate, if she has died; but that you cannot have recourse to it if you can recover them from any other source, and in this case she was not a pauper and you could recover from the husband.

I cannot follow that reasoning. I think it is clearly fallacious. The words seem to me to be as plain as any words can possibly be, and mean that expenses of this sort can be recovered, when the patient has died, from the patient's estate. The words of limitation below "not being expenses recoverable from any other source" clearly are directed to the position which is contemplated by the proviso to sect. 184 (1), which provides that the county council may make agreements with associations or funds by which they will look to those associations or funds for the recoupment of expenses incurred in regard to members of those associations or funds. Also, no doubt, it contemplates the position that would arise under the Road Traffic Act, in which, as is so commonly done, hospital expenses can be recovered against the defendant to a claim for an accident upon the road.

However, I do not think it is necessary to elaborate this. I am quite satisfied that this was an erroneous view. There was no answer to the claim in the clear words of the section under which the patient's estate after her death was liable for the expenses of maintaining her. The judgment in favour of the defendant was therefore wrong and should be reversed. The appeal will be allowed with costs, and judgment entered below for the sum of £74 16*s.* 1*d.*

Luxmoore, L.J.: I agree and have nothing to add.

Goddard, L.J.: I agree.

Appeal allowed with costs.

Solicitors: *C. W. Radcliffe* (for the appellants); *Spiro & Steele* (for the respondent).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

GUARDIAN TRUST AND EXECUTORS CO. OF NEW ZEALAND, LTD. *v.* PUBLIC TRUSTEE OF NEW ZEALAND.

[PRIVY COUNCIL (Viscount Simon, L.C., Lord Thankerton, Lord Romer and Lord Clauson), **November 24, 27, 28, 1941, January 19, 1942.**]

Privy Council—New Zealand—Executors—Notice to creditors and others to send in claims—Executor with notice of persons disputing the validity of will—Liability for payment of legacies—Trustee Act (New Zealand), 1908, *s.* 74.

In July, 1935, the appellants obtained probate of a will which named them as executors. The next-of-kin instituted proceedings for the revocation of probate on the ground of the want of testamentary capacity of the testatrix, and in Dec., 1936, the court ordered probate to be recalled. In Apr., 1937, the respondent obtained letters of administration of the estate. Knowing that proceedings to attack the will were in contemplation the appellants, in Dec., 1935, obtained an order under the Trustee Act (New Zealand), 1908, s. 74, requiring all " creditors and other persons " having claims against the estate to notify the appellants by Jan. 31, 1936. In Feb., 1936, the appellants paid certain legacies which had been given by the will :—

HELD : (i) the respondent was entitled to recover from the appellants the amounts of the legacies paid. The appellants had received notice that the estate might be claimed by the next-of-kin, and, the claim having proved to be well-founded, they were liable for having dealt with the estate in disregard of that notice. The order under the Trustee Act (New Zealand), 1908, s. 74, did not affect persons whose claim was that the appellants, as executors, had no right to administer the estate at all.

(ii) a trustee who has received notice of a charge upon the interest of a beneficiary in favour of a third party is not entitled to disregard the charge merely because he believes it to be invalid. In all such cases, the question is whether the person in a fiduciary capacity has had notice of the claim and not whether he formed a favourable or unfavourable view of the prospect of the claim succeeding.

(iii) it was no defence for the appellants to contend that the grant of probate ordered them to pay the legacies. The grant requires them to pay only so far as the law binds.

[**EDITORIAL NOTE.** A notice to creditors and others to come and claim is not a protection to the executors against all claimants except those who send in a claim. If the executor can be shown to have had notice of the claim *aliunde*, as it is called, that is, by some means other than a claim sent in in response to the notice, he will be liable to make good any such claim which can be substantiated. An interesting argument here adduced was that the executors were ordered by the grant of probate to pay the legacies ; but it is shown that they were only ordered to do so so far as the law binds.

AS TO NOTICES FOR CLAIMS, see HALSBURY, Hailsham Edn., Vol. 14, pp. 321, 322, para. 597 ; and FOR CASES, see DIGEST, Vol. 23, pp. 330-332, Nos. 3963-3973.]

Cases referred to :

(1) *Newton* v. *Sherry* (1876), 1 C.P.D. 246 ; 23 Digest 331, *3966* ; 45 L.J.Q.B. 257 ; 34 L.T. 251.

(2) *Hewson* v. *Shelley*, [1914] 2 Ch. 13 ; 23 Digest 60, *402* ; 83 L.J.Ch. 607 ; 110 L.T. 785.

APPEAL from a judgment of the Court of Appeal of New Zealand, dated July 14, 1939, reversing, by a majority, a judgment of NORTHCROFT, J., in the Supreme Court of New Zealand, dated July 28, 1938. The facts are fully set out in the judgment of the Judicial Committee delivered by LORD ROMER.

H. J. Wallington, K.C., *G. O. Slade* and *Michael Bowles* for the appellants.

G. R. Blanco White, K.C. and *J. H. Stamp* for the respondent.

LORD ROMER : Miss Elizabeth Smith, of Christchurch, New Zealand, died on July 9, 1935, having made a will on June 8, 1934, whereby she appointed as her executors the appellants, to whom probate in common form was granted on July 19, 1935. On Apr. 3, 1936, proceedings were instituted by two of the next-of-kin of the deceased for revocation of probate on the ground of her want of testamentary capacity. The proceedings were successful, and by order of the court, dated Dec. 17, 1936, probate was recalled. The deceased had made no other will, and on Apr. 19, 1937, letters of administration were granted to the respondent. In the meantime the executors had paid out of Miss Smith's estate sums amounting in all to £8,450 in respect of pecuniary legacies which she had purported to give by her will to certain persons and institutions not being persons entitled to share in her estate on an intestacy. The question accordingly arose whether, having regard to the circumstances in which such payments were made, and which are hereinafter described, the executors were liable to refund the £8,450 to the respondent as administrator of Miss Smith's estate. This question was answered in the negative by NORTHCROFT, J., but his decision was reversed by the Court of Appeal (MYERS, C.J., and SMITH and FAIR, JJ., OSTLER, J., *dissenting*), and from such reversal the executors now appeal to His Majesty in Council.

The history of the case may be said to have begun with the death of Miss Smith's unmarried brother in the year 1923. The appellants were his executors, and in this way got into touch with Miss Smith, who had benefited to the extent of some £20,000 under his will. The brother and sister had lived in the same house at Christchurch, where various nephews and nieces would seem to have stayed with them during his lifetime. After his death their visits gradually became less frequent, and Miss Smith had lived alone for a number of years preceding her death. She was a woman without any knowledge of, or aptitude for, business, but Harris, who was the appellant's manager at Christchurch, and had frequently seen her in connection with the winding up of her brother's affairs, had kept in touch with her and was able to advise her to some extent about her own. She was a person who would easily fall a victim to the blandishments of the fraternity of fraudulent share-pushers, and in 1933 Harris discovered that she was in their toils. He came to her assistance and appears for a time to have succeeded in his efforts on her behalf.

It was plain to him, however, that she needed to be protected from herself, and he persuaded her to execute a power of attorney in favour of his employers, the appellants. This did not, however, altogether succeed in its object. Harris found that Miss Smith was still being victimised, and he reported the circumstances to Ward, the general manager of the appellants, whose headquarters are at Auckland. Correspondence between these two men ensued, and, in the end, and with the concurrence of certain of her relatives, a petition under the Aged and Infirm Persons Protection Act, 1912, was presented by the appellants asking that a protection order might be made appointing the appellants managers of the estate of Miss Smith, who, at this time, was of the age of 79 or thereabouts. On Dec. 14, 1933, a protection order as asked by the petition was made, and on the same day Harris wrote to Ward a letter as follows :

> I was pleased to wire you to-day that we have come to the end of our troubles in connection with Miss Smith's affairs by getting the court order . . . Miss Smith called on me yesterday and I am pleased to say that I was able, without any trouble, to get her to see the wisdom of the court proceedings being completed. She is now quite resigned to allowing us to handle everything and I only hope that we will be able to do something towards restoring her finances.

Subsequent events showed that this hope was abundantly justified, but Harris was sadly mistaken in thinking that he and the appellants had come to the end of their troubles in connection with Miss Smith's affairs. For only about 3 months after the making of the protection order Harris conceived an idea that led eventually to their being involved in a great deal of trouble, which culminated in the present proceedings. The idea was that Miss Smith should make a will, and he informed Ward of the idea in a letter to Ward of Mar. 16, 1934. " I will now make an endeavour," he wrote, " to get Miss Smith to a proper state of mind for the making of a will." He certainly got her to make a will, but it was beyond his powers to get her into a proper state of mind to do so, and, as has already been said, probate of the will was eventually recalled on the ground that at the time of making it Miss Smith had not the requisite testamentary capacity.

It is unnecessary to detail the steps taken by Harris to procure the making of the will. They were carefully considered by NORTHCROFT, J., who tried the action for the recall of the probate, and the following extracts from his judgment in that case show the view which he took of Mr. Harris's activities :

> It is proper to say that he does appear in this matter, as in all others relating to Miss Smith, to have been moved by a genuine desire to assist one whose infirmities had enlisted his sympathies . . . I am satisfied that, although his action was mistaken,

and arose from inexperience, Mr. Harris acted genuinely in the best interests of the testatrix as he judged them.

These views of his found practical expression in his order that the costs of the present appellants of those proceedings should be paid out of the estate as between solicitor and client, and there their Lordships are content to leave it. Nor is it necessary to state in any detail the provisions of the will. It is sufficient to say that she gave pecuniary legacies amounting to a little over £12,000 to various persons and institutions among whom were included several persons entitled to a share in her estate on an intestacy, and bequeathed the residue of her estate to the appellants on certain charitable trusts. As has already been stated, she appointed the appellants her executors.

The events which took place after her death must, however, be stated in some detail. On the very same day as that on which the appellants obtained probate—namely, on July 19, 1935—Harris wrote to Ward as follows:

> I have heard it rumoured that some of the relations are not too pleased with the will and there has been some talk of contesting it, but on reflection I am sure that they will realize their folly.

On the next day he is found writing to a Mr. Thomas, a solicitor whom he had employed in connection with the preparation of the will, in the following terms:

> I had an informal talk with McKay a solicitor of the office of Stanton, of this city, and he mentioned that Miss Pyne, one of the beneficiaries of Miss Smith, had consulted them as regards the will. Apparently she is getting in touch with the other relatives to see if they will join in taking steps to have the will upset . . . The question of testamentary capacity was mentioned, but I ridiculed any suggestion that she was lacking in this respect.

On July 25, 1935, Ward, writing to Harris, said in connection with the question of the will being contested:

> I understand that Miss Pyne is pressing the matter somewhat and the solicitors are now looking into the matter of testamentary capacity. Personally I think that they would have great difficulty in upsetting it on this account.

On Aug. 9, 1935, Harris wrote to Ward that he understood that Miss Pyne was not taking any action as regards upsetting the will, but that a Mrs. Dando and a Mrs. Cookson were interesting themselves in the matter. It was this Mrs. Cookson who was subsequently one of the plaintiffs in the action brought for revocation of the grant of probate. However firmly Ward and Harris may have believed that Miss Smith was possessed of full testamentary capacity when she executed the will, these letters show that after her death they had been given ample warning that others who were interested in the matter took a different view. Having regard to Miss Smith's history, it is plain that such warning could not be disregarded, and that until the question of testamentary capacity had been settled in favour of the will payment by the appellants of the legacies could only be made at their peril. That this was fully appreciated by Ward and the directors of the appellants is made manifest by two letters written by Ward to Harris on Oct. 15 and 16, 1935, respectively. In the first of these Ward writes:

> The solicitor who is acting for some of the beneficiaries mentioned to me casually the other night that they proposed to take proceedings with a view to upsetting the will. I am rather inclined to think that those moving in the matter are the Dandos, but I have no confirmation of this. I have also heard from another source that some of the beneficiaries were proposing to take proceedings on the grounds that the Guardian Company had practically coerced this woman into making her will.
>
> In view of the possibility of proceedings we consider it would be unwise to make any payment to the legatees, because there is just the chance if the will was upset that they may not turn out to be the actual next-of-kin who are entitled and if payment were made of the legacies inside the executor's year we would possibly be under some liability.

In the second letter paras. (2) and (3) are as follows:

> (2) With regard to a possible distribution, the board have decided that in view of information we have received indirectly it is anticipated that proceedings will be instituted to attack the will.
>
> (3) Consequently it would be inadvisable for us to pay the legacies in case the provisions of the will are upset and, if this is so, of course, there would be an intestacy . . .

These letters suggest that Ward and his directors may not have been unmindful of what befell another executor who paid the legacies given by a will which was afterwards declared to be invalid, and whose sad story was told by him to Sam

Weller when they were fellow inmates of the Fleet prison. (All of which may be found reported in c. XLIV of the PICKWICK PAPERS). However this may be, it may well be asked in view of the letters why the appellants nevertheless paid all the legacies. The answer to that question is to be found in paras. (4) and (5) of the letter last quoted. They are as follows :

> (4) Therefore, under the circumstances, the board considered it advisable that an order under the Trustee Act, 1909, s. 74, should be obtained, and, after expiration of the time allowed by the court, if no further claims are made the legacies should be paid out.
>
> (5) We should be pleased if you would instruct the estate solicitors to prepare the necessary petition for execution by the board as soon as possible.

The Trustee Act, 1908, s. 74, to which the letter refers is in these terms :

> (1) Where an executor or administrator has given such notices as a judge, upon application by petition to him, directs for creditors and other to send in to the executors or administrators their claims against the estate of the testator or intestate, such executors or administrators, at the expiration of the time named in such notices or the last of the said notices for sending in such claims, may distribute the assets of the testator or intestate, or any part thereof, amongst the parties entitled thereto, having regard to the claims of which such executors or administrators have then notice, and shall not be liable for the assets or any part thereof so distributed to any person of whose claims such executors or administrators have not had notice at the time of distribution of the said assets, or a part thereof, as the case may be.
>
> (2) But nothing in this Act shall prejudice the right of any creditor or claimant to follow the assets or any part thereof into the hands of the persons who have received the same respectively.

How anyone could have persuaded himself that this section was going to enable the appellants to pay the legacies with safety it is difficult to understand. It would appear, however, that Ward and the board reasoned among themselves somewhat as follows : In *Newton* v. *Sherry* (1), the Court of Appeal in England decided that the words " and others " in the Law of Property Amendment Act, 1859, s. 29, which corresponded with the Trustee Act (New Zealand), 1908, s. 74, included next-of-kin. If, therefore, notices are issued under sect. 74 and at the expiration of the time named in such notices no claims have been sent in by any of the next-of-kin, the legacies can be safely paid. Such reasoning is based on a complete misapprehension of the object and effect of the section and of the decision in *Newtown* v. *Sherry* (1). That (as one might have guessed) was a case of an intestacy. In such a case it is, of course, essential that the administrator should be protected from the claims of unknown next-of-kin as much as from the claims of unknown creditors. The decision has no bearing on a case like the present, except for the observations made by LINDLEY, J., as to the object and effect of sect. 29 of the Act. As regards the object, LINDLEY, J., said (p. 258), that it was to enable the executor or administrator to " administer the estate without the expense and delay of a Chancery suit." As to its effect, he said, at p. 258 :

> If proper advertisements are issued for " creditors and others " . . . to come in and substantiate their claims, the executor or administrator is not liable for parting with the assets in a due course of administration amongst those of whose claims he has notice.

It is plain from this, as, indeed, it is from the language of the section itself, that the only persons who are to be affected by the notices are those whose claims against the estate are to be met by the executor or administrator as the case may be in a due course of administration, and not persons whose claims are that the executor or administrator has no right to administer the estate at all. It is probable that neither Ward nor any one of his directors addressed his mind to the question what the appellants would have done if in pursuance of the notices one of the next-of-kin had sent in a claim that the will was invalid. If that had happened and the construction put on the section by Ward and his directors were to prevail, the appellants at the expiration of the time named in the notice would have been entitled, in the words of the section, to distribute the assets of Miss Smith among the parties entitled thereto having regard to the claims of which they then had notice. A construction that can lead to so absurd a result is plainly wrong.

The petition was nevertheless presented to the court, and an order was made thereon on Dec. 10, 1935. In due course notices were published as directed by the order requiring all " creditors and other persons " having claims against the estate of Miss Smith to send in such claims to the appellants " together with written particulars thereof " on or before Jan. 31, 1936. The notices stated that, after such date the executors proposed to distribute the assets among the parties entitled thereto having regard to the claims of which they should have then received notice.

As might have been expected, none of the next-of-kin sent in a claim in pursuance of the notices, but the solicitors acting for some of them had seen the notices, and on Dec. 18, 1935, wrote Mr. Harris as follows :

> We have been consulted by certain of the next-of-kin of the late Miss Elizabeth Smith with a view of taking proceedings for the revocation of the probate granted to your company in July last, on the ground of the lack of testamentary capacity on the part of the testatrix. At present certain inquiries are being made and counsel's opinion is being taken, but it will not be available until after the legal vacation.
>
> Our attention has been drawn to an advertisement in the Christchurch Press on the 14th inst. as to your intention to distribute the estate after Jan. 31 next. At the present time we desire merely to notify you that the question of taking proceedings for the revocation of probate is under consideration and that a definite decision will be arrived at in the matter before the end of Jan. next, and as soon as this is done we shall advise you of the course it is proposed to take.
>
> We would be glad to have an acknowledgment of this letter.
>
> Yours faithfully
> O'Donnell and Cleary,
> p. T. P. Cleary.

A formal acknowledgment of the receipt of this letter was sent to Messrs. O'Donnell and Cleary, but otherwise no notice was taken of it by the appellants, who, on various dates between Feb. 14 and 20, 1936, and without any further communication to those men, proceeded to send out cheques in payment of the legacies the subject-matter of the present appeal. On Feb. 20, 1936, Messrs. O'Donnell and Cleary wrote a further letter to Harris stating that they had by then received instructions to take proceedings for the revocation of the probate granted to the appellants, and that such proceedings would be issued shortly. They were informed in reply that " distribution in the estate has been made."

The proceedings referred to having been taken with the result which has already been stated, the present action was instituted on Dec. 22, 1937, by the respondent against the appellants for the purpose of recovering for the benefit of the next-of-kin the £8,450 and interest. By his amended statement of claim the respondent alleged, among other things, that at the time or times when the cheques for this sum were issued the appellants had notice (i) that certain of the next-of-kin of the deceased claimed that at the date of the execution by her of the will she was not of testamentary capacity ; and (ii) that certain of the next-of-kin intended to take, or contemplated taking, proceedings on that ground for the revocation of the probate granted to the appellants, and had consulted solicitors with a view to the institution of the said proceedings. That the appellants did have such notice in fact is plain from what has already been stated. The question to be decided is whether they are by reason thereof liable to make good the said sum to Miss Smith's estate.

There does not appear to be any statute in force in New Zealand which governs the case. If falls, therefore, to be decided in accordance with the well-established principles of equity. One of those principles is that if a trustee or other person in a fiduciary capacity has received notice that a fund in his possession is, or may be, claimed by A., he will be liable to A. if he deals with the fund in disregard of that notice should the claim subsequently prove to be well founded. This principle has, indeed, been recognised by the New Zealand Legislature in dealing with cases which are closely akin to the present one. By the Administration Act, 1908, s. 26, it is provided that an administrator acting under the provisions of the Act who makes any payment or does any act *bona fide* under or in pursuance of the administration shall not be liable for the sums so paid or the acts so done by reason of the existence of any will of the deceased owner (where the administrator acts under letters of administration without will annexed), or of any will other than that of which administration has been granted (where he acts under probate or under letters of administration with will annexed)—but then follow these words :

> . . . if the existence of such first-mentioned will or such other will, as the case may be, was unknown to him at the time of making such payment or doing such act.

It follows that, if he knew of such a will at the time, he would be liable for making the payment or doing the act.

In the present case, apart altogether from what they had previously heard, the information conveyed to the appellants by the letter of Dec. 18, 1935, from Messrs. O'Donnell and Cleary was of such a nature that no reasonable man should have disregarded it. The appellants should on its receipt at least have applied to the court for directions, and, if the facts and circumstances had been placed before it, the court would certainly have refused to sanction any payment to the legatees for the time being, even though Jan. 31, 1936, had passed without anything further having been heard from these solicitors. It is, indeed, quite plain that the appellants themselves would not have paid the legacies in disregard of the information contained in the letter had they not misunderstood the meaning and effect of the Trustee Act, 1908, s. 74. As it is, the section and their proceedings under it can avail them nothing, and they have no effective answer to the claim of the respondent.

The action was nevertheless dismissed by NORTHCROFT, J., because he was satisfied that the appellants at all material times believed that Miss Smith had testamentary capacity, and that they had acted throughout with perfect honesty. With all respect to the judge, the question is not whether the appellants acted honestly in disregarding the information which they had received. A trustee who has received information of a charge on the interest of his *cestui que trust* in favour of a third party is not entitled to disregard it merely because he honestly believes the charge to be invalid. Nor can an executor who has information of the existence of a later will act in disregard of such information merely because he honestly believes that his testator was not at the time of making it of testamentary capacity. In all such cases, as in the present one, the question is whether the person acting in a fiduciary capacity has had notice of the claim, and not whether he formed a favourable or unfavourable view as to the prospect of the claim succeeding. In their Lordships' opinion the appellants had ample notice of the claims of the next-of-kin in the present case before they paid the legacies, and it follows that, in their opinion, the Court of Appeal were right in reversing the order of NORTHCROFT, J. In the course of his judgment in that court, after a review of the facts of the case, MYERS, C.J., said that he could come to no other conclusion than that the payments to the legatees were made with knowledge and notice on the part of the respondents of facts and circumstances which should have made it plain to any ordinary reasonable and prudent man of business that the payments should not have been made. With this conclusion their Lordships find themselves in complete agreement.

One further point should be mentioned. It was urged on behalf of the appellants that the equitable principle to which their Lordships have referred has no application to the present case inasmuch as the appellants by reason of the grant to them of probate were acting under the order of the court. They were, so it was argued, under an obligation to the court to pay the legacies. There was in truth no such obligation. For, although a grant of probate is an order of the court (see *Hewson* v. *Shelley* (2)), it does not, actually, order the grantee to do anything. In New Zealand it runs, so far as material for the present purpose, as follows :

> Be it known to all men that on this   day of   in the year   the last will and testament of deceased, a copy of which is hereunto annexed, has been exhibited read and proved before   and administration of the estate effects and credits of the deceased has been and is hereby granted to   the executor in the said will and testament, being first sworn faithfully to execute the said will by paying the debts and legacies of the deceased as far as the property will extend and the law binds . . .

Even the oath, therefore, only binds the executor to pay the legacies "as far as . . . the law binds." In the present case the law did not so bind.

For these reasons their Lordships will humbly advise His Majesty that the appeal should be dismissed. The respondent's costs of the appeal must be paid by the appellants.

Appeal dismissed with costs.

Solicitors: *Stafford Clark & Co.* (for the appellants); *Mackrell, Maton, Godlee & Quincey* (for the respondent).

[*Reported by* HUBERT B. FIGG, ESQ., *Barrister-at-Law.*]

GIFFORD *v.* WHITTAKER.

[King's Bench Division (Viscount Caldecote, L.C.J., and Humphreys and Singleton, JJ.), **March 17, 1942.**]

Street Traffic—Motor vehicle—"Person uses or causes or permits to be used on any road"—Driver of vehicle—Accident due to improper loading—Motor Vehicles (Construction and Use) Regulations. 1937 (*S.R. & O.*, 1937, *No.* 229), *regs.* 67 (2), 94.

The respondent was the driver of a lorry which belonged to his employers, and which they had hired to a brewery company. The lorry was in charge of an employee of the brewery who, with the assistance of two fellow-employees, had loaded it. The respondent drove under the instructions of the brewers' foreman. The latter sat on the back of the lorry, and, as it was being driven round a sharp bend, fell off, taking with him some crates which were part of the vehicle's cargo. He sustained injuries from which he subsequently died. The respondent was charged with using the lorry with the load improperly secured, contrary to the Motor Vehicles (Construction and Use) Regulations, 1937, reg. 67 (2). It was contended for the respondent that, since he was driving the lorry under the instructions of the brewers' foreman, it was the foreman, and not the respondent, who was in charge of the vehicle and, therefore, using it within the meaning of reg. 94:—

Held: the respondent was using the lorry within the meaning of regs. 67 (2), 94.

[**EDITORIAL NOTE.** This case is a question of the construction of the regulations. It is pointed out that these regulations, being designed for the public safety and drafted in the widest possible terms, are to be construed to include all cases within their ordinary meaning, and the driver of a lorry is a person using the lorry. Therefore, though the accident may have been due to an improper method of loading, the driver of a lorry is liable to a penalty for using it when improperly loaded, although persons, over whom he had no control, were responsible for the loading.

As to Contravention of Motor Vehicles Regulations, see HALSBURY, Hailsham Edn., Vol. 31, pp. 777, 778, para. 1213; and for Cases, see DIGEST, Supp., Street Traffic, Nos. 180b-185b.]

Case referred to:

(1) *Adair* v. *Donaldson*, [1935] S.C. (J.) 23.

Appeal by way of case stated from a decision of the Durham County Quarter Sessions.

On June 14, 1940, the respondent was driving a lorry as the servant of its owners. At the time the lorry was on hire to a firm of brewers. The respondent was driving under the instructions of an employee of the brewery company who was in charge of the lorry and who, assisted by two other servants of the brewery company, had loaded it. All three were experienced draymen. The respondent had taken no part in the loading of the lorry. As the lorry was going round a sharp bend in the road the brewers' foreman, who was sitting on the rear, overbalanced and fell off, and later died from the injuries he sustained. In falling he brought with him a number of cases of empty beer bottles which were part of the load which the lorry was carrying. The driver of the lorry, the respondent, was convicted by the justices on a charge of having contravened the Motor Vehicles (Construction and Use) Regulations, 1937, reg. 67 (2), in that he had failed to have the load carried by the vehicle he was using so secured that danger was not likely to be caused to any person on a road by reason of any part of the load falling from the vehicle. The justices convicted the respondent, but the quarter sessions allowed his appeal on the ground that the responsibility in law for the loading of the lorry rested with the servants of the brewery company.

E. G. Sykes for the appellant.

J. Charlesworth for the respondent.

Viscount Caldecote, L.C.J.: The respondent was charged with contravention of the Motor Vehicles (Construction and Use) Regulations, 1937, reg. 94, which provides as follows:

> If any person uses or causes or permits to be used on any road a motor vehicle or trailer in contravention of or fails to comply with any regulations contained in Part III of these Regulations he shall for each offence be liable to a fine not exceeding £20.

The regulation which was alleged to have been contravened was reg. 67 (2), which is in these terms:

> The load carried by any vehicle shall be so secured that danger is not likely to be caused to any person on a road by reason of the load or any part thereof falling from the vehicle.

The justices convicted the respondent and imposed a fine of £1. An appeal to quarter sessions was allowed, but, at the request of the present appellant, a case was stated for the opinion of this court.

Quarter sessions based their decision on the ground that the respondent was not responsible for having the load secured in the manner required by the regulations. They took the view that he was driving the lorry under the instructions of the servants of the brewery and that the latter, who were experienced draymen, were responsible for the loading of the lorry. They seem to have addressed their minds to the question whether the driver was the person responsible for seeing that the loading of the vehicle conformed with the regulations, and particularly reg. 67 (2). In my opinion, the real question to be determined is whether or not the respondent was a person using the vehicle and is the question stated by LORD HUNTER in *Adair* v. *Donaldson* (1) in these words:

> The question raised in the case is whether the driver was using the motor-vehicle on the road within the meaning of the regulations.

The argument of counsel for the respondent is that the word "uses" in reg. 94 would, in its widest sense, cover everybody who takes advantage of a vehicle as a means of transport. Applying that to the case of a motor omnibus, he argued that every passenger "uses" that vehicle, but that it was clearly not the intention of these regulations that such persons were to be held to be using the vehicle within the meaning of these regulations. For these reasons, he said that some restricted meaning for the word "uses" had to be found. He then said that only one person at a time could be using a motor lorry within the meaning of reg. 94. The reason for that is not very clear. As I understood it, it is that the person who uses the vehicle is not the driver but the person in charge of the lorry. The regulations deal separately with a number of matters, and reg. 94 provides a penalty in respect of all of them. Counsel referred to a number of other regulations and asked the court to base some conclusions on the sense in which different words are used in those different regulations. The word to be interpreted is the word "uses," but counsel called attention to other words, for example, "drives" or "is in charge of." Having suggested a particular interpretation of those words, he comes back to the word "uses," and contends that it is plain, from a consideration of these regulations as a whole, that the word "uses" can only apply to the person in fact in charge of the vehicle. It may be the driver, if he is the only person on the vehicle, or if he is in fact in charge of it, but that the driver is not necessarily the person in charge of and, therefore, using the vehicle. For the present case, the only person said to be using the vehicle was the man who was unfortunately killed. That is based on the finding in the case that the driver was driving the lorry under his instructions. In my opinion, applying the ordinary common-sense rules of interpretation to reg. 94, it is impossible to arrive at any other conclusion than that in this case, at any rate, the person using the vehicle was the driver. It may be that the person in charge of the vehicle is a person using the vehicle, but that the person driving the vehicle is using it seems so plain as to make it unnecessary to consider the other regulations. In *Adair* v. *Donaldson* (1), LORD HUNTER said that the person using the vehicle in that case "was the person who, at the time, was making use of the motor lorry on the road." That decision is not binding on this court, but, in my opinion, the conclusion of the court in that case and the reasons given for it were right and should be applied here, although in the present case there were several persons on the lorry, while in *Adair* v. *Donaldson* (1) there was only the driver. The driver was rightly convicted on the evidence, there being no question that reg. 67 (2) had not been complied with. The appeal will be allowed with costs, the order of quarter sessions reversed, and the conviction restored.

HUMPHREYS, J.: I agree.

SINGLETON, J.: I agree. In my view, the case stated finds that the load on the lorry was not so secured that there was no likelihood of danger being caused to a person on a road by reason of the load, or a part of it, falling from the lorry. Quarter sessions must, therefore, be taken to have found that someone had committed an offence against reg. 67 (2). Reg. 94, the penalty regulation, also creates certain offences. It provides that :

> . . . if any person uses or causes or permits to be used on any road a motor vehicle or trailer in contravention of . . . these regulations he shall be liable to a penalty.

It is argued that some other person or persons committed the offence charged against the driver of this motor vehicle. Those who loaded it may well be said to have failed to comply with the regulations ; a person in charge of the lorry may well be said to have caused or permitted the offence ; but there is no finding of fact in the case which would justify the conclusion that the driver on the day in question was not using it. We were asked to find that he was not using it because someone else was in charge of it. The use by the driver in this case was an active use of the vehicle, and there is, in my view, no reason for saying that he was not using the vehicle within the ordinary meaning of those words. These regulations are drawn in the widest possible form so that there shall be someone on whom responsibility can be placed. I agree that the appeal should be allowed.

Appeal allowed with costs.

Solicitors : *L. Mulcahy*, Gateshead (for the appellant) ; *Molineaux, McKeag & Cooper* (for the respondents).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

McMILLAN *v.* GUEST.

[House of Lords (Lord Atkin, Lord Wright, Lord Roche, Lord Porter), **February 16, 17, 19, 23, April 27, 1942.**]

Income Tax—Director's remuneration—Director of private company permanently resident abroad—Remuneration fixed by company's articles—Public office or employment—Remuneration liable to income tax—Income Tax Act, 1918 (*c.* 40), *Sched. E, rr.* 1, 6.

The appellant was the director of a company incorporated under the Companies Act, 1929. The directorship and the whole of the government of the company were in England. The appellant was resident in the United States, and had resided there since 1919. At no material time was the respondent ever in England, but he devoted his time to furthering the interests of the company in North America. The appellant received remuneration as provided by the company's articles, and it was paid to him as a director without any reference to the particular tasks he performed in North America, in respect of which he received no additional remuneration. It was held by the general commissioners that the appellant was chargeable to income tax upon his remuneration as a director under Sched. E, r. 6, which provides that tax shall be charged in respect of every public office and employment of profit within the United Kingdom :—

Held : (i) the appellant was properly assessed to income tax under Sched. E. A director of a company incorporated under the Companies Act, 1929, is the holder of a public office, and that office is located where the company is.

(ii) although the company was a private one, the directorship was none the less a public office.

Decision of the Court of Appeal ([1940] 4 All E.R. 452) *affirmed.*

[**EDITORIAL NOTE.** The fact that the work of the director was carried on outside the United Kingdom is shown to be immaterial since the words of charge include a person *having* an office in the United Kingdom. If the office is locally situate in the United Kingdom, it is irrelevant that the work is performed elsewhere. The other question was whether a directorship in a private company is a public office. In this connection, having regard to the duties imposed upon directors generally by the Companies Act, 1929, their Lordships have been unable to distinguish between the officers of a public company and those of a private company in this respect.

As to Public Office or Employment, see HALSBURY, Hailsham Edn., Vol. 17, pp. 217-220, paras. 439-443 ; and for Cases, see DIGEST, Vol. 28, p. 85, Nos. 484-489.]

Cases referred to :

(1) *Great Western Ry. Co.* v. *Bater*, [1922] 2 A.C. 1 ; 28 Digest 85, *485* ; 91 L.J.K.B. 472 ; 127 L.T. 170 ; 8 Tax Cas. 231 ; *revsg.* [1920] 3 K.B. 266 ; [1921] 2 K.B. 128.

(2) *Proctor* v. *Ryall* (1928), 14 Tax Cas. 204; Digest Supp.
(3) *Berry* v. *Farrow*, [1914] 1 K.B. 632; 28 Digest 5, *10*; 83 L.J.K.B. 487; 110 L.T. 104.
(4) *Watson* v. *Rowles* (1926), 95 L.J.K.B. 959; 28 Digest 87, *499*; 135 L.T. 614; 11 Tax Cas. 171.
(5) *A.-G.* v. *Lancashire & Yorkshire Ry. Co.* (1864), 2 H. & C. 792; 28 Digest 85, *485*; 33 L.J.Ex. 163; 10 L.T. 95.
(6) *Pickles* v. *Foster*, [1913] 1 K.B. 174; 28 Digest 88, *516*; 82 L.J.K.B. 121; 108 L.T. 106; 6 Tax Cas. 131.
(7) *Robinson* v. *Corry*, *Corry* v. *Robinson*, [1934] 1 K.B. 240; Digest Supp.; 103 L.J.K.B. 228; 150 L.T. 250; 18 Tax Cas. 411.

APPEAL by the taxpayer from a decision of the Court of Appeal, dated Nov. 25, 1940, and reported [1940] 4 All E.R. 452. The facts are fully set out in the opinion of LORD PORTER.

J. Millard Tucker, K.C. and *T. N. Donovan* for the appellant.

The Attorney-General (*Rt. Hon. Sir Donald Somervell, K.C.*) and *Reginald P. Hills* for the respondent.

LORD ATKIN: My Lords, this is an appeal from an order of the Court of Appeal reversing a decision of LAWRENCE, J., who allowed an appeal by the appellant, McMillan, from a determination of commissioners for general purposes of income tax upholding an assessment of the appellant for income tax under Sched. E. The sole question is whether the appellant, who in the years of assessment was a director of a limited company, A. Wander, Ltd., had held a public office of profit within the United Kingdom. The facts are not in dispute, and are set out in paras. 4-6 of the case stated by the general commissioners, which I will not here repeat. The Income Tax Act, 1918, Sched. E., provides:

> Tax under Sched. E shall be charged in respect of every public office or employment of profit.

By r. 6:

> The tax shall be paid in respect of all the public offices and employments of profits within the United Kingdom . . . viz. . . . (*h*) offices or employments of profit under any company or society, whether corporate or not corporate . . .

It is necessary to consider whether the appellant (i) held an office, (ii) held a public office, (iii) held a public office within the United Kingdom.

On the first point there was no dispute. There is no statutory definition of office. Without adopting the sentence as a complete definition one may treat the following expression of ROWLATT, J., in *Great Western Ry. Co.* v. *Bater* (1), at p. 274, as a generally sufficient statement of the meaning of the word:

> . . . an office or employment which was a subsisting, permanent, substantive position, which had an existence independent of the person who filled it and which went on and was filled in succession by successive holders . . .

This statement was adopted by LORD ATKINSON in his judgment in the same case in the House of Lords, at p. 28. There can be no doubt that the director of a company holds such an office as is described.

It was contended by the appellant that, while he held an office, yet it was not a public office within the meaning of the Income Tax Act, 1918. It can hardly be said to be obvious that the position of director of a trading company which may carry on business with a very small capital on a very small scale is necessarily a public office. It is, however, impossible to give effect to the words of r. 6 (*h*) "any company" so as to distinguish between those whose offices are public and those whose offices are not. In particular, in reference to companies incorporated under the Companies Acts, it has to be remembered that the legislature has thought fit to impose duties upon their officers which attach to them as such, and which are not imposed upon private partnerships, as for instance, the Companies Act, 1929, ss. 27 (2), 37, 112, 122, 217. I can find no reason for distinguishing in this respect between offices held in a private company within the meaning of the Companies Acts (which this is) and a public company. Some of the above sections, though not all, apply to both. The office of director of this company was, for the above reasons, a "public office."

Was, then, the office held by the appellant a public office "within the United Kingdom"? As to this, I am completely satisfied by the reasoning of LORD

Greene, M.R., in his judgment delivered in the Court of Appeal. I will only add that we are here dealing with an "office," not with an "employment," the locality of which may be governed by different considerations. The office of director of an English company, the head seat and directing power of which is admitted to be in the United Kingdom, seems to me of necessity to be located where the company is. It is in fact part of the organic structure of the corporation. In such a case I do not think that it is true, as suggested by Rowlatt, J., in *Proctor* v. *Ryall* (2), that "the place of exercise governs." The appellant, though resident in the United States of America, while there held office in the United Kingdom; and though he may have taken his share of the directing power only in attending to the activities of the English company in the United States of America and in Canada, he did so by virtue of his English office. From this point of view I think that too much emphasis may be laid upon the source from which the office was remunerated; but the fact that it was English reinforces the view that the locality of the office was in fact English. Like Lord Greene, M.R., I derive little assistance from previous cases. I consider it to be clear that the director of an English company which is resident in the United Kingdom, wherever he resides and whether or not he takes any part in directing the affairs of the company, holds an office in the United Kingdom. For these reasons I am of opinion that the appeal fails and should be dismissed with costs.

My noble and learned friend, Lord Roche, wishes me to state that he concurs in the order proposed.

Lord Wright: My Lords, the appellant was not resident in this country during the years of charge. Accordingly the emoluments derived from his directorship in A. Wander, Ltd., are not taxable unless they fall within the words of Sched. E, nor are they affected by the provisions of the Finance Act, 1922, s. 18, because they could not have been charged under Sched. D. The Crown has, therefore, to establish that they are profits of a public office or employment within the United Kingdom, which last condition is specified in r. 6.

Since r. 6 (*b*) expressly includes offices or employments of profit under a corporate company, and since A. Wander, Ltd., is a company registered in England under the Companies Acts, the requirements of Sched. E would seem so far to be satisfied. The company, further, is one which, as the case finds, is resident and controlled in the United Kingdom. I limit my observations to such a company, without considering what is the position of a company registered in the United Kingdom but controlled and managed abroad. The next matter to be examined is whether the directorship held by the appellant is an office or employment within the meaning of Sched. E. The word "office" is of indefinite content. Its various meanings cover four columns of the New English Dictionary, but I take as the most relevant for purposes of this case the following:

> A position or place to which certain duties are attached, especially one of a more or less public character.

This, I think, roughly corresponds with such approaches to a definition as have been attempted in the authorities, in particular *Great Western Ry. Co.* v. *Bater* (1), where the legal construction of these words, which had been in Sched. E since 1803 (Stat. (1803) 43 Geo. III, c. 122, s. 175), was discussed. It was there held that the position of a clerk in a railway company was not an office or employment of profit of a public nature within Sched. E. In *Great Western Ry. Co.* v. *Bater* (1), at p. 25, Lord Wrenbury was content so to hold without attempting to define what type of office or employment would satisfy the language of the schedule. Lord Sumner, at p. 25, said that to hold otherwise would be an abuse of language. To hold that the director of a company such as A. Wander, Ltd. (though it is what is called a private company), does not have an office within the meaning of the schedule would equally, in my opinion, be an abuse of language. Everyone, I think, would say that as director he held an office in the company. The word "employment," in my opinion, has to be construed with and takes its colour from the word "office."

If I may adopt the words of Lord Greene, M.R., it is too late to say that the director of a company like this does not hold an office within Sched. E. I do not attempt what their Lordships did not attempt in *Bater's* case (1), i.e., an exact definition of these words. They are deliberately, I imagine, left vague. Though their true construction is a matter of law, they are to be applied in the facts of the particular case according to the ordinary use of language and the dictates of common sense, with due regard to the requirement that there must be some degree of permanence and publicity in the office. In *Bater's* case (1), LORD WRENBURY seemed to disapprove of the opinion of BANKES, J., in *Berry* v. *Farrow* (3), that a director held an office within the schedule, but I cannot think that his disapproval was justified or has been supported. In *Watson* v. *Rowles* (4), a director of a "private" limited company was held to be taxable under Sched. E. The public character of the company is sufficiently established by its being incorporated under the statutory machinery of the Companies Acts and by its being subject to the provisions of these Acts. It is, however, clear that not all officers, and still less all employees, of a limited company or of any corporate body are holders of an office or employment under Sched. E. This is illustrated by *Bater's* case (1), and much earlier by *A.-G.* v. *Lancashire & Yorkshire Ry. Co.* (5). I do not think that the agency considered in *Pickles* v. *Foster* (6) was correctly treated as an office or employment within Sched. E.

There still remains the question whether the appellant's office or employment, though it is public, is one within the United Kingdom as required by Sched. E, r. 6. The commissioners held that it was because the appellant retained the right and duty to exercise the power of a director. That decision was reversed by LAWRENCE, J., on the ground that the place of exercise governed. For that principle he relied on *Pickles* v. *Foster* (6) and on the *dictum* of ROWLATT, J., in *Proctor* v. *Ryall* (2). That *dictum*, however, was not necessary to the decision of the case and is qualified in its scope; e.g., ROWLATT, J., refers to the case of a sinecure, which is not exercised anywhere at all. I do not think that ROWLATT, J., was right, if or so far as he held that the place of exercise governed.

The office of a director is something notional; its locality is one degree, if that is possible, even more notional. In my opinion, the place where it is exercised, if it is exercised anywhere at all, is not necessarily the test. As obvious illustrations, I may refer to heads (*d*), (*e*), (*f*), under which come officers in the armed forces of the Crown. To them r. 18 (2) of the schedule clearly applies, at least as machinery for the assessment which is to be at the head office of the department. In any case, the words of r. 1 are not simply "exercising" but "having or exercising" the office or employment. Exercising no doubt does involve activity in the office or employment, but a man may have an office and draw emoluments without doing any work at all. For instance, a director may in certain cases be properly allowed to retain his emoluments when for good reasons he may be relieved from any active duties at all. I have already mentioned the case of a sinecure. The peculiarity of this case is that the appellant has all the time been rendering in the United States and in Canada services of great value to the company, while at the same time he has been released from and has not performed the normal duties of a director, such as attendance at board meetings. He has still remained a director and as such cannot be in a different position from what he would have been in if he had not rendered those services abroad. I agree with LORD GREENE, M.R., that it is in the office of director that the crucial test is to be found, because [p. 458]:

> . . . every right which a director has and every duty which the law, general or special, imposes on him is to be exercised in this country and nowhere else.

That is the test accepted in substance by the commissioners. It is, I think, the true test in a case like this. The appellant had or held all through the years of charge the office of director in the United Kingdom. That, in my opinion, is sufficient to satisfy the schedule.

The cases cited do not afford any strict parallel. In *Robinson* v. *Corry* (7), the taxpayer, who was deputy cashier at the naval base at Singapore, was not only outside the United Kingdom during the period of charge, but exercised all the duties of the employment there, as its nature required. LORD GREENE, M.R., I think correctly, treats the liability of the taxpayer there as depending on r. 18 (2), which relates to employment under government. *Pickles* v. *Foster* (6) could be sufficiently decided against the Crown on the ground that the agency in West Africa was not an office or employment with Sched. E. The ruling that the office or employment to come within Sched. E must be exercised in the United Kingdom was not necessary to the decision and cannot, I think, be supported. I think that the appeal should be dismissed.

Lord Porter: My Lords, I agree that this appeal should be dismissed. The appellant has been charged to tax under Sched. E in respect of a public office or employment of profit. Under the rules applicable to this schedule :

> (1) Tax under this schedule shall be annually charged on every person having or exercising an office or employment of profit mentioned in this schedule . . . in respect of all . . . fees . . .
>
> (6) The tax shall be paid in respect of all public offices and employments of profit within the United Kingdom or by the officers hereinafter respectively described, namely : (*h*) offices or employments of profit under any company or society whether corporate or not corporate.

The appellant is a director of A. Wander, Ltd., a private company which is resident and controlled in the United Kingdom. He was appointed a director by the articles of association and has no contract of service with the company. By art. 90 the remuneration of the directors is a sum equal to ten (originally fifteen) per cent. of the net profits of the company in every year, and is divisible among the directors in such proportion as they may agree, and, in default of agreement, equally.

Since 1919 the appellant has been resident in the United States of America, and in 1938 he became a naturalised American citizen. Mr. McMillan went to America to take over the management of a company in Chicago allied to the predecessors of A. Wander, Ltd., for whom he opened a Canadian office, and concerned himself in the administrative and selling organisation there. In 1930, largely as a result of his advice, a Canadian factory was built. Mr. McMillan superintended its building and has since that time continued to advise its manager on matters relating to the conduct of the business. The appellant, as managing director of the Chicago company, consults with the managing director of the English company, or any other director of the latter company when they are in Chicago, regarding anything to the advantage of the English Chicago or Canadian businesses, and has assisted in Canada in engaging the Canadian staff. Copies of all minutes, annual balance sheets and managing directors' and auditors' reports of A. Wander, Ltd., are sent regularly to the appellant in America, but he has attended no board meetings in England except one in 1931, and only one in Chicago in 1925. He is not required to attend board meetings of the English company. Indeed, notices of such meetings are not sent to him.

In these circumstances, he was assessed by the commissioners in respect of his income as director of the English company under the Income Tax Act, 1918, Sched. E, for the years 1937-38 and 1938-39, but, being dissatisfied with the decision in point of law, required a case to be stated.

The case from which the facts I have set out are taken was heard first by Lawrence, J., who overruled the commissioners, and afterwards by the Court of Appeal, who restored their assessment. Your Lordships have to determine if they were right in so doing.

The points taken on behalf of the appellant were (i) that the office was not within the United Kingdom, and (ii) that it was not public.

For the first point reliance was placed upon the decisions in *Pickles* v. *Foster* (6) and *Proctor* v. *Ryall* (2). The result of those cases was said to be that an office was not within the United Kingdom unless it was exercised there ; and the appellant went on to argue that on the facts found he did not exercise his office in this country.

The Crown did not dispute, and, indeed, I think it is plain, under the rules applicable to Sched. E., that tax is charged only on persons having or exercising an office mentioned in the schedule, and the only offices mentioned in the schedule are those within the United Kingdom. If, therefore, the office is not within the United Kingdom, it is not the subject of tax under this schedule.

Though they made this admission, the respondents did not accept the view that the office must be exercised within the United Kingdom. Whether a person, who holds the office of director in a company resident and managed and therefore controlled in this country, who receives his fees from a pool provided in this country for himself and his co-directors—a pool divided up in the proportions which they agree—and who receives copies of minutes, annual balance sheets and managing directors' and auditors' reports, exercises or does not exercise his office in this country is a question which I do not think it necessary to decide. In the two cases quoted the problem was expressed with sufficient accuracy by asking was the employment exercised here or not; no question of *having an office* arose. It does arise in the present case, and whatever views one may entertain as to the accuracy of the language used in the cases referred to above when applied to those individual cases, it is not, I think, intended to apply to all cases under Sched. E.

For the present purpose it is enough to say that a person in the position of the appellant holds an office in this Kingdom despite the fact that he has not in fact attended any meetings in this country since 1931. He is a director of a company resident and managed in this country, entitled to attend any board meetings which may be held here, giving advice as to matters concerning its management, and supplied at least with its formal literature. In such a case it is, I think, immaterial that most, if not all, of Mr. McMillan's activities are carried out in America. He still holds an office in the United Kingdom.

If the appellant is, as I think he is, wrong on this point, he still has a second string to his bow. Even, he says, if he has or exercises an office in the United Kingdom, it yet is not a public one. That it is an office is, I think, plain. It has permancy apart from the temporary holder and is held in one of the specified corporations. One has only to refer for example, to the Companies Act, 1929, ss. 145 and 151, to find the phrase office of director expressly mentioned. Indeed, this is not in dispute. What is controverted is the allegation that a directorship, at any rate in a so-called private company, is a public office. The argument is put upon the ground that at worst—i.e., at worst for the appellant—directors, in the case of companies not by statute requiring any directors, if appointed at all (as they may be, but are not compelled to be in the case of a private company), are not holders of a public office.

There is no magic in the phrase private company. It is true that it need not have directors or issue a prospectus; that it is not permitted to have more than 50 shareholders and may have no more than two; but it still must be registered and keep an official register of its members. It is a corporate body constituted by Act of Parliament (now the Companies Act, 1929), and that Act imposes duties upon the office itself and its holder for the time being. These obligations are imposed in the public interest in order that some public control over its organisation and activities may be obtained. No doubt less control is exercised in the case of a private than in the case of a public company; but the former is not private in the sense that it has no public formalities to carry out, and the word private is only used as a convenient label to distinguish it from the so-called public company. I think the office is a public one, and I agree with the motion proposed by VISCOUNT SIMON, L.C.

Appeal dismissed.

Solicitors: *Goulden, Mesquita & Co.* (for the appellant); *Solicitor of Inland Revenue* (for the respondent).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

NOTE.

RACECOURSE BETTING CONTROL BOARD *v.* BRIGHTON COUNTY BOROUGH RATING AUTHORITY.

[COURT OF APPEAL (MacKinnon, Luxmoore and Goddard, L.JJ.), **April 15, 16, 1942.**]

This appeal from a decision of WROTTESLEY, J., dated June 18, 1941, and reported [1941] 2 All E.R. 595, was dismissed by consent. MACKINNON, L.J., stated that, having regard to the way in which the case stated was drawn, it raised no question of law for the consideration of the court. Counsel for the appellants said that his consent was given on the understanding that nothing in the case decided by WROTTESLEY, J., should be treated as an authority for the applicability of the profits basis to such a case as the present, or on the question of the method in which that basis should be applied, and the court stated in its order that there was no question of law raised which could be answered by the court before WROTTESLEY, J. The effect of this is not clear, but it may be assumed that the judgment of WROTTESLEY, J., can now be cited only as *obiter dicta*.

R. *v.* SNELL, *Ex parte* ST. MARYLEBONE BOROUGH COUNCIL.

[KING'S BENCH DIVISION (Viscount Caldecote, L.C.J., and Humphreys and Cassels, JJ.), **April 17, 1942.**]

Public Health—Housing—Housing estate—Recovery of possession from tenant—Rent exceeding £20—Summary procedure before justices—Housing Act, 1936 (*c.* 51), *ss.* 83 (1), 156 (2).

A borough council was the owner of a number of flats erected by them under a housing scheme. The tenant of one of the flats being considered unsatisfactory, the council served a notice to quit and upon its expiration applied for an order for possession to a court of summary jurisdiction under the Small Tenements Recovery Act, 1838. The council required possession for the purpose of re-letting the flat to another member of the working classes. The Small Tenements Recovery Act, 1838, applies only to premises let at a rent not exceeding £20 per annum. The council contended, however, that, since in applying for possession they were exercising the power of management of the property vested in them by the Housing Act, 1936, s. 83 (1), they were enabled by sect. 156 (2) of that Act to proceed under the Small Tenements Recovery Act, 1838, notwithstanding the fact that the yearly rent of the flat exceeded £20 :—

HELD : the requiring of possession for the purpose of re-letting to another member of the working classes was an exercise of the power of management vested in the council by the Housing Act, 1936, s. 83 (1), and sect. 156 (2) enabled the local authority to proceed summarily for the recovery of possession under the Small Tenements Recovery Act, 1838.

[**EDITORIAL NOTE.** This decision settles a matter which has been the cause of concern to local authorities for some time. The matter is purely one of the construction of the Housing Act, 1936, ss. 83 (1), 156 (2), and the result is that, in the management of property for the housing of the working classes, local authorities have the advantage of taking proceedings in a court of summary jurisdiction under the Small Tenements Recovery Act, 1838, whatever the rent may be. The advantages of this procedure are too well known to call for comment.

AS TO THE RECOVERY OF POSSESSION OF PREMISES UNDER THE HOUSING ACT, 1936, see HALSBURY, Hailsham Edn., Vol. 26, pp. 580-582, paras. 1232, 1233.]

APPLICATION on behalf of the St. Marylebone Borough Council for an order of *mandamus* directed to J. E. Snell, Esq., metropolitan police magistrate. The facts are fully set out in the judgment of CASSELS, J.

H. G. Robertson for the applicants.

E. Ryder Richardson for the respondent.

VISCOUNT CALDECOTE, L.C.J. : In this application on behalf of the borough council of the metropolitan borough of St. Marylebone for an order of *mandamus* directed to the magistrate I have come to the conclusion that the order should be made. The question depends upon the interpretation of some sections contained in the Housing Act, 1936, and partly also upon the provisions of the Small Tenements Recovery Act, 1838. I have come to this conclusion for reasons which will be stated by CASSELS, J. I do not propose to say more than that in my opinion the order should be made.

HUMPHREYS, J. : I have arrived at the same conclusion, although during the argument I confess that I have from time to time felt some doubts. One of the doubts which troubled me was whether the argument of counsel for the respondent was correct when he contended that it was unlikely that Parliament would have intended to put the member of the working classes who was a tenant of a house which was part of the premises owned and managed by a local authority under the powers conferred on it by the Housing Act, 1936, in the position that that local authority might apply to him treatment which no other landlord could apply to a tenant. It was suggested that, while the Rent and Mortgage Interest Restrictions Acts applied to the High Court and to the county court, so as to prevent those courts in these times from turning out a tenant, although the tenancy had expired or duly determined by notice to quit, except upon terms stated in those Acts, yet the Housing Act, 1936, s. 156 (2), enabled the local authority acting under that Act to go to a court of summary jurisdiction which would have no discretionary power to refuse an order for possession. I am satisfied that that argument is not correct, and that in truth the magistrate is in the same position as the High Court or the county court, or in substantially the same position for the purpose of this argument, *qua* the commencement of the turning out of a tenant under the Rent and Mortgage Interest Restrictions Acts. As to the other points which have been raised, I, like my Lord, prefer to leave it to CASSELS, J., to state the reasons which make me agree with the proposal of my Lord.

CASSELS, J.: This case raises a point which we are told has for some years presented difficulties to local authorities which are administering the Housing Act, 1936. The point is whether a court of summary jurisdiction has jurisdiction under the Small Tenements Recovery Act to consider an application for possession of premises which are managed by the local authority under the Housing Act, 1936, notwithstanding that the yearly rent is more than £20. It has been suggested in the course of the argument that, if the rent is above £20 per annum, then a local authority acting under the Housing Act, 1936, must take proceedings in the High Court or a county court, and cannot have recourse to a court of summary jurisdiction.

This case comes before us by way of an application for an order of *mandamus*. The council for the metropolitan borough of St. Marylebone (which has been referred to as the council) owns and manages the Fisherton Street housing estate in their borough, and that estate consists of blocks of flats erected by the council for the occupation of persons of the working classes. The flat in question in this case was let to a tenant who, according to the evidence before us, proved to be a tenant whose conduct, it was alleged, amounted in law to a nuisance, and the applicants, therefore, required possession of these premises. In other words, they desired to turn their tenant out. It is not disputed that the applicants required possession of these premises for the purpose of re-letting them to another member of the working classes. They, therefore, considering that the Housing Act, 1936, s. 156 (2) enabled them to commence proceedings in the court of summary jurisdiction notwithstanding that the rent was £50 per annum instead of £20 per annum, or under, went to the court of summary jurisdiction and were about to apply for an order for possession when the point was taken that the magistrate had no jurisdiction to hear the application. The matter was put before the magistrate without any evidence being called. He took time to consider and came to the conclusion that he had no jurisdiction to hear the application because, according to the affidavit which he has sworn, he was of the opinion that the facts, which the solicitor for the applicants informed him he was able to prove, did not establish that the local authority required possession of these premises for the purpose of exercising their powers under any enactment relating to the housing of the working classes. He came to the conclusion that the ordinary relationship of landlord and tenant existed, and that, as the rent exceeded £20 per annum, the applicants should go elsewhere and not to a court of summary jurisdiction.

It is said on behalf of the local authority that they can only own, let and manage a housing estate, consisting of flats for the accommodation of the working classes, by reason of the Housing Act, 1936. They have no power to do so apart from that Act. The first subsection of the Act to which our attention was called was sect. 156 (2), which reads as follows:

> Where a local authority, for the purpose of exercising their powers under any enactment relating to the housing of the working classes, require possession of any building or any part of a building of which they are the owners, then, whatever may be the value or rent of the building or part of a building, they may obtain possession thereof under the Small Tenements Recovery Act, 1838, as in the cases therein provided for, at any time after the tenancy of the occupier has expired, or has been determined.

The tenancy of the tenant in this case had expired or had been determined, because due notice had been given, and no point is taken with regard to that.

It is contended on behalf of the local authority that sect. 156 (2) enabled it to apply to the court of summary jurisdiction, and the ground for that was said to be found in the Housing Act, 1936, s. 83 (1), which provides:

> The general management, regulation, and control of houses provided by a local authority under this Part of this Act shall be vested in and exercised by the authority, and the authority may make such reasonable charges for the tenancy or occupation of the houses as they may determine.

On the other hand, it was contended on behalf of the respondent that it was never the intention of the legislature to enable landlords such as local authorities acting under the Housing Act, 1936, to do what other landlords had no power to do, that is to say, notwithstanding the amount of the rent, to bring proceedings in a court of summary jurisdiction; for, if that were so, by reason of the mandatory nature of the language of the Small Tenements Recovery Act, 1838, s. 1, a magistrate or justices sitting to hear an application of this kind, would find himself or themselves compelled immediately to grant the application, with the sole reservation of only 31 days, and that after that the tenant must go out no matter how sympathetic the magistrate or justices might be to the tenant. Upon investigation, however, it was found that, in the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 5, special provision was made for the particularly hard case which counsel for the respondent had conjured up before us, for, indeed, it was provided by sect. 5 (4) of that Act:

> Notwithstanding anything in . . . the Small Tenements Recovery Act, 1838, s. 1, every warrant for delivery of possession of, or to enter and give possession of, any dwelling-house to which this Act applies, shall remain in force for three months from the day next after the last day named in the judgment or order for delivery of possession or ejectment, or, in the case of a warrant under the Small Tenements Recovery Act, 1838, from the date of the issue of the warrant, and in either case for such further period or periods, if any, as the court shall from time to time, whether before or after the expiration of such three months, direct.

That is a very clear indication that a very full discretion was given to, and is possessed by, the magistrate or justices when hearing an application under the Small Tenements Recovery Act, 1838. Indeed, a local authority, in making such an application and succeeding in having it heard by the court of summary jurisdiction, might well find itself faced by a magistrate who was prepared to exercise this discretion, and to adjourn the case for periods of 3 months over and over again, so that the local authority, if the magistrate came to the conclusion that it was a real case of hardship, would never succeed in getting possession of these premises.

One must look to see whether provision is made in the Housing Act, 1936, for the jurisdiction of a magistrate in an application of this kind. This court has come to the conclusion that there is jurisdiction, and for these reasons. There is no question but that the Housing Act, 1936—a very comprehensive Act, dealing not for the first time with the housing of the working classes—made provision, among many other things, for a local authority to be the landlords of premises which are let to tenants who are members of the working classes. It provided that a local authority may make a demolition order for an area (with, of course, certain restrictions); the state is given power to overlook the matter and to see that it is being properly administered; they can make clearance orders, clear the land and erect houses on it; they can erect and own flats, and let them out to tenants. The particular section which deals with that matter is sect. 18 (1). Under that section a local authority may carry out the purposes of this Act by managing an estate for the accommodation of members of the working classes. Management includes letting. Letting presupposes a tenant.

If the local authority, as the landlords, require possession of the premises occupied by its tenant—it may be because he has not paid his rent; it may be because he is a nuisance, as this particular tenant is said to have been; it may be that he has ceased to be a member of the working classes by the inheritance of a very large sum of money, and for that reason is no longer qualified to occupy the particular premises as a member of the working classes—whatever the reason, so long as the purpose for which the local authority requires possession of the premises is a purpose within the Act—namely, in order to let to another member of the working classes—then it comes within the management of the property provided for by the Housing Act, 1936, s. 83 (1), and is within the purposes of the Act. If it is within the purposes of the Act, sect. 156 (2) deals with the matter. It is quite clear, from the wording of that subsection, that Parliament had in mind the possibility that, if a local authority were to go to a court of summary jurisdiction for possession of the premises, they might be met by an objection based on the Small Tenements Recovery Act, and this subsection was enacted to meet that objection.

If it could have been contended in this case that this local authority did not require possession of these premises for the purpose of letting them to another member of the working classes, but for the purpose of erecting a school, or widening a road, or for some other purpose which was not included in the Housing

Act, the tenant would have been entitled to succeed, and, indeed, the magistrate would have been entitled to say that the court of summary jurisdiction had no jurisdiction to hear that application. That is not so in this case, and, for the reasons which I have given, this court decides that the applicants should succeed in these proceedings, and that an order of *mandamus* should issue to the magistrate to hear and determine.

Solicitors: *Samuel Coleman* (for the applicants); *Treasury Solicitor* (for the respondent).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

COCA-COLA COMPANY OF CANADA, LIMITED *v.* PEPSI-COLA COMPANY OF CANADA, LIMITED.

[PRIVY COUNCIL (Viscount Maugham, Lord Thankerton, Lord Russell of Killowen, Lord Macmillan and Lord Clauson), **February 16, 17, 18, 19, 27, March 19, 1942.**]

Privy Council—Canada—Trade-Marks and Trade Names—Infringement—"Coca-Cola" and "Pepsi-Cola"—"Similar"—Unfair Competition Act (*Canada*), 1932 (*c.* 38), *ss.* 2 (*k*), 3 (*c*), 23 (5) (*b*).

The appellants were owners of a trademark consisting of the words "Coca" and "Cola" joined by a hyphen and written in script form with flourishes. The mark was applied to non-alchoholic beverages and syrups and was used for that purpose in Canada. It was first reigstered under the Canadian Trade Mark and Design Act, in 1905, and the registration was renewed for a period of 25 years in 1930. The respondents since 1934 marketed a non-alchoholic beverage under a mark consisting of the words Pepsi" and "Cola" joined by a hyphen and written in a script form with flourishes. It was proved that there were, in respect of such beverages being sold in Canada, 22 registered trade marks which included the word Cola or Kola as part of a compound name. The appellants contended that the respondents were using a trade-mark similar to their own contrary to the Canadian Unfair Competition Act, 1932, s. 3 (*c*). By sect. 2 (*k*) of the Act the word "similar" describes marks so resembling each other or so clearly suggesting the idea conveyed by each other that the contemporaneous use of both in the same area in association with wares of the same kind would be likely to cause users of such wares to assume that the same person assumed responsibility for them:—

HELD: the trademarks used by the appellants and the respondents were not "similar" to each other within the meaning of the Unfair Competition Act, 1932.

[**EDITORIAL NOTE.** The decision in this case is governed by a statutory definition relating to similarity, but in substance that definition states the principles previously applied in deciding allegations of infringement. The plaintiff in this case seems to have adduced no evidence of confusion and the court is left to decide the question of similarity upon a mere inspection of the marks. Though the marks have an obvious appearance of similarity, this is explained by the fact that the word Cola appears in the trade name of very many soft drinks sold in Canada and this reduces the question of similarity to the words Coca and Pepsi and the similarity in the script in which the words were written.

AS TO INFRINGEMENT OF A REGISTERED TRADE MARK, see HALSBURY, Hailsham Edn., Vol. 32, pp. 591-594, para 899; and FOR CASES see DIGEST, Vol. 43, pp. 214-223, Nos. 592-676.]

APPEAL by the plaintiffs from a judgment of the Supreme Court of Canada, dated Dec. 9, 1939, reversing a judgment of the Exchequer Court of Canada.

The facts are fully set out the judgment of their Lordships, delivered by LORD RUSSELL OF KILLOWEN.

K. E. Shelley, K.C., and *G. H. Lloyd-Jacob* for the appellants.

W. Trevor Watson, K.C., *W. D. Herridge* and *Frank Gahan* for the respondents.

LORD RUSSELL OF KILLOWEN: These are consolidated appeals from a judgment of the Supreme Court of Canada, delivered on appeal from a judgment of the Exchequer Court of Canada, in an action for the alleged infringement of a registered trade mark, 43/10433. The Exchequer Court held the defendant to have infringed the mark, but dismissed a counterclaim by the defendant for cancellation of its registration. The Supreme Court reversed this judgment on infringement and dismissed the action, but affirmed the dismissal of the counterclaim. Both parties have appealed to His Majesty in Council, the plaintiff from the dismissal of the action, and the defendant from the dismissal of the counterclaim. At the conclusion of the arguments of counsel in support of the plaintiff's appeal, their Lordships intimated that they did not require to hear counsel on behalf of the defendant. Thereupon the defendant's counsel stated that the defendant did not wish to proceed with the appeal on the counter claim but would submit to having it dismissed with costs. Their Lordships are, accordingly, only concerned with the question of the alleged infringement.

It will be convenient in the first place to state the relevant facts. The plaintiff's mark consists of the words Coca and Cola joined by a hyphen and written, not in block letters, but in a script form with flourishes. It was applied to beverages and syrups, and was used for that purpose in Canada from the year 1900 (or perhaps earlier) by a company formed in the state of Georgia and called the Coca-Cola Co. It was registered by that company under the Trade Mark and Design Act of Canada on Nov. 11, 1905. The mark was assigned in the year 1922 by the Georgia company to a company formed in the state of Delaware, and called also the Coca-Cola Co. The Canadian business of the last-mentioned company was acquired in the following year by the plaintiff, and an assignment by the Delaware company of the mark to the plaintiff was registered on Mar. 7, 1930. The plaintiff then renewed the registration of the mark for a period of 25 years from Nov. 1930. There is no doubt that the plaintiff has carried on and is carrying on in Canada under its registered mark a large business in the manufacture and sale of a non-alcoholic beverage known as Coca-Cola. The scale of its trade is sufficiently indicated by the fact that in the year 1936 it owned some 20 bottling plants and, in addition, had contracts with some 80 independent bottlers.

The defendant company was incorporated on May 27, 1934, and began to sell in Canada a non-alcoholic beverage called Pepsi-Cola, under a mark consisting of the words Pepsi and Cola joined by a hyphen and written in a script form with flourishes. Whether the defendant had acquired the goodwill of any business, and whether the defendant was properly on the register in respect of a mark which differs slightly from the mark actually in use by the defendant, were matters much discussed by plaintiff's counsel. These matters, however, seem to be irrelevant to the only question which their Lordships have to decide, viz., whether the mark which the defendant uses infringes the plaintiff's registered mark. The respective rights of the parties are now governed by the Unfair Competition Act, 1932, to which more detailed reference must be made.

By sect. 3 (c) of that Act it is provided that no person shall knowingly adopt for use in Canada in connection with any wares any trade mark which is similar to any trade mark which is in use in Canada by any other person and which is registered pursuant to the provisions of that Act as a trade mark for the same or similar wares. There is no dispute that the mark which the defendant uses is subject to the above prohibition if it is " similar " to the plaintiff's registered mark. The other requirements as to " knowingly " and similarity of wares are admittedly fulfilled. The word " similar " in relation to trade marks is defined by the Act (unless the context otherwise requires) thus :

> Sect. 2 (*k*) " Similar " in relation to trade marks . . . describes marks . . . so resembling each other or so clearly suggesting the idea conveyed by each other that the contemporaneous use of both in the same area in association with wares of the same kind would be likely to cause dealers in and/or users of such wares to infer that the same person assumed responsibility for their character or quality, for the conditions under which or the class of persons by whom they were produced or for their place of origin.

The contemporaneous use of both marks in the same area in association with wares of the same kind is not in dispute. The actual question for decision in the present case may, therefore, in the light of the above definition be stated thus : Does the mark used by the defendant so resemble the plaintiff's registered mark or so clearly suggest the idea conveyed by it, that its use is likely to cause dealers in or users of non-alcoholic beverages to infer that the plaintiff assumed responsibility for the character or quality or place of origin of Pepsi-Cola ?

The President of the Exchequer Court answered the question in the affirmative. The Supreme Court answered it in the negative. Their Lordships are in agreement with the Supreme Court.

The case appears to them to be one which is free from complications, and which raises neither new matter of principle nor novel question of trade mark law. The only peculiar feature of the case is the dearth of evidence, attributable doubtless to the procedure adopted by the plaintiff at the trial. The only matters proved before the plaintiff's case was closed were (i) the plaintiff's registered mark and (ii) the user by the defendant of the mark alleged to be an infringement. No evidence of (to put it shortly) confusion, either actual or probable, was adduced. It was contended that a statement by a witness called by the defendant (one Charles Guth) was proof of actual confusion. Guth was general manager of a United States company which owns the capital stock of the defendant. He was also president of a New York company called Loft Inc. which owned a large number of candy stores in New York at which Coca-Cola was sold. Subsequently the sale of Coca-cola was discontinued, and Pepsi-Cola was sold at the stores. A passing-off action was brought by the Delaware Coca-Cola Co. against Loft Inc. The judge of the Court of Chancery, Delaware, dismissed the action, holding that Loft Inc. was not responsible for the acts of its agents of which evidence had been given. In the course of his cross-examination in the Exchequer Court, Guth was asked "Then you have no quarrel with the Chancellor's decision as to the facts expressed in his opinion ?" He answered, "None at all." It was argued that this answer proved the fact found in the judgment of the Chancellor, viz. (as quoted by the President of the Exchequer Court from a report of the case) that :

> . . . the uncontradicted evidence shows that substitutions were made by employees of the defendants of a product other than Coca-Cola for that beverage when calls for the same were made.

The President relied on this judgment "as very formidable support to the plaintiff's contention that . . . there is likelihood of confusion". In their Lordships' opinion he was not entitled to refer to or rely upon a judgment given in proceedings to which neither the plaintiff nor the defendant was a party as proving the facts stated therein. Those facts are in no way proved thereby, nor are they in any way proved by the answer of Guth which has been quoted above. Guth could not of his own knowledge either quarrel or agree with the Chancellor's decision as to what it was that had happened in the numerous stores, and was described by the word "substitutions." There was, accordingly, no evidence before the Exchequer Court of confusion, actual or probable.

In these circumstances, the question for determination must be answered by the court, unaided by outside evidence, after a comparison of the defendant's mark as used with the plaintiff's registered mark, not placing them side by side, but by asking itself whether, having due regard to relevant surrounding circumstances, the defendant's mark as used is similar (as defined by the Act) to the plaintiff's registered mark as it would be remembered by persons possessed of an average memory with its usual imperfections.

In the present case two circumstances exist which are of importance in this connection. The first is the information which is afforded by dictionaries in relation to the word "Cola". While questions may sometimes arise as to the extent to which a court may inform itself by reference to dictionaries, there can, their Lordships think, be no doubt that dictionaries may properly be referred to in order to ascertain not only the meaning of a word, but also the use to which the thing (if it be a thing) denoted by the word is commonly put. A reference to dictionaries shows that Cola or Kola is a tree whose seed or nut is "largely used for chewing as a condiment and digestive" (MURRAY), a nut of which "the extract is used as a tonic drink" (WEBSTER), and which is "imported into the United States for use in medical preparations and summer drinks" (ENCYCLOPÆDIA AMERICANA). Cola would, therefore, appear to be a word which might appropriately be used in association with beverages and, in particular, with that class of non-alcoholic beverages colloquially known by the description of "soft drinks". That in fact the word "Cola" or "Kola" has been so used in Canada is established by the second of the two circumstances before referred to.

The defendant put in evidence a series of 22 trade marks registered in Canada from time to time during a period of 29 years, viz., from 1902 to 1930, in connection with beverages. They include the mark of the plaintiff and the registered mark of the defendant. The other 20 marks consist of two or more words or a compound word, but always containing the word “ Cola ” or “ Kola ”. The following are a few samples of the bulk : “ Kola Tonic Wine ”, “ La-Kola ”, “ Cola-Claret ”, “ Rose-Cola ”, “ Orange Kola ”, “ O’Keefe’s Cola “, ” Royal Cola. ” Their Lordships agree with the Supreme Court in attributing weight to these registrations as showing that the word Cola (appropriate for the purpose as appears above) had been adopted in Canada as an item in the naming of different beverages. The proper comparison must be made with that fact in mind.

Numerous cases were cited in the courts of Canada and before the Board in which the question of infringement of various marks has been considered and decided. Except when some general principle is laid down, little assistance is derived from authorities in which the question of infringement is discussed in relation to other marks and other circumstances.

The plaintiff claimed that by virtue of the Unfair Competition Act, 1932, s. 23 (5), (6) its registered mark was both a word mark and a design mark, and their Lordships treat it accordingly.

If it be viewed simply as a word mark consisting of “ Coca ” and “ Cola ” joined by a hyphen, and the fact be borne in mind that Cola is a word in common use in Canada in naming beverages, it is plain that the distinctive feature in this hyphenated word, is the first word “ Coca ” and not “ Cola ”. “ Coca ” rather than “ Cola ” is what would remain in the average memory. It is difficult, indeed impossible, to imagine that the mark Pepsi-Cola, as used by the defendant, in which the distinctive feature is, for the same reason, the first word “ Pepsi ” and not “ Cola ”, would lead anyone to confuse it with the registered mark of the plaintiff. If it be viewed as a design mark, the same result follows. The only resemblance lies in the fact that both contain the word “ Cola ”, and neither is written in block letters, but in script with flourishes. The letters and flourishes in fact differ very considerably, notwithstanding the tendency of words written in script with flourishes to bear a general resemblance to each other. There is no need to specify the differences in detail. It is sufficient to say that, in their Lordships’ opinion, the mark used by the defendant, viewed as a pattern or picture, would not lead a person with an average recollection of the plaintiff’s registered mark to confuse it with the pattern or picture represented by that mark.

In the result, their Lordships are of opinion that the trade mark used by the defendant and the registered mark of the plaintiff are not trade marks so nearly resembling each other or so clearly suggesting the idea conveyed by each other that the contemporaneous use of both in the same area in association with wares of the same kind would be likely to cause dealers in or users of such wares to infer that the same person assumed responsibility for their character or quality or for the conditions under which or the class of persons by whom they were produced or for their place of origin. The defendant, therefore, has not adopted for use in Canada in connection with its wares, a trade mark which in any way offends against the provisions of the Unfair Competition Act, 1932, s. 3.

Their Lordships will humbly advise His Majesty that this appeal and the cross appeal should be dismissed. The plaintiff will pay the costs of the appeal, and the defendant will pay the costs of the cross appeal with the usual set off.

Solicitors : *Warren, Murton, Foster & Swan* (for the appellants) ; *Parker, Garrett & Co.* (for the respondents).

[*Reported by* HUBERT B. FIGG, ESQ., *Barrister-at-Law.*]

FATTORINI, LTD. *v.* INLAND REVENUE COMMISSIONERS.

[HOUSE OF LORDS (Viscount Simon, L.C., Lord Atkin, Lord Macmillan, Lord Wright and Lord Porter), **December 8, 1941, February 10, 12, 13, 16, April 27, 1942.**]

Income Tax—Undistributed income—Shares charged to bank—Covenant to pay all dividends received from shares to bank—Company having no other income —Whether directors acted unreasonably in not distributing dividend—Finance Act, 1922 (c. 17), *s.* 21 (1).

A holding company owned a part of the shares of 3 operative companies —i.e., companies which actually carried on the trading with which they were all concerned. In 1936, the holding company purchased all the remaining shares in the 3 operative companies. In order to provide the purchase money, the holding company charged all the shares to the bank, and covenanted to pay to the bank all dividends received in respect of the shares so charged. The holding company contended that, since it had agreed to pay all the dividends to the bank and those dividends made up its whole income, it had no income to distribute. For the revenue, it was contended that the company, having become a holding company, and having no other business, could distribute its whole income; that it had no requirements or needs falling within the proviso to the Finance Act, 1922, s. 21 (1); that the fact that it had agreed to pay the dividends, as and when received, to the bank, did not, in the circumstances of the case, prevent it from declaring a dividend; and, finally, that it had not distributed a reasonable part of its income, since it ought to distribute at least the income which it had distributed before its contract with the bank:—

HELD: (i) the company was not precluded by its contract with the bank from distributing a dividend if the directors had thought it financially advisable to do so.

(ii) the company, though an investment company, was entitled to invest a part of its profits in making further investments, instead of distributing them as dividends, without contravening the Finance Act, 1922, s. 21.

(iii) there was no evidence to support the decision that the company could reasonably have distributed a dividend. The onus is on the revenue to show that the directors acted unreasonably in withholding a part of its income from distribution, and this onus is not discharged by showing that the directors might reasonably have distributed some part of its income. The section being a penal one, the revenue must prove that the directors acted unreasonably.

Decision of the Court of Appeal ([1940] 3 All E.R. 657) *reversed.*

[**EDITORIAL NOTE.** The main importance of this decision lies in the holding that, the section being a penal one, the Revenue must prove that the directors acted unreasonably in withholding a part of its income from distribution. It is not enough for the Revenue to show that a part of the income might reasonably have been distributed, if it can, at the same time, be said that the directors would not be acting unreasonably in refusing to distribute that part. It must be shown that there was income available for distribution which the directors unreasonably withheld from distribution. In coming to this decision, the House have also pointed out that the fact that all the income of the company had to be paid to the bank in repayment of a loan would not prevent the distribution of a dividend. Funds for a dividend might have been obtained by borrowing to the extent of the credit balance standing on profit and loss account.

AS TO REASONABLE DISTRIBUTION OF INCOME, see HALSBURY, Hailsham Edn., Vol. 17, pp. 291, 292, para. 577; and FOR CASES, see DIGEST, Supp. Income Tax, Nos. 674p, 674q.]

Cases referred to:—

(1) *Inland Revenue Comrs.* v. *Blott*, [1921] 2 A.C. 171; 28 Digest 107, *663*; 90 L.J.K.B. 1028; 125 L.T. 497; 8 Tax Cas. 101.

(2) *Glazed Kid, Ltd.* v. *Inland Revenue Comrs.* (1930), 15 Tax Cas. 445; Digest Supp.

(3) *Montague Burton, Ltd.* v. *Inland Revenue Comrs.* (1936), 105 L.J.K.B. 236; Digest Supp.; 154 L.T. 335; 20 Tax Cas. 48; *on appeal from* 152 L.T. 8.

(4) *Bomford* v. *Osborne*, (1941) 2 All E.R. 426; Digest Supp.

APPEAL by the company from a decision of the Court of Appeal, dated Aug. 2, 1940, and reported [1940] 3 All E.R. 657. The facts are fully stated in the opinion of VISCOUNT SIMON, L.C.

T. N. Donovan for the appellants.

The Solicitor-General (*Rt. Hon. Sir William Jowitt, K.C.*) and *Reginald P. Hills* for the respondents.

VISCOUNT SIMON, L.C.: My Lords, this appeal arises out of a case stated for the opinion of the High Court by the board of referees under the Finance Act, 1922, Sched. I, para. (2). The appellant is a company "under the control of less than 5 persons" to which the Finance Act, 1922, s. 21 applies. The company is purely an investment company and, before entering into the transactions next to be stated, held investments for which the company had paid over £18,000, and which were producing revenue.

Those controlling the company were Wilfred Fattorini and his wife. They were, as I understand, the only shareholders and were the directors of the company. It was desired to increase the investments held by the company by acquiring certain large holdings of shares in other companies (which have been called "the operative companies" to distinguish them from the investment company), but the appellant company had no sufficient resources of its own by means of which to make the purchase. Accordingly, it approached Martins Bank, Ltd., and on Sept. 22, 1936, an agreement was made under which the bank undertook to advance a sum not exceeding £108,000 at a stipulated rate of interest. With this advance, supplemented by its own cash, the company acquired the shares of the operative companies at a price of £121,221. The bank's loan was secured by a deposit of all the shares including the investments already owned by the company, and the company bound itself to pay to the bank, until the loan was completely discharged, all dividends which it received in respect of any of its investments. These dividends were the company's sole source of income.

The investments in the operative companies' shares brought in an excellent return. In the financial year 1936-7 the income from all investments was £6,540; and in the financial year 1937-8 no less than £34, 855. These amounts were paid over to the bank in accordance with the arrangement, with the result that the bank loan was proportionately reduced.

The appellant company declared no dividend during or in respect of the two years above referred to. The special commissioners, acting under the powers conferred upon them by the Finance Act, 1922, s. 21, as amended, directed that for the purpose of assessment to sur-tax, the total income from all sources of the company for the years of assessment 1936-7 and 1937-8 respectively (see Finance Act, 1937, s. 14 (2)) should be deemed to be the income of the members of the company, and that the amount should be apportioned among them. The company appealed to the special commissioners in their judicial capacity against such direction, and the special commissioners allowed the appeal and discharged the direction for both years. The respondents required the appeal to be reheard by the board of referees which, subject to the case stated, reversed the decision of the special commissioners and restored the direction. The special case came before MACNAGHTEN, J., who delivered judgment reversing the determination of the board of referees and restoring that of the special commissioners. From this decision the respondents appealed to the Court of Appeal (SCOTT, CLAUSON and GODDARD, L.JJ.) which reversed the decision of MACNAGHTEN, J., and restored the determination of the board of referees. There has thus been a constant alternation of view in the course of this litigation, each tribunal in turn reversing the decision brought to it on appeal.

Counsel for the appellant, in his excellent argument, placed before the House the statutory history of successive efforts made by the legislature to prevent the avoidance of super-tax, or of its successor sur-tax, by using the cloak afforded by company law. Since the tax is charged only in respect of the income of an individual, its incidence might be avoided by transferring to a company controlled by such individual, in return for shares, the source of such income and by securing that, instead of any dividends being declared, the profits made by the company should be accumulated and ultimately distributed in a capital form as the results of voluntary liquidation or by creating bonus shares (*Inland Revenue Comrs.* v. *Blott* (1)) or otherwise. Accordingly, by the Finance Act, 1922, s. 21, it was enacted:

> With a view to preventing the avoidance of the payment of super-tax through the witholding from distribution of income of a company which would otherwise be dis-

tributed, it is hereby enacted as follows:

(1) Where it appears to the Special Commissioners that any company to which this section applies has not, within a reasonable time after the end of any year or other period ending on any date subsequent to the fifth day of April, nineteen hundred and twenty-two, for which accounts have been made up, distributed to its members in such manner as to render the amount distributed liable to be included in the statements to be made by the members of the company of their total income for the purposes of super-tax a reasonable part of its actual income from all sources for the said year or A other period, the Commissioners may, by notice in writing to the company, direct that for purposes of assessment to super-tax, the said income of the company shall, for the year or other period specified in the notice, be deemed to be the income of the members and the amount thereof shall be apportioned among the members:

Provided that, in determining whether any company has or has not distributed a reasonable part of its income as aforesaid, the Commissioners shall have regard not only to the current requirements of the company's business but also to such other requirements as may be necessary or advisable for the maintenance and development B of that business.

Sched. I to the Act of 1922 provides that "actual income from all sources" is to be computed by reference to the income for the year in question, and not to that of a past period. In order to complete the statutory scheme as it applied to the years 1936-7 and 1937-8, it is necessary to add a reference to the Finance Act, 1927, s. 31, and the Finance Act, 1936, s. 20. These later enactments, C however, do not affect the present case, since the shares of the operative companies purchased as the result of the agreement of Sept. 22, 1936, were not the first property of a substantial character acquired by the investment company, and moreover the loan was from a bank.

Counsel for the appellant pointed out that the legislature has now, in the case of some investment companies, made it more difficult to escape the burden of sur-tax (see Finance Act, 1939, s. 14 (1)), but this is outside the period within D which the present dispute falls, and it must not be assumed as a matter of statutory construction that earlier provisions have a particular meaning because, if so interpreted, the need for the later enactment is elucidated.

The paragraphs of the special case which raise the matters now to be decided are the following:

23. We the members of the Board sitting to rehear the appeal hold as a matter of E construction of the contract with Martins Bank that it would not have been a breach of contract for the company to distribute a dividend, and we found as a fact that, if we were wrong on this point and a distribution of a dividend would have been a breach of contract, it was not reasonable for the company to make such a contract. We hold that the case of *Glazed Kid Limited* v. *Inland Revenue Comrs.* (2) was distinguishable, as it was assumed in the judgment in that case that the distribution of a dividend could only have been made if moneys payable to the Bank had been retained, a course which would have been restrained by injunction; and there appeared to be no argument F that the contract was not a reasonable contract.

24. We considered that, as the company was an investment company, which after Aug. 24, 1936, held investments producing revenue for which the company had paid £18,000, there was *prima facie* case that the reasonable course was that the company should so manage its affairs as to provide for distribution of dividend and that the company had not displaced such *prima facie* case by evidence that this could not have been done without jeopardising the interests of the company or without making it G impossible to acquire the shares which it desired to buy.

25. We found as a fact that the company had not within a reasonable time distributed in the manner referred to in the Finance Act, 1922, s. 21, a reasonable part of its income for either of the periods in question.

The questions for the opinion of the court are thus stated:

(i) Whether our conclusions of law as set forth in para. 23 were correct.

(ii) Whether there was evidence to support our finding of fact as set forth in para. 25.

H (iii) Whether the matters set forth in para. 24 are such as to show that we misdirected ourselves as to the onus of proof in a case where it is admitted that an investment company with a substantial income has not distributed any part of it.

As regards para. 23, I agree that the contract with the bank did not bind the company not to distribute a dividend, and, inasmuch as the company made profits in each of the years in question, the fact that it used the dividends it received (as it was bound to do) in reducing the charge on the shares, did not make it unlawful to distribute a dividend. There is nothing in law to prevent a company using an income-receipt as cash in its hands to discharge a capital liability or to purchase a capital asset, and then, after the close of its financial year, paying a dividend out of other cash, or borrowing for the purpose, to the extent of the credit balance standing on profit and loss account. This was very clearly explained by my noble and learned friend Lord Romer, when sitting in the Court of Appeal in *Montague Burton, Ltd.* v. *Inland Revenue Comrs.* (3), at p. 16, and his view was affirmed on appeal to this House, particularly in the speeches of Lord Hailsham, L.C., and of Lord Russell of Killowen. The board of referees sought to distinguish the decision of Rowlatt, J., in *Glazed Kid Co.* v. *Inland Revenue Comrs.* (2), where the company made a very similar arrangement to borrow from a bank the purchase price of shares on the terms that it paid over to the bank the dividends as received. Macnaghten, J., in reversing the decision of the board of referees, declared himself unable to see the distinction and I agree with him. The judgments of Rowlatt, J., in income tax cases deserve, in my opinion, particular attention, but in this instance, with all respect to that judge, his view cannot be upheld. He said, at p. 456:

> . . . it is not open to anyone to say that they [the Glazed Kid Co.] have not distributed a reasonable part when they could not distribute any part of what were their profits, because every penny of those profits, which solely consisted of these dividends, were under contract receivable by somebody else.

This is to confuse the use made of an income-receipt to discharge a capital liability with the quite distinct question of the use of a credit balance on the profit and loss account to justify the distribution of a dividend.

As for para. 24 of the special case, the commissioners had contended before the board of referees that, since the company was purely an investment company, its profits should have been distributed to its shareholders. I do not think that this general proposition can be sustained: as already pointed out, the additional investments were highly profitable. There was no evidence that the company could have financed its purchase on less onerous terms, and the Solicitor-General rightly admitted that it was no part of the case for the Revenue before this House that the company should not have entered into this bargain with the bank. As Scott, L.J., observed, a finding that it was " not reasonable to make such a contract " is irrelevant.

There remains para. 25, which contains a finding of fact in the exact terms which would justify the commissioners' direction under sect. 21. The question to be decided is whether there was evidence to support this finding of fact, and the answer to that question must be found by examining the contents of the case and of the annexed documents. The case does not state what the evidence was upon which the board of referees relied in coming to this conclusion. If the finding in para. 25 is to be treated as based upon the board's view, expressed in para. 24, that the company had not followed a reasonable course in making its agreement with the bank, then this view, as I have already pointed out, would not provide a firm foundation for the conclusion. Apart from this, the only material upon which the conclusion in para. 25 can be regarded as based is the fact, to be deduced from the documents, that the company might still pay a dividend if it could borrow the necessary amount on the equity of redemption of the deposited shares. This would be an unusual proceeding, and there is no evidence referred to in the case that it would be commercially possible for the company to do so, or to support the view that, in the circumstances, the failure to do so would amount to a failure to distribute a reasonable part of the company's actual income. I do not forget that the board of referees is a tribunal of business men capable of applying a business judgment to the question before them, but I find it impossible to say that the case contains conclusions of fact which will support the finding in para. 25, when in truth no such conclusions are formulated at all. There is no evidence on the matter to be found in the case; and in the absence of material adequate to support the conclusion, I think the House is bound to answer the question put in the negative and to allow the appeal. I move that the appeal be allowed with costs.

Lord Atkin: My Lords, in the present case the special commissioners, acting in pursuance of the Finance Act, 1922, s. 21, as amended by subsequent Finance Acts, gave a direction that the whole income of the appellant company for the years 1936-7, 1937-8 should be deemed to be the income of the members and should be apportioned among them. On appeal to the special commissioners as an appellate body, they reversed the first decision; on appeal, the board of referees reversed the latter decision; on further appeal MACNAGHTEN, J., reversed the decision of the board of referees, and on still further appeal the Court of Appeal reversed the decision of MACNAGHTEN, J., On appeal to this House I understand that your Lordships are unanimous in deciding to reverse the decision of the Court of Appeal.

There is no doubt that the company comes within the terms of the relevant section which, for this purpose, is the Finance Act, 1937, s. 14 (2). In the case of a company to which the Finance Act, 1922, s. 21, applies, being an investment company, the following provision shall have effect:

> (a) The Special Commissioners may, if they think fit, give a direction under subsect. (1) of the section if it appears to them that the company has not within any year of assessment distributed to its members in such manner as to render the amount distributed liable to be included in the statements to be made by the members of the company of their total income for the purposes of surtax a reasonable part of its actual income from all sources for that year.

By the appropriate sections dealing with appeals the board of referees on appeal take the place of the special commissioners and can give the statutory direction. The board are a special tribunal, appointed, indeed, by the Treasury, though not to be lions under the Treasury chair, but to decide disputes judicially between Crown and subject, holding the scales impartially between them. No criticism at all has been directed against them in this respect. Their findings of facts are final, and their decisions can only be questioned on case stated on points of law. I must deal as briefly as possible with the facts stated before discussing the points of law raised in this case. The appellant company was incorporated in 1919 with a nominal capital of £25,000 divided into 15,000 ordinary and 10,000 preference shares of £1 each of which 15,000 ordinary and 1,765 preference shares have been issued as fully paid up. The company was formed to acquire a retail jewellery and mail order business carried on at Bolton by Thomas Fattorini, and, in June, 1919, it duly acquired the business for £14,724, paid as to £12,000 in fully-paid shares and the balance in cash. There were at this time three other companies in existence in each of which Thomas Fattorini was the principal shareholder. (i) Thomas Fattorini (Skipton), Ltd., incorporated in 1919 with an issued capital at the material date of 47,980 ordinary and 4,200 perference shares of £1 each. (ii) Thomas Fattorini (Birmingham), Ltd., afterwards named Thomas Fattorini, Ltd., with an issued capital of 13,480 ordinary shares of £1 each. (iii) H. Pearson, Ltd., with an issued capital of 24,980 shares of £1 each. Company No. 1 carried on a jewellery and mail order business at Skipton. Company No. 2 carried on the business of manufacturing medals and badges at Birmingham. Company No. 3 carried on the business of cycle dealers. Thomas Fattorini did not acquire his interest in this company until Nov. 1919. In 1924 the cycle business ceased and the company thereafter carried on a mail order business in Manchester.

In 1928 the appellant company discontinued its jewellery business, and sold its mail order business to company No. 1 for £14,000, which it lent to one or other of the three operative companies named. From that date up to at any rate 1936 it carried on a blameless existence as an investment company, distributing annually dividends of about £500 or £600 derived from the interest on the above loans. In the company as stated Thomas Fattorini was the principal shareholder, the other being apparently his son Wilfred.

In June, 1934, Thomas Fattorini died, and his son Wilfred acquired his father's shares in the appellant company, being registered in respect of them in Sept., 1936. After that date, he and his wife were the sole shareholders in the company. In the same year the company proceeded to buy the shares held by the executors of the father and by his other son in the three above-named operative companies. The shares held by Frank were bought from him by an agreement made in the early part of 1936. The total price was £18,229 which the company paid out of its own resources, realising the loan for that purpose.

The shares were transferred in Aug., 1936. At the same time the company proceeded to buy the remaining shares in the operative companies, viz., those held by the executors of the father and by Wilfred himself. For these shares the price required amounted to a large sum, over £100,000, and it was necessary to get the assistance of the company's bank to finance the transaction. These further shares amounted to 77,300 and the price to be found was about £105,000, so that the shares were bought at a premium. Accordingly, the bank agreed to provide the necessary overdraft. They took as security all the shares in the operative companies, both those now to be purchased and those already purchased from Frank, which, of course, provided some margin. They had stipulated that the loan should be paid off within two-and-a-half to three years, and, in addition to a charge on the dividends, they took from the company an agreement until the loan was repaid to pay to the bank all the dividends it received from the shares in reduction of the amount due to the bank from time to time for payment of capital and interest. There was a stipulation that the companies should not, during the period of the loan, pay directors' fees in excess of £6,000 a year, a provision which suggests that Wilfred was not left without resources. As far as the company was concerned, for the time being it placed all its resources of every kind at the disposal of the bank and was left without any income of any kind which it could, without the consent of the bank, devote to any purpose. There is no finding that this agreement was made in bad faith, or to avoid sur-tax, and the Crown expressly disclaimed any attack upon it as being unreasonable. Indeed, it is easy to see that Wilfred and his wife as the directors and sole shareholders of the company might congratulate themselves upon getting an advance from a bank on this class of security of so large an amount, with the result that they secured in the near future a very valuable asset at the cost of foregoing for a few years dividends which so far had amounted to £500 or £600. The receipts from dividends during the years of charge were £6,540 and £34,855, or, deducting bank interest (in the first year for half-a-year), £5,340 and £31,140. The board of referees have found that the company had not within a reasonable time distributed, in the manner referred to in the section, a reasonable part of its income for either period and restored the direction of the first special commissioners that the actual income of the company from all sources should be deemed to be the income of the members and the amount apportioned among them. It is unnecessary to emphasise the highly penal nature of the section. It matters not how small a proportion of the whole income is " the reasonable part " found not to have been distributed. If the company is in fault over a few hundred pounds, the shareholders may be credited with many thousands of pounds with correspondingly heavy liabilities for sur-tax. In the present case the board of referees have not found what would have been a reasonable sum to distribute. It is said that they have the support of some decision for this. If it be so, I can only say that the decision is wrong in a case stated such as this where the question is was there evidence to support the decision. I find it impossible to approach the question whether there was evidence to support a finding that " a reasonable part " should be distributed, without knowing what part it was considered reasonable to distribute, at least as a minimum. In the present case the Solicitor-General stepped into the breach and suggested that at least the company should have distributed £500 or £600, an amount corresponding to its resources before it embarked upon the purchase of the operative companies' shares.

The first question stated by the board refers to a contention that, under the agreement with the bank, it would have been a breach of contract to distribute a dividend. No such contention was sought to be made by the appellants before this House, and the question becomes irrelevant. The remaining questions are connected and should be set out. In para. 24 of the case the board of referees state :

> We considered that, as the company was an investment company which after Aug. 24, 1936, held investments producing revenue for which the company had paid £18,000, there was a *prima facie* case that the reasonable course was that the company should so manage its affairs as to provide for distribution of dividend ; and that the company had not displaced such *prima facie* case by evidence that this could not have been done without jeopardising the interests of the company or without making it impossible to acquire the shares which it desired to buy.

Incidentally, it is not clear to me whether this means that the company had failed to produce the kind of evidence referred to, and that, if they had produced the evidence, they might have displaced the *prima facie* case ; or means that there was evidence of the nature referred to but it did not displace the *prima facie* case. I think it probably means the former. In para. 25 they say:

> We found, as a fact, that the company had not within a reasonable time distributed in the manner referred to in the Finance Act, 1922, s. 21, a reasonable part of its income for each of the periods in question.

The two questions now relevant posed by the board are:

> (ii) Whether there was evidence to support our finding of fact as set forth in para. 25.
>
> (iii) Whether the matters set forth in para. 24 are such as to show that we misdirected ourselves as to the onus of proof in a case where it is admitted that an investment company with a substantial income has not distributed any part of it.

I do not know whether there is any meaning in the inversion of order of the paragraphs in the questions as put. In any case I should conclude that, if the board adopted a view as to the *prima facie* value of certain facts, and the failure of the company to displace those facts, their final decision that the company had not distributed a reasonable part of its income was necessarily based upon their expressed view of the *prima facie* case made and not displaced. On what other footing could the board have reached a final decision on the facts? It would follow that, if they have in fact misdirected themselves in para. 24, their finding of fact in para. 25 is invalidated by this misdirection.

It seems clear that the discussion must proceed *ab initio* on the footing that the action of the directors must be judged by considering what their conduct would reasonably be if no question of sur-tax influenced their decision. Withholding of distribution for the purpose of "avoidance of the payment of sur-tax" by shareholders would, if found, obviously negative the reasonableness of any part so withheld. The other general point to be observed is that, as it seems to me, what has to be found is that the company acted unreasonably in withholding some part of its income from distribution. It is not enough to show that a part could reasonably be distributed, if at the same time it could be said, as it well might, that it was equally reasonable to withhold distribution. The section is highly penal, and I feel no doubt that the onus is originally and remains on the Revenue to show that the company acted unreasonably in withholding part of its income from distribution. What is reasonable has consistently been held to depend upon the actual conditions known at the time for decision. In the application of this section it is what *these* directors recommend and *these* shareholders decide in *those* conditions of *that* company. There is no abstract conception of reasonableness, and the conclusion is not to be reached on *a priori* reasoning. Assuming that the directors are business men, have they acted unreasonably in the circumstances in withholding a distribution? From this point of view I am quite unable to agree that the fact that a company, even an investment company, during the year holds income-producing investments raises a *prima facie* case that the reasonable course for the company is so to manage its affairs as to provide for that income or any part of it to be distributed. It is certainly untrue of private commercial companies of whom I have no doubt numbers are now prospering because the members have year after year placed all their profits in the business and have foregone any income other than such as they may derive from directors fees or the like. Furthermore, I see no reason why the supposed rule should apply to investment companies who are equally entitled, if they choose to forego their income for a time, to develop and improve the company's undertaking. I think, therefore, that the answer to question three is that the matters referred to do show that the board misdirected themselves as to the onus of proof.

I also think that the facts stated by the board disclose no evidence on which it could be found that the company failed to distribute a reasonable part of its income in the years in question. We may eliminate the question which interested the Court of Appeal whether it was legal for the company, having disposed legally of all its income for the year, to distribute a dividend at all. It was pointed out in the Court of Appeal that, if the company had made profits, it would be perfectly legal to distribute them if it could secure the means to do so out of its other free assets or by borrowing. The point was not argued before us by counsel for the appellant in his cogent and convincing address. Whether it would be reasonable to exercise the legal right is another and the only relevant question. It will be convenient here to deal with the argument, which was pressed upon us by counsel for the appellants that, in the present case, the dividends from the operative company's shares formed the whole of the "actual" income of the company within the meaning of sect. 21 of the 1922 Act, and that, since the whole of that "actual" income had been assigned to the bank, there was no part of it which could have been distributed. My Lords, the Court of Appeal have effectively disposed of this argument. Actual income does not mean the specific receipts that come in from time to time, but the "income-tax income" as calculated at the end of the year of assessment. To hold otherwise would make nonsense of the section when applied to commercial companies, who use their receipts as soon as they come in, and hardly ever have left for distribution the actual incomings as sought to be defined in the argument.

When one begins to consider the circumstances of this company at the end of this year when they had to consider the distribution of dividend, I am at a loss to see what was unreasonable in their decision to distribute nothing. There were only two shareholders, in substance only one, Wilfred. They had agreed shortly before by an agreement, which is not now in any way attacked, to assign the whole of their resources to the bank to secure what appeared to be a profitable and reasonable purchase. As a result, the company had not any asset left nor any source of free income. They, therefore, could not procure the funds with which to distribute a dividend without borrowing. They had no source of income from which they could pay interest on any loan. If they had to borrow from some one other than the bank, they would have had, therefore, to pay some capital premium in lieu of interest calculated for the period of the bank loan, and presumably in the circumstances heavy. It was suggested that they might have approached the bank either for the necessary loan or to release some of the dividends. The company were represented by the very two people, the only persons interested, who had only a few months before, in an agreement which is unassailable, agreed to carry out the bank's stipulation that the loan should be paid off in two or three years by surrendering for the time being all the dividends. What is the overwhelming impulse to declare dividends that would now induce them to depart from the bank arrangement, or induce the bank to vary it ? In view of these considerations it appears to me that it was for the inland revenue authorities to give evidence indicating not only that it was possible for the company to borrow (the Court of Appeal say that it would have been easy to borrow), but that in the circumstances it was the reasonable thing to do. In the result, therefore, I come to the clear conclusion that there was no evidence that the company failed to distribute a reasonable part of its income. I regard the case as turning on the bank agreement. As long as that remains unassailed, it must necessarily have controlled the actions of the company, and their reasonable decisions. The Court of Appeal spoke of "the whole plan in the present case for protecting its two shareholders from sur-tax." I cannot reconcile this phrase with their attitude towards the bank agreement; nor do I find it supported by any finding of the board of referees.

If the arrangement with the bank was in fact made as part of a plan for avoiding sur-tax, there might very well be evidence of a failure to distribute a reasonable part of the income. In the absence of any evidence or finding to that effect and in view of the respondents' disclaimer of any attack on that agreement, it must be taken to represent a genuine business arrangement and is a circumstance of the highest importance in estimating the reasonableness of the company's action.

I am of opinion, therefore, that the answer to question 2 should be, No, and to question 3, Yes. The appeal should be allowed and the order of the Court of Appeal set aside, and the order of Macnaghten, J., restored. The respondents should pay the costs in this House and in the Court of Appeal.

Lord Macmillan: My Lords, sur-tax, like its predecessor super-tax, but unlike income tax, is charged, not at a standard rate, but on an ascending scale on successive portions of the total income of the taxpayer above a minimum. It is thus necessarily a tax on individuals. It is not levied on companies, for it is not capable of being accommodated to the system whereby income tax is deducted from dividends at the source, inasmuch as the rates of sur-tax vary with the incomes of the individual shareholders.

The immunity of companies from this tax has not unnaturally led to the adoption of various ingenious devices whereby individuals have sought to transform their income into the income of a company and so to escape the tax. The machinery of the Companies Acts and particularly the provisions applicable to private companies enabled this to be done with some success. If such devices were to be effective, it was necessary that the company should not distribute its profits in dividends, for dividends received by an individual must be included in the computation of his total income for sur-tax purposes. Schemes were accordingly devised whereby the profits of the company should ultimately reach the shareholders otherwise than in the form of dividends, e.g., by way of loans or through a liquidation. The legislation on the subject illustrates the usual competition in ingenuity between the tax gatherer and the tax evader, which has rendered the revenue statutes increasingly complicated.

The particular legislation with which your Lordships are concerned in the present case is designed to circumvent the expedient whereby the income of a company, in consequence of its refraining from distributing its profits, never reaches its shareholders in the form of dividends and accordingly never becomes liable to sur-tax in their hands. The method which has been devised to defeat such schemes is to be found in the Finance Act, 1922, s. 21, as amended by subsequent Acts. Thereby the special commissioners, where it appears to them that any company has not within a reasonable time after the end of any year distributed to its members "a reasonable part of its actual income," are empowered to direct that the said income shall be deemed to be the income of its members, among whom it shall be apportioned. The amount attributed to each member thus becomes part of that member's total income for sur-tax purposes. This is a severe deterrent, for it subjects to sur-tax the whole actual income of the company (on the assumption that all its members reach the sur-tax level) and not merely such part of that income as it might be held to have been reasonable to distribute.

I need not rehearse at length the facts of the present case which have already been fully set out by my noble and learned friend VISCOUNT SIMON, L.C. It is enough to say that the appellant company, which is an investment company within the statutory meaning, acquired shares in three commercial companies, chiefly with money borrowed from Martins Bank, on the terms that it should pay over to the bank all the dividends received in respect of all its shares until the indebtedness to the bank for capital and interest was completely satisfied. In accordance with the bank's requirements, the certificates of the purchased shares were all deposited with the bank as security, along with blank transfers and powers of attorney and a letter of deposit giving the bank an immediate power of sale. The appellant company had no income apart from the dividends on the shares which it had acquired. These dividends, in pursuance of the agreement with the bank, were all paid over to the bank, and the company paid no dividends to its shareholders.

The question for the special commissioners was whether in their opinion the appellant company had not in the circumstances distributed a reasonable part of its actual income to its shareholders in the years in question. It appeared to them that this was so, and they made directions accordingly. On appeal to the special commissioners in their judicial capacity, these directions were discharged. At the instance of the Crown the case was reheard by the board of referees, who took the contrary view and upheld the directions. On a case stated by the board, MACNAGHTEN, J., reversed their determination, but the Court of Appeal subsequently restored it.

Regard being had to the form in which the matter comes before your Lordships' House, there is in my opinion only one question for decision, namely, whether, on the facts as stated by the board to have been found by them, there was evidence on which they could in law decide as they did.

Two matters dealt with by the board have first to be considered. They held (i) that, as a matter of construction of the contract with the bank, it would not have been a breach of contract for the appellant company to distribute a dividend. That is clearly right. It is equally clear, however, that it would have been a breach of contract to apply the dividends which the appellant company received and which were its sole source of income to payment of a dividend to its own shareholders. Therefore, if the appellant company was to pay a dividend, it must find the money from some other source than the dividends which it had itself received. The only possible source suggested by the inland revenue is that "if necessary, the company could lawfully have borrowed the necessary money to enable it to make such distribution." In the stated case the board do not find in fact that the company could have borrowed the necessary money or that it would in the circumstances have been reasonable for the company to do so. Then (ii) the board found as a fact that, if they were wrong in holding that the company without breach of contract could have declared a dividend, "it was not reasonable for the company to make such a contract." At your Lordships' Bar, however, the Solicitor-General, for the Crown, expressly disclaimed any attack on the appellant company's contract with the bank as being in itself unreasonable. I think this concession was rightly made, for, considered apart from any question of taxation, the contract appears quite unobjectionable.

Once it is conceded that the contract is not assailable as unreasonable and, consequently, that it was not unreasonable for the appellant company to contract to pay over its whole income to the bank, it becomes difficult to see how it can be said to have been unreasonable to refrain from distributing dividends, which could have been provided only out of borrowed money. No indication is given of any grounds on which it would have been reasonable for the company to borrow money to enable it to pay a dividend. If a dividend had been paid, it would not in fact have been paid out of profits, but out of borrowed money. It would not have been a distribution of profits, but a distribution of borrowed money, which it was legitimate to distribute, because a corresponding amount of profits had been earned.

What, then, is the finding in fact by the board which your Lordships are asked to hold as justifying the board's conclusion that the appellant company had not distributed in dividends a reasonable part of its income ? It is to be found in para. 24 of the stated case, which expresses the opinion of the board that :

> . . . as the company was an investment company which, after Aug. 24, 1936, held investments producing revenue for which the company had paid £18,000, there was a *prima facie* case that the reasonable course was that the company should so manage its affairs as to provide for distribution of dividend ; and that the company had not displaced such *prima facie* case by evidence that this could not have been done without jeopardising the interests of the company or without making it impossible to acquire the shares which it desired to buy.

The reference to the figure of £18,000 relates to the purchase price of the shares which the appellant company purchased from its own resources as distinct from the money borrowed from the bank.

It will be observed that the paragraph I have quoted puts the matter as one of onus. Now, it may well be that, when the special commissioners make a direction under sect. 21 of the 1922 Act, it is for the company to put forward reasons and, if necessary, evidence to show why the direction is in the circumstances unjustified. Here the appellants put forward their contract with the bank as justifying their having made no distribution of their income in dividends. The Crown admits that it was quite reasonable for the company to contract to apply its income as it did. It seems to me that it was then for the Crown to show that it would have been reasonable for the company, notwithstanding its contract with the bank, to raise money, by borrowing or otherwise, in order to pay a dividend, as there was no legal obstacle to its doing so, and that the company could in fact have raised the necessary money. There is no trace of any such evidence in the case.

When the matter reaches the stage of a stated case, the question is not properly one of onus. It is simply a question of whether the facts found and stated afford evidence on which the board could properly arrive at their conclusion. Now, all that para. 24 of the stated case finds is that *prima facie* the reasonable course was that the company should so manage its affairs as to provide for distribution of dividend. This is rather an expression of opinion than a statement of fact, and no grounds are given for it.

The result is that, in my opinion, the board have not stated any facts such as to justify them in holding that the appellant company failed to distribute a reasonable part of its actual income in the years in question. I am accordingly in agreement with all your Lordships that the appeal should be allowed.

Lord Wright : My Lords, I have considered in print the speech which my noble and learned friend VISCOUNT SIMON, L.C., has delivered. I agree with it and merely add a few words since your Lordships are differing from the Court of Appeal.

The board of referees have embodied their decision in a case stated for the opinion of the court and have made it for present purposes subject to two questions of law. I disregard the first question which is now irrelevant. As to the second question, which is whether there was evidence to support the
A board's finding that the company had not within a reasonable time distributed a reasonable part of its income for the periods in question, that is a question of law which depends on an analysis of the facts found in the special case. However, I think it cannot properly be disposed of without considering the other question, which is logically prior, though postponed in the order in which the case is stated. That latter is in truth a question as to the onus of proof, and can only be understood by referring to para.24 of the case. I understand that
B paragraph to mean that the board are treating the onus as of an ambulatory or shifting character, so that at a certain stage of the inquiry it finally shifts from the respondent to the appellant. I think that is wrong in law. The Crown set out to prove that the direction of the board is justified because the appellant company has not distributed a reasonable part of its income within the meaning of the Finance Act, 1922, s. 21. It is obvious that the section is penal in character, and, in my opinion, the onus is finally on the Crown to
C prove its right to impose what is a very severe penalty. At the end of the day it is for the Crown to establish the facts necessary to show want of reasonableness on the part of the appellant. I cannot discover in the case as stated that there are facts found sufficient to justify the conclusion. Nor do I think that the board would have come to their conclusion if they had not taken the view as to onus expressed in para. 24. It was for the Crown to establish that the
D appellant company could have produced funds (it being accepted that the contract with the bank was not unreasonable) out of which to declare a dividend "without jeopardising the interests of the company or without making it impossible to acquire the shares which it desired to buy." I accept this as a correct statement of what would have been sufficient if established. The board have not found that this has been proved. It seems to me that their conclusion in para. 25 was based upon their view as to the onus of proof. If
E the board were wrong in that view, and I think they were, it follows that in law there was no evidence to support their finding of fact in para. 25.

LORD PORTER: My Lords, I agree that this appeal should be allowed, and I think I can state with brevity my reasons for coming to this conclusion. The facts have already been fully set out by VISCOUNT SIMON, L.C., including in particular paras. 23, 24 and 25 containing the findings of the board of referees
F from which, as I understand it, that body draws its inferences and conclusion. The case ends by asking certain questions for the opinion of the court, questions which, as a result of the present appeal, it is now incumbent upon your Lordships to answer.

As regards the first, I agree with VISCOUNT SIMON, L.C., in thinking that it would not have been a breach of contract for the company to distribute a dividend despite the fact that it had already assigned all its income to the bank
G in order to repay the loan obtained and had also hypothecated the whole of its assets for that purpose. Reference has already been made to *Montague Burton, Ltd.* v. *Inland Revenue Comrs.* (3), which establishes this proposition.

In view of this opinion, the alternative suggestion that it was not reasonable for the company to make such a contract becomes immaterial, but I should not consider it material in any case. A company is entitled to manage its own business in its own way. The question for the board of referees is not, as I
H see it, whether the company has taken a reasonable course, but whether, the particular course having been taken, the company has distributed a reasonable part of its actual income. In saying this I do not rule out the possibility that it may be seen in a particular instance that no genuine transaction has taken place and that the bargain made, actual or purported, is really a subterfuge merely adopted to avoid the payment of tax. I am not saying that such a state of affairs should not be taken into consideration in determining whether a reasonable part of a company's income has or has not been distributed. Moreover, I agree with VISCOUNT SIMON, L.C., and with the board that the decision

in *Glazed Kid, Ltd.* v. *Inland Revenue Comrs.* (2) is open to the objection that it appears to assume that a dividend, at any rate in the case of a holding company, can only be paid out of income received or receivable as cash. The fact that the income had been invested or hypothecated for some purpose elsewhere would not of itself necessarily prevent the distribution of a dividend. Subject to the qualification that the opinion of the board of referees as to the reasonableness of the contract entered into is in this case an immaterial consideration, I should answer the first question asked by the case in the affirmative.

There is, however, as I think, more difficulty in answering the second question. As I understand the framework of the case, the deductions and inferences drawn by the board from the history of the transactions set out in the earlier paragraphs are brought to a conclusion in para. 24, and therein are to be found the grounds from which it is determined that a reasonable distribution of income had not been made.

Those reasons are, I think, as follows:

(i) The company is an investment company; (ii) it held income-producing investments which cost £18,000; (iii) having those investments it should have managed its business in such a way as to ensure that the company enjoyed the income produced by them either directly or indirectly; (iv) the company had not proved that they could not have kept this income without endangering its interests and without preventing itself from purchasing the shares acquired by means of the loans from the bank.

(i) The company is indeed an investment company, and I suppose it is possible to say that in such a case the necessity for building up considerable reserves may not be so imperative as in the case of a trading company—at any rate the board was entitled to think so, even in the case of a company holding somewhat speculative shares. This circumstance, however, seems to have little bearing upon a case where the putting by of reserves does not come in issue, but only the making of a speculative but profitable investment.

(ii) and (iii) Nor does it seem to me of much assistance to say that the company once held and, subject to the bank's interest, still holds, investments costing £18,000. The question is what distributable revenue those investments do or ought to produce. The statement in its bald form appears only to be another way of saying that the purchase of the additional shares ought either not to have been made at all or, at any rate, ought not to have taken the form it did, and seems to merge in allegation (iv), viz., that it had not been proved impossible to acquire those shares in some other way.

(iv) To say that it would have been possible to raise the loan required on less onerous terms, without any suggestion as to how it could have been done or whence the money could have been obtained, is, indeed, to enter the realm of conjecture. In fact, the money was raised by loan from the bank, and in fact the bank insisted upon the terms agreed. Indeed, so far as the evidence is concerned, it was anxious to have the total sum repaid at an earlier date than that finally stipulated.

If, then, positive evidence is required to support the finding in para. 25 of the special case that the company had not distributed a reasonable portion of its income I can find none. So far as the bank is concerned it is negatived, and so far as any other source is concerned it is merely conjecture. Indeed, as I think, para. 24 depends, and, having regard to the form of the case stated, depends solely, upon the assumption that the onus of proof is on the company to show not that it could have raised money to pay a dividend after making the bargain into which it had entered, but that it could have made a better bargain.

If the finding in the case had been that the appellants could and should reasonably have raised money or credit upon the equity of redemption of the assets pledged to the bank, and so could have provided funds sufficient to declare a dividend, or even that it would have been reasonable to raise the money in this way and the appellants had not shown they could not do so, I should have hesitated in differing from the Court of Appeal. However, that is not how I understand the board to have reached the result arrived at. It is the bargain with the bank of which they complain, not the failure of the company once that bargain was made, to obtain such funds as would enable it to distribute a dividend.

If the contract with the bank had not been, as it obviously was, a genuine transaction, but only a matter of avoiding tax, or, if it had been found that the directors of the company could, and as reasonable business persons should, have borrowed on the security of their equity of redemption, or even that, as reasonable business persons, they should have done so if they could, and it had not been shown that they could not, I should be unwilling to vote for allowing the appeal. There is no such finding, and I do not think that the respondent's case is strengthened by a suggestion that quite a small sum should have been raised for the purpose. The question is what should reasonably have been done. If it was possible and reasonable for the appellants to borrow at all in the present case, I think the facts found would support the inference that a considerable sum could have been borrowed just as readily as they would support the inference that a small one should have been borrowed. I do not think they support either. The appellants' duty is to act reasonably, not to adopt any and every means in order to scrape up enough money to declare a dividend, however small.

It will be seen that the opinion which I have expressed is based upon the exact findings of the board of referees as I understand those findings. May I add that it would assist a tribunal, to which a case stated is referred, if the facts found were carefully separated from the inferences of fact and law based upon them, and if those inferences themselves were clearly distinguished. In *Bomford* v. *Osborne* (4), I expressed the view that in setting out a case it was not legitimate, after stating the facts, to reach a certain conclusion by saying that such and such a thing is found as a fact. I am still of this opinion, and think that the final conclusion is not a fact but an inference from facts previously set out, and that therefore that conclusion is not binding upon the tribunal to which the case is referred unless it appears from the previous findings that there are facts which support it. In the present case I cannot find such support and should allow the appeal.

Appeal allowed.

Solicitors: *Biddle, Thorne, Welsford & Barnes*, agents for *Charlesworth, Wood & Brown*, Skipton (for the appellants); *Solicitor of Inland Revenue* (for the respondents).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

Re PARSONS, PARSONS *v.* PARSONS.

[CHANCERY DIVISION (Farwell, J.), **May 7, 1942.**]

Estate Duty—Property which has borne duty on death of spouse—Legacy to husband—Husband disclaiming—Residue given to husband for life—Whether duty payable on disclaimed gift on death of husband—Finance Act, 1894 (*c.* 30), *ss.* 5 (2), 22—*Finance Act,* 1914 (*c.* 10), *s.* 14.

The testatrix gave a legacy of £10,000 to her husband absolutely; and she gave the income of her residuary estate on trust for her husband for life and after his death in trust for her son absolutely. The husband disclaimed the legacy by a formal deed of disclaimer and the legacy fell into residue. On the husband's death the revenue authorities claimed estate duty in respect of the legacy, on the grounds that, although the husband had disclaimed the legacy, he was competent to dispose of it and the liability to duty was not, therefore, excluded by the Finance Act, 1894, ss. 5 (2) and the Finance Act, 1914, s. 14. For the husband it was contended that the disclaimer operated *ab initio*, and the effect was as if the will had never contained the legacy:—

HELD: the fact that the husband was not obliged to accept the legacy did not mean that he was not competent to dispose of it within the meaning of the Finance Act, 1894, s. 22. The will operated from death and there was a point of time (although small) when the husband was competent to dispose of the legacy. Accordingly, estate duty was payable.

[**EDITORIAL NOTE.** The exemption from estate duty of property which has borne duty on the death of one spouse is well-known. In the present case, the residuary estate of the testatrix was given to the husband for life and then to a son absolutely.

In the ordinary course, therefore, the residuary estate would have been exempt from duty on the death of the husband. That estate, however, included £10,000 stock, which had fallen into residue upon the husband disclaiming a specific legacy of the stock. The Crown has successfully contended that, as to this disclaimed legacy, the husband was at some time after the death of the testatrix competent to dispose of it and that, therefore, it attracts duty.

As to Exemption from Estate Duty on Death of Spouse, see HALSBURY, Hailsham Edn., Vol. 13, pp. 252-254, para 246; and for Cases, see DIGEST, Vol. 21, p. 47, Nos. 300, 301.]

Case referred to:

(1) *Townson* v. *Tickell* (1819), 3 B. & Ald. 31; 44 Digest, 399, *2316.*

Summons to determine whether the Revenue were entitled to a claim for estate duty on a disclaimed legacy. The facts are fully set out in the judgment.

J. V. Nesbitt for the plaintiff, the executor.

J. H. Stamp for the Crown.

Farwell, J.: The question is whether or not estate duty is payable on a legacy of £10,000, which the legatee disclaimed. The testatrix made her will on June 29, 1933, and she died on June 20, 1937. Her husband survived her and lived until Aug. 31, 1940.

The will appoints executors, and then, in para. 4, it provides as follows:

> I give my ten thousand pounds 2½ per cent. consolidated stock to my said husband absolutely free from all death duties.

The residuary estate of the testatrix was settled upon trust to pay the income to the husband during his life, and upon his death passed to his son absolutely. The facts are that the husband disclaimed the gift in para. 4 of the will, by a deed dated Feb. 24, 1938. The deed itself recites:

> Whereas the said Isaac Hardy Parsons [the husband] has refused to accept the said legacy and desires formally to disclaim the same.

The fact that the husband executed the formal deed of disclaimer does not seem to me to affect it. As soon as the husband refused the gift to which he was entitled under the will, then that gift was disclaimed and formed part of the residuary estate.

On the death of the testatrix estate duty was paid in respect of her estate, including the estate duty on the £10,000 2½ per cent. consolidated stock, and by virtue of the Finance Act, 1894, s. 5 (2), and the Finance Act, 1914, s. 14, no estate duty became payable on the death of her husband in respect of her residuary estate or any part thereof unless the husband was during the continuance of the settlement competent to dispose of the same.

The Estate Duty Office claim that estate duty is payable on the death of the husband in respect of this stock. The executors dispute that, and what I have to determine is whether or not that duty is payable.

For the executor it is said that the disclaimer must be treated as having operated *ab initio*, so that the effect is as though the legacy contained in the will had not been there at all. It is to be treated, according to the argument of the plaintiff, as though there had never been a legacy of £10,000 to the husband, and that that £10,000 had, from the first, formed part of the residuary estate, of which he was not competent to dispose. On the other hand, although the husband disclaimed the legacy, he nevertheless was competent to dispose of such property comprised in the legacy in question, notwithstanding that he did disclaim the gift altogether, and the question really turns on the meaning to be put upon the Finance Act, 1894, s. 22, which defines what is meant by the words "competent to dispose." That section provides:

> A person shall be deemed competent to dispose of property if he has such an estate or interest therein or such general power as would, if he were *sui juris*, enable him to dispose of the property, including a tenant in tail whether in possession or not . . .

Counsel for the executor referred me to authorities upon which he contended that judges, in deciding their cases, had treated a disclaimer as making the gift void *ab initio*. The case which was specially relied upon was *Townson* v. *Tickell* (1). In that case Abbott, C.J., delivered the first judgment and said, at p. 36:

> The law certainly is not so absurd as to force a man to take an estate against his will. *Prima facie* every estate, whether given by will or otherwise, is supposed to be beneficial

> to the party to whom it is so given. Of that, however, he is the best judge, and if it turns out that the party to whom the gift is made does not consider it beneficial, the law will certainly, by some mode or other, allow him to renounce or refuse the gift. The question here is, in what mode that refusal is to be made. In this case the renunciation has been by deed under the hand and seal of the party. It has been argued, however, that nothing short of renunciation or disclaimer in a court of record will avoid the devise; and if there had been any distinct authority to that effect, we should have been bound to give due weight to such authority.

A Then ABBOTT, C.J., goes on to point out that there is no authority which requires a disclaimer to take place in a court of record, and he comes to the conclusion that, the disclaimer having been made, the devise, so far as the disclaiming devisee was concerned, was null and void.

In his judgment, BAYLEY, J., said, at p. 38:

> It seems to me, that the effect of that is, that the estate never was in him at all. For B I consider the devise to be nothing more than an offer which the devisee may accept or refuse, and if he refuses, he is in the same situation as if the offer never had been made; and that being so, I am of opinion, that the disclaimer, in this case, was sufficient, and that there ought to be judgment for the plaintiff.

The same opinion was expressed by HOLROYD, J., who said, at p. 38:

> I think that an estate cannot be forced on a man . . . The law presumes that he will assent until the contrary be proved; when the contrary, however, is proved, it C shows that he never did assent to the devise, and, consequently, that the estate never was in him.

Those judgments were concurred in by BEST, J.

That case, and others, are relied upon as authority for the proposition that the disclaimer of a gift by will has the effect of rendering that portion of the will which disposes of the legacy in question absolutely nugatory, as though it D never had been inserted in the will at all. In my judgment, that authority does not go nearly far enough to assist the plaintiff here. The will itself, immediately on the testatrix's death, had taken effect, and the effect was that the husband was entitled to a sum of £10,000 2½ per cent consolidated stock. He was under no obligation to accept that gift, and, as is said in the case I have just referred to, the law is not so absurd as to enforce upon him the obligation to accept it, if he did not desire to do so, and, by disclaiming it verbally or in E writing, he was in a position to refuse to have anything whatever to do with the gift in question.

In my judgment, that is not in any sense the solution of the question as to whether the husband was at any time after the death of his wife competent to dispose of this particular property. In my judgment, he was competent to dispose of the property, although he was also competent, if he so desired, to refuse to accept the legacy. Notwithstanding the language in some of the F cases, it is not possible to treat a gift by will as if it were an offer which it was open to the legatee to accept or refuse. A gift under a will is a gift which takes effect immediately upon the death of the testator, the donor. The legatee, the donee, is entitled to say: "I will not have the gift; I do not want it; I have no need of the gift at all". If he takes that line, he is entitled to rid himself of the benefit which the testatrix desires to give him. In this particular G case, the stock, which would otherwise have been his property, which he could have disposed of as he thought fit, ceased to be a property of which he was competent to dispose and became part of the residuary estate, but, in my judgment, there was a time (it may be a very short time) during which the husband was competent to dispose of this property. He chose to dispose of it by refusing to take it, but nevertheless he was competent to take it and dispose of it.

H Accordingly, in my judgment, the Revenue is entitled to estate duty on this £10,000 stock on the death of the husband.

Declaration that estate duty payable. Costs as between party and party to come out of the estate.

Solicitors: *Vizard, Oldham, Crowder & Cash,* agents for *Owston & Co.*, Leicester (for the executor); *Solicitor of the Inland Revenue* (for the Crown).

[*Reported by* IRENE G. R. MOSES, *Barrister-at-Law.*]

OSBORNE *v.* STEEL BARREL CO., LTD.

[COURT OF APPEAL (Lord Greene, M.R., du Parcq, L.J. and Singleton, J.), **April 14, 15, 16, 17, 27, 1942**.]

Income Tax—Computation of profits—Company commencing trading—Opening stock—Stock and other assets acquired in consideration of cash and the issue of fully-paid shares.

H.B. purchased the assets of a company from the receiver for the debenture-holders of that company. At that time the appellant company was not in existence. He later assigned to the appellant company the benefit of his contract. The assets consisted of land, buildings, goodwill and stock. The consideration received by H.B. from the appellant company was £10,500 in cash and 29,997 fully-paid shares in the company. No part of the consideration was allocated to any particular asset. It was contended that H.B. entered into the agreement as trustee for the appellant company or that he later assumed that character, and was, therefore, precluded from receiving any consideration for the assignment of the benefit of the agreement. The court held as a fact that H.B. entered into the agreement on his own behalf. It was then contended that the fully-paid shares cost the company nothing; that the only price paid for the assets was the £10,500 cash; and that the opening figure for the value of the stock should be a proportionate part of £10,500 and not a proportionate part of £40,497, the total amount of the value of the shares and the cash:—

HELD: in computing the price paid by the company for the assets, the shares must be taken at their par value, and the proper opening figure for the stock was a proportionate part of £40,497. In the circumstances, £10,000 was a proper opening figure for the value of the stock.

[**EDITORIAL NOTE.** The point in this case will be more easily appreciated if stated in the following simple form. A company starting business acquires stock for £10,000 cash and fully-paid shares of a par value of £30,000 issued to the owner of the stock. The contention of the Crown is that the shares cost the company nothing and that, therefore, the value of the stock should be entered in their books at £10,000. The court has rejected this contention, holding that the shares must be taken to be worth their par value, since the company cannot issue shares at a discount, and, therefore, the proper opening figure for the value of the stock is £40,000. It will be seen that the decision is important in arriving at the profits assessable to tax.

AS TO OPENING AND CLOSING STOCK, see HALSBURY, Hailsham Edn., Vol. 17, p. 124, para. 229; and FOR CASES, see DIGEST, Supp., Income Tax, Case 204d.]

Cases referred to:

(1) *Inland Revenue Comrs.* v. *Blott, Inland Revenue Comrs.* v. *Greenwood*, [1921] 2 A.C. 171; 28 Digest 107, *663*; 90. L.J.K.B. 1028; 125 L.T. 497; 8 Tax Cas. 101.

(2) *Lowry* v. *Consolidate African Selection Trust, Ltd.*, [1940] A.C. 648; [1940] 2 All E.R. 545; Digest Supp.; 109 L.J.K.B. 539; 23 Tax Cas. 259.

(3) *Craig (Kilmarnock), Ltd.* v. *Inland Revenue*, [1914] S.C. 338; Digest Supp.; 13 Tax Cas. 627.

(4) *Golden Horse Shoe (New), Ltd.* v. *Thurgood*, [1934] 1 K.B. 548; Digest Supp.; 103 L.J.K.B. 619; 150 L.T. 427; 18 Tax Cas. 280.

(5) *Martin* v. *Lowry*, [1927] A.C. 312; 28 Digest 22, *114*; 96 L.J.K.B. 379; 136 L.T. 580; 11 Tax Cas. 297.

(6) *Inland Revenue Comrs.* v. *Livingston*, [1927] S.C. 251; Digest Supp.; 11 Tax Cas. 538.

(7) *Rutledge* v. *Inland Revenue Comrs.*, [1929] S.C. 379; Digest Supp.; 14 Tax Cas. 490.

(8) *Adamson* v. *Union Cold Storage Co., Ltd.* (1931), 146 L.T. 172; Digest Supp.; 16 Tax Cas. 293.

APPEAL by the respondents from an order of MACNAGHTEN, J., dated July 25, 1941.

A. S. Diamond (for *R. E. Borneman* on war service) and *Frederick Grant* for the appellants.

The Solicitor-General (*Sir David Maxwell Fyfe, K.C.*) and *Reginald P. Hills* for the respondent.

Grant: If the revenue are right in saying that the consideration for the shares was services rendered by Hood Barrs, it would be necessary to say what the services were. The services would be the enabling the company to obtain the assets in question. It is wrong to say that the payment, when properly looked at, was for services rendered. The real bargain between the parties is the one contained in the letters. When there is a consideration satisfied by the issue of shares, wholly or in part, the purchase price is the same thing as the value. The cost of the assets to the company was the value of the shares. When Hood Barrs made the contract, he was not acting as a A trustee for anybody. That is a fair inference from the contract. The company's memorandum does not indicate that there was any trusteeship in existence. Hood Barrs himself acquired the assets beneficially, and he then transferred the benefit to the company. The contention of the Revenue that it was a payment for services makes no difference. Part of these shares were included in the cost to the company of the assets to be acquired. The cost to the company was cash plus shares and not cash only. If I am wrong on that point, I am B entitled to succeed on *Craig* (*Kilmarnock*), *Ltd.* v. *Inland Revenue* (3), which is a decision that has never been challenged. [Counsel referred to *Golden Horse Shoe* (*New*), *Ltd.* v. *Thurgood* (4).]

The Solicitor-General : The shares were not allotted as a consideration for the obtaining of the assets because Hood Barrs was a trustee and because the shares were given for the indivisible totality of the assets. The company, in opening its trading account, was entitled only to put in the cost and not the C value. In allotting the shares the company parted with nothing which cost it anything or constituted a price. It is clear that Hood Barrs was a trustee on Aug. 11, 1932, and the company was incorporated on Aug. 29. Hood Barrs gave his personal guarantee and he agreed to procure further advances. The assets themselves were of no particular importance. The special commissioners were wrong in saying that the real matter for which the shares were D issued was the obtaining of the assets. It was to enable the company to operate. The accepted principle, in opening a trading account, is that one is entitled to charge the cost of the opening stock and no more : *Golden Horse Shoe* (*New*), *Ltd.* v. *Thurgood* (4). *Craig* (*Kilmarnock*), *Ltd.* v. *Inland Revenue* (3), is not an authority for the proposition that when a business is purchased, as opposed to the purchase of stock *simpliciter*, one is entitled to base the stock on value only. One must still have regard to the price paid. That is the over- E riding principle. [Counsel referred to *Martin* v. *Lowry* (5), *Inland Revenue Comrs.* v. *Livingston* (6), *Rutledge* v. *Inland Revenue Comrs.* (7), *Inland Revenue Comrs.* v. *Blott* (1), and *Lowry* v. *Consolidated African Selection Trust, Ltd.* (2).]

Hills, following on the same side : The commissioners took the value of the stock whereas they should have taken the value of the shares. [Counsel referred to *Adamson* v. *Union Cold Storage Co., Ltd.* (8).]

F LORD GREENE, M.R. [delivering the judgment of the court] : The present controversy turns on two main questions which have been discussed at length before us. The first is whether the issue of shares to Hood Barrs formed part of the consideration for the acquisition by the appellant company of the benefit of his agreement with the receiver. The second, which only arises if the first is answered in the affirmative, is, on what principle ought the opening figure for the stock acquired under that agreement to be ascertained ? The extent to which, G in dealing with these questions, we are affected by the findings of fact of the special commissioners will appear later.

On the first of these questions it was contended for the Crown that Hood Barrs in fact entered or must be treated as having entered into the agreement with the receiver as trustee for the appellant company which had not at that date been incorporated ; that accordingly, no part of the shares can be treated as having been issued to Hood Barrs in consideration of the transfer by him to the H appellant company of the benefit of that agreement ; and that therefore the only sum paid by the appellants for the stock was an apportioned part of the £10,500 paid in cash to the receiver.

This contention requires examination. It seeks to establish in the first place that, when Hood Barrs entered into the agreement with the receiver, he did so as trustee for the appellant company which was not then in existence. Whether or not he did so is a question of fact. If he did, then it would follow that the appellant company, when it came into existence, was entitled to claim the benefit of the agreement without the payment of any consideration to Hood

Barrs, but subject to his right to be indemnified. If he did not, he was entitled to assign the benefit of the agreement to the appellant company or not as he chose, and, if he was willing to do so, he was entitled to receive such consideration, if any, over and above an indemnity as might be agreed. However, the Crown's contention goes further. It was argued that, even if Hood Barrs originally contracted with the receiver on his own behalf, he later assumed the character of trustee, and that he was, therefore, precluded from receiving any consideration for the assignment of the benefit of his agreement to the appellant company. A

We will examine these two arguments in the order stated. Before doing so, we would point out that the allegation that Hood Barrs was from the first a trustee, or subsequently became one, does not appear to have been treated by the Crown at the hearing before the commissioners as an important part of its case. No reference to it is made in the Crown's contentions, as set forth in para. 15 of the case, in spite of the fact that in the first contention of the appellant company, as stated in para. 14, it was asserted in the plainest terms B that Hood Barrs made the agreement with the receiver on his own behalf and sold the benefit of it to the appellant company for cash and shares. No question bearing on the matter appears to have been put to Hood Barrs in cross-examination, although he was the one person who knew the facts. Counsel for the Crown explained this by saying that before the special commissioners the Crown must have been content to rely on the documents. This was not the proper way to treat the matter, if it was regarded as important for the Crown's case. C

Be this as it may, there is, in our opinion, a short answer to the first argument—namely, that the special commissioners have found as a fact that Hood Barrs entered into the agreement with the receiver on his own behalf, and not as trustee for the appellant company. The contrary view is quite inconsistent with the language of para. 16 of the case, and it may be added that in para. 2 of the case, which recites the making of the agreement between Hood Barrs and D the receiver, there is no word to suggest that Hood Barrs was acting otherwise than on his own behalf. The only question, therefore, which is open to us to consider is whether there was evidence to support the finding. In our opinion, there was ample evidence. The agreement with the receiver itself is not in the form usually found where the purchaser is contracting as trustee for an intended company. Para. 3 (*b*) of the memorandum of association of the appellant company is not in the form generally used when a company is proposing to adopt E and take over a contract made by a trustee on its behalf before its incorporation. Lastly, the minutes and letters referred to in para. 4 of the case are inconsistent with the view that Hood Barrs had contracted as trustee.

In their second argument, counsel for the Crown attempted to brush this aside. They contended that, even if Hood Barrs did not originally contract as trustee, the language of the agreement of Oct. 15, 1932, on the face of it shows that he was contracting with the appellant company on the footing that he had F made the agreement with the receiver as trustee and that this is conclusive. There are, in our opinion, three answers to this contention. In the first place, the passage relied on is the first recital, which states that Hood Barrs made the agreement with the receiver "on behalf of the company." If this recital means that he did so as trustee for the appellant company, it is contrary to the fact and as between the Crown and the appellant company neither is bound by an untrue G recital. In the second place, the words "on behalf of" are ambiguous and may mean that Hood Barrs purported to contract as agent. If he had done so, the appellant company could not, of course, have ratified the contract. Although this is an inconvenient method to adopt, it is common practice for a purchaser to purport to contract as agent for an intended company, as appears from PALMER'S COMPANY PRECEDENTS, 15th Edn., Vol. 1, p. 298, plan 2, and at p. 340, form 40, the words "on behalf of" being the words given for use in H such cases.

Lastly, if Hood Barrs did not originally contract as trustee but agreed to assume that capacity, he was entitled to stipulate for a consideration for so doing. That this was in fact what took place is made abundantly clear by the letter of Aug. 30, 1932, from the secretary of the appellant company as to whose authority no question is raised. The transaction is there referred to as a purchase from Hood Barrs for cash and shares and the last paragraph is as follows:

> It will be in order for you to act as trustee on behalf of this company to carry through

the purchase of these assets by this company.

This paragraph shows that the character of trustee was to be assumed by Hood Barrs for the purpose of " carrying through the purchase," and it was so assumed for the consideration stated. If, therefore, the agreement of Oct. 15, 1932, be construed, as it must be, in the light of the fact that Hood Barrs did not contract with the receiver as trustee for the appellant company, the only possible construction which can be put upon it is, in our opinion, that adopted by the special commissioners in para. 16 of the case—namely, that the assignment of Hood Barrs' contract with the receiver was part of the consideration for the issue of the shares. It is to be observed that MACNAGHTEN, J., although he evidently doubted the correctness of the conclusion, did not say that it was wrong. His reason for allowing the Crown's appeal was quite a different one.

Before leaving this part of the case it is right to refer to the document of Oct. 5, 1932, since counsel for the Crown relied upon it to reinforce their argument. This document is described as an agreement, but it is in fact an assignment to the appellant company of the goodwill and outstanding contracts of the old company. Hood Barrs is expressed to be a party to it ; he is described as " the trustee " and the eighth recital states that he entered into the agreement with the receiver " as trustee for and on behalf of" the appellant company. The assignment by the receiver is expressed to be " by the direction of the trustee testified by his execution of these presents." The copy of this document which is annexed to the case does not contain any execution by Hood Barrs, nor is his name mentioned in the testimonium. In fact, his execution of the deed was not necessary in order to pass the property comprised in it. If the point were important, we should not feel ourselves entitled to assume that Hood Barrs ever executed the document. Even if he did, it does not appear to us to carry the Crown's argument any further, since the same observations apply to it as those which we have already made with regard to the agreement of Oct. 15, 1932. On the question of fact whether Hood Barrs contracted as trustee with the receiver, both these instruments, of course, constitute evidence that he did, and no doubt the special commissioners paid due attention to them in coming to their conclusion that he did not.

We now pass to the second branch of the case, which raises the question on what principle the opening figure for the stock acquired by the appellant company ought to be ascertained. On the basis of the conclusion to which we have come on the first branch, the special commissioners were right in holding that the issue of shares was made partly in consideration of the assignment to the appellant company of the benefit of Hood Barrs' agreement with the receiver. The consideration paid for this assignment was accordingly £10,500 in cash and a proportionate part of the 29,997 fully-paid shares. The consideration paid for the stock, therefore, was a proportionate part of the cash and a proportionate part of this proportionate part of the shares.

At the outset, we must deal with a contention put forward on behalf of the Crown which found favour with MACNAGHTEN, J., and, indeed, formed the reason for his decision. It was to the effect that the issue of the shares did not cost the appellant company anything, that accordingly the shares issued in respect of the stock added nothing to the price, and that the only thing that the company paid for the stock was a proportionate part of the cash.

It was strenuously argued on behalf of the Crown that, if a company acquires stock in consideration of the issue of fully-paid shares to the vendor, that stock must, for the purpose of ascertaining the company's profits, be treated as having been acquired for nothing, with the result that, when it comes to be sold, the Revenue is entitled to treat the whole of the purchase price obtained on the sale as a profit. This is a remarkable contention, and it would require conclusive authority before we could accept it. The cases relied on in its support were *Inland Revenue Comrs.* v. *Blott* (1) and *Lowry* v. *Consolidated African Selection Trust, Ltd.* (2), neither of which, in our view, has any bearing on the point. The argument really rests on a misconception as to what happens when a company issues shares credited as fully paid for a consideration other than cash. The primary liability of an allottee of shares is to pay for them in cash ; but, when shares are allotted credited as fully paid, this primary liability is satisfied by a consideration other than cash passing from the allottee. A company, therefore, when, in pursuance of such a transaction, it agrees to credit the shares as fully paid, is giving up what it would otherwise have had—namely, the right to call on the allottee for payment of the par value in cash. A company cannot issue £1,000 nominal worth of shares for stock of the market value of £500, since shares cannot be issued at a discount. Accordingly, when fully-paid shares are properly issued for a consideration other than cash, the consideration moving from the company must be at the least equal in value to the par value of the shares and must be based on an honest estimate by the directors of the value of the assets acquired.

In the view which he took, MACNAGHTEN, J., appears to have been influenced by a misapprehension into which he was led by an item in the earlier balance sheets of the company. In those balance sheets there appears on the asset side a sum of £29,997 under the description "Nominal value of shares issued." This, MACNAGHTEN, J., thought, was the same thing as entering the shares themselves as an asset as well as a liability. This could not be so, since from the accountancy point of view shares can only be a liability and can never appear on the asset side of the balance sheet. In truth the description "Nominal value of shares issued" is a slovenly and inaccurate expression intended to describe the value of the assets acquired by the issue of the shares. If an accurate expression had been used, it would have been "Value of rights acquired by the company under the contract of Oct. 15, 1932." The appellant company later wrote down this item to nothing on a revaluation of its assets, a thing which it was perfectly entitled to do. This does not mean that the assets and rights acquired were at the time of less value than £29,997, and no suggestion of the kind was made before the special commissioners.

Turning now to the main question, it cannot, we think, be open to doubt that as a general rule stock acquired by a trader must be brought in at the price which he paid for it in order to calculate the profit which he makes by its sale. It was argued by counsel for the appellants that there is an exception to this rule where a business with a variety of assets including stock is bought for a lump sum and that in such a case the value of the stock must be taken as the opening figure.

In support of this proposition the case of *Craig* (*Kilmarnock*), *Ltd.* v. *Inland Revenue* (3) was relied upon. It is not necessary for us to express an opinion upon this argument, or to examine the decision in *Craig's* case (3). We may, however, observe in passing that in that case the consideration for the purchase included, in addition to a sum of cash, a covenant for indemnity in respect of unascertained liabilities of the vendors. In other words, the consideration was cash plus indemnity and provision was made in the accounts for the indemnity by writing up the original arbitrary valuation of the stock to the estimated market value. By this means a reserve fund was created which, as LORD GUTHRIE pointed out, might in the event prove more than sufficient to meet the liabilities. The facts of the case were of a special nature, and we do not think that it assists in the solution of the present problem.

In our opinion, what had to be found in the present case was the price paid for the stock. Since this price was cash plus shares, it is necessary in the first instance to ascertain what payment in cash was represented by the issue of the fully-paid shares. In our opinion, on the facts of the present case, it must be taken as a sum of cash equal to the par value of the shares. It would have been illegal for the appellant company to issue the shares at a discount, and there is no ground for suggesting that this was done. Accordingly, we must proceed upon the basis that the various benefits obtained by the appellant company under the agreement of Oct. 15, 1932, were together of a value at least equal to the nominal amount of the shares which it issued to Hood Barrs. We have already pointed out that it was at this value that the benefits in question were entered in the earlier balance sheets, and the special commissioners were strictly accurate in saying, as they did in para. 16 of the case, that the appellant company "paid £29,997 in the form of shares for a variety of considerations including the assignment of the benefit of Mr. Hood Barrs' agreement with the receiver." The company therefore paid for these considerations £29,997 and for the assets acquired from the receiver £10,300, or in all £40,497, and, since the shares must be treated as not having been issued at a discount, the aggregate value of these considerations and assets must be taken to have amounted at the least to that sum.

This by itself does not at first sight appear to solve the problem what part of this sum of £40,497 is to be attributed to the stock. A little consideration will, however, show that it does give the clue to the solution. If it be assumed that the aggregate value of the considerations and assets was £40,497, no more and (since, the shares were not issued at a discount) no less, it follows that the appellant company paid the full value for each item and the price paid was the value in each case. It was on this basis that the special commissioners must have proceeded, for they ascertained the value of the stock and took that as the proper opening figure. This finding was challenged by counsel for the Crown. They argued that the proper course would have been to ascertain the value of each of the considerations and assets and to attribute to each a proportionate part of the purchase price of £40,497. On this view, if the aggregate value exceeded £40,497, the price paid for each consideration and each asset would be a sum bearing the same proportion to its value as £40,497 bore to the aggregate value. We are not concerned to dispute the view that this method would have been a proper one if the special commissioners had had the necessary materials before them. In practice, however, this would scarcely have been possible in view of the nature of some of the considerations obtained by the appellant company under the agreement of Oct. 15, 1932. In any case, no such point was taken on behalf of the Crown before the special commissioners, and no attempt was made to show that the aggregate value of the considerations and assets exceeded the price paid for them. The reason for this, no doubt, was that the case presented on behalf of the Crown before the special commissioners was of a quite different character to that presented before us, as appears from the contentions set out in para. 15 of the stated case. The special commissioners could only decide upon the materials before them. They were, in our opinion, justified in proceeding on the footing that the value of the benefits which the appellant company acquired was no more than what it paid for them and accordingly to treat the value of the stock as the proper figure in the absence of any evidence as to the value of the other items or that their aggregate value exceeded the total price paid.

After hearing evidence on both sides, they came to the conclusion that the value of the stock acquired by the company was £10,000. That was a finding of fact, and, for the reasons already stated, we think it must in the circumstances of this case be taken as the cost to the company of the stock so acquired. The appeal is allowed and the decision of the special commissioners is restored. The appellants will have their costs here and below.

Appeal allowed with costs. Leave to appeal to the House of Lords refused.

Solicitors: *A. P. Browne & Co.* (for the appellants); *Solicitor of Inland Revenue* (for the respondent).

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

BEAK (H.M. INSPECTOR OF TAXES) *v.* ROBSON.

[COURT OF APPEAL (Lord Greene, M.R., du Parcq, L.J., and Lewis, J.), **May 7, 1942.**]

Income Tax—Schedule E—" All salaries, fees, wages, perquisites or profits whatsoever "—Director subject to restrictive covenant—Payment of lump sum as consideration for covenant—Income Tax Act, 1918 (c. 40), *Sched. E, r.* 1.

The respondent, on Oct. 4, 1937, entered into an agreement with a company in whose employment he had been for some time, whereby he was to be employed for a term of 5 years as director and manager, at a salary there stated. The agreement contained clauses under which, in the event of the respondent determining the agreement by notice, as he was entitled under one of its clauses to do, or committing a breach of it which led to a determination, he covenanted for a certain period not, without the consent of the company, to be engaged or interested in the business of a coal exporter within a radius of 50 miles of Newcastle-upon-Tyne. The respondent was paid the sum of £7,000 by the company on the execution of the contract in consideration of the respondent entering into that covenant. The Crown claimed that the £7,000 was remuneration from his office as director and manager and accordingly was taxable under the Income Tax Act, 1918, Sched. E :—

HELD : the sum of £7,000 was not chargeable under Sched. E. The covenant was severable from the other terms of the contract and the £7,000 was a separate consideration in respect of the obligations under the covenant. Even if the covenant were regarded as a condition of the service, the sum of £7,000 could not properly be said to be remuneration from the service.

[**EDITORIAL NOTE.** The authorities were at one time clear that a payment made to the holder of an office for the reason that he is no longer in the office or employment was not a payment assessable to tax as part of the emoluments of the office. This principle, however, was to a great extent negatived by the taxation of voluntary pensions. Here the payment is not a payment made after the termination of the employment, but it is one made in respect of matters which can only arise after that termination. It is a payment in respect of a restrictive covenant which can only operate after the termination of the employment. The Court of Appeal have held that the consideration paid in respect of such a covenant is separable from the remuneration, although it was said that the contract of employment would not have been entered into by the employers unless the employee had entered into that covenant. The decision is an important one, for few contracts of employment omit such a covenant, and, if the consideration can be split in this way, clearly an important saving of tax can be made.

AS TO WHAT ARE EMOLUMENTS, see HALSBURY, Hailsham Edn., Vol. 17, pp. 212-217, paras. 431-438 ; and FOR CASES, see DIGEST, Vol. 28, pp. 85-88, Nos. 490-507.]

Cases referred to :

(1) *Cameron* v. *Prendergast*, [1940] A.C. 549 ; [1940] 2 All E.R. 35 ; Digest Supp. ; 109 L.J.K.B. 486 ; 162 L.T. 348 ; 23 Tax Cas. 122.

(2) *Herbert* v. *McQuade*, [1902] 2 K.B. 631 ; 28 Digest 86, *492* ; 71 L.J.K.B. 884 ; 87 L.T. 349 ; 4 Tax Cas. 489.

(4) *Anglo-Persian Oil Co., Ltd.* v. *Dale*, [1932] 1 K.B. 124 ; Digest Supp. ; 100 L.J.K.B. 504 ; 145 L.T. 529 ; 16 Tax Cas. 253.

APPEAL by the inspector of taxes from an order of LAWRENCE, J., dated Jan. 16, 1942. The facts are fully set out in the judgment.

Sect. 8 of the agreement was in these terms :

If this agreement shall be determined by notice given by Mr. Robson to the company under cl. 6 hereof or by any breach by him of the provisions of this agreement, then from such determination or breach until the determination of a period of 5 years from Apr. 1, 1937, Mr. Robson shall not without the consent in writing of the company either solely or jointly with or as manager or agent for any other person persons or company directly or indirectly carry on or be engaged concerned or interested in the business of coal exporter merchant or shipbroker within 50 miles of Newcastle-upon-Tyne.

The Attorney-General (*Rt. Hon. Sir Donald Somervell, K.C.*), and *Reginald. P. Hills* for the appellant.

Cyril King, K.C., and *J. Charlesworth* for the respondent.

The Attorney-General : The restrictive covenant is so bound up with the other clauses of the agreement that it cannot be treated as severable. If the director serves for 5 years without giving notice or breaking the agreement, the restriction does not come into operation. Services cannot be separated from conditions of service in the case of an office of this nature. The £7,000 is a profit of the office. Anything which comes to a director by reason of his office is a profit of that office. *Cameron* v. *Prendergast* (1). [Counsel also referred to *Herbert* v. *McQuade* (2).]

Hills, following on the same side, referred to *Anglo-Persian Oil Co., Ltd.* v. *Dale* (3).

Counsel for the respondent were not called upon.

LORD GREENE, M.R. : In my opinion, this is a clear case and the decision of LAWRENCE, J., was manifestly right.

The respondent on Oct. 4, 1937, entered into an agreement with a company in whose employment he had been for some time, whereby he was to be employed for a term of five years as director and manager, at a salary there stated. The agreement contained clauses under which, in the event of the respondent determining the agreement by notice, as he was entitled under one of its clauses to do, or committing a breach of it which led to a determination, he covenanted for a stated period, not, without the consent of the company, putting it shortly, to be engaged or interested in the business of a coal exporter within a radius of 50 miles of Newcastle-upon-Tyne. The parties had fixed upon a sum of money, namely £7,000, which was to be paid to the respondent on the execution of the contract in consideration of his entering into that covenant. The sum was duly paid, and the Crown claimed that it was remuneration from his office of director and manager and taxable accordingly under Sched. E.

It is to be observed that the way in which the parties have chosen to contract is one in which the obligations flowing from the contract of service and the remuneration to be received by the respondent in respect of that service are entirely separated from the covenant and the consideration which is given for it. Separate considerations are fixed for the two things: one consideration for the service, a totally different consideration for the covenant. Breach of the contract of service has nothing in the world to do with breach of the covenant. Conversely, breach of the covenant would have nothing in the world to do with the contract of service. The two things are quite distinct with separate considerations and separate obligations provided for both. These facts would seem to be quite sufficient to dispose of this case. The sum of £7,000 is not paid to the respondent for performing the services in respect of which he is chargeable under Sched. E. The consideration which he has to give under the covenant falls to be given not during the period of his employment, but after its termination. In fact, he is selling to the company for a sum of £7,000 the benefit of a covenant which will only come into effect when the service is concluded. It seems to me that to say that that £7,000 is a profit or remuneration from his office is to ignore the real nature of the transaction.

It is said, however, that this covenant which he gives is a condition of the service into which he enters by agreeing to serve as director and manager. That observation is no doubt true, in the sense that this particular provision with regard to the covenant is found in the contract of service and no doubt the parties would not have entered into that contract of service unless that term had been agreed upon; but it seems to me quite impossible to proceed from that to the further step and say that, because this provision is a condition of the service in that sense, therefore the remuneration paid is remuneration from the service.

I put the example in the course of the argument of a man appointed a manager for a period of years at a definite remuneration. One of the terms might be that while the employment continues he is to use his motor car for the purposes of his employer. The contract might go on to say that on the termination of the employment he, in consideration of a sum paid down, would transfer the motor car to the employers as their own property. It seems to me that it would be quite impossible to suggest in such a case that the sum he received in consideration for the undertaking to transfer the motor car would be remuneration from his employment. I cannot myself see any difference between that case and the present. In each case the employee is contracting to sell something to his employer at the termination of his agreement and receives a particular and specific consideration for it.

It was suggested that covenants of this kind, namely, covenants by employees not to compete after the termination of their service, are commonly found in managerial agreements without there being any specific consideration allocated to them. That, no doubt, is perfectly true, and in some cases covenants of that kind may be valid in law; but, quite apart from the question of their validity, it is common knowledge that many managerial agreements do contain clauses of that kind. If, for a fixed remuneration, a man agrees to serve and without any additional remuneration agrees to enter into such a covenant, I cannot myself see how it can be suggested that the covenant in some way or another must be regarded as something outside the contract of service. It was then suggested that, if the respondent was successful in the present case, it would be necessary in all such cases as those to which I have referred—it would be legitimate, at any rate—to segregate the covenant not to compete from the covenants relating to the service and attribute some apportioned part of the consideration to the former, with the result that parts of salaries would escape taxation under Sched. E. Arguments of that kind can be dealt with if and when anyone has the hardihood to make such a claim; but that is not the present case. The fact that the parties in the present case could, if they had so desired, have cast their agreement in a form under which for increased remuneration the respondent agreed to serve and then merely gave this covenant is beside the point. They have not done that. They have entered into an agreement which, although contained in one document and although made on the same occasion and connected in the way I have indicated, really relates to two quite different matters, one the period of service, one something which is to happen after the period of service. The fact that they have decided upon and allocated to that covenant an agreed consideration seems to me to take it right outside the class of case which was referred to in argument and which I have just mentioned. In my opinion, the appeal fails and should be dismissed with costs.

du Parcq, L.J.: I agree and I do not think that I can usefully add anything.

Lewis, J.: I have nothing to add to the judgment of Lord Greene, M.R., with which I agree.

Appeal dismissed with costs. Conditional leave to appeal to the House of Lords.

Solicitors: *Solicitor to Inland Revenue* (for the appellant); *Hyde, Mahon & Pascall*, agents for *Wilkinson & Marshall*, Newcastle-upon-Tyne (for the respondent).

Distinguished. *Re* Edwards' Will Trusts. [1948] 1 All E.R. 821.

[*Reported by* W. K. Scrivener, Esq., *Barrister-at-Law.*]

Distinguished. *Re* Schintz's Will Trusts. [1951] 1 All E.R. 1095.

Re JONES' WILL TRUSTS, JONES *v.* JONES.

[Chancery Division (Simonds, J.), **March 20, April 24, 1942.**]

Wills—Incorporation of declaration of trust—Existing declaration "or any substitution therefor or modification thereof or addition thereto which I may hereafter execute"—Validity of disposition.

The testator made the following bequest in his will: "£1,000 to the Tettenhall College Investment Trustees appointed or to be appointed under special declaration of trust . . . executed by me bearing even date with this my last will and testament, or any substitution therefor or modification thereof or addition thereto which I may hereafter execute . . ." The declaration of trust was clearly identified, and the question to be determined was whether this bequest was valid:—

Held: the bequest failed for uncertainty. Although evidence was admissible to prove the identified document, it would not be admissible to prove any substituted document. Such a partial admission of evidence was not justified, because the testator's intention as a whole would not be ascertained.

[**EDITORIAL NOTE.** This case is an example of a real difficulty in the law of wills. Where the testator has founded a charity, which he anticipates will develop even during his lifetime, he is naturally not anxious to tie it down to a trust deed which may be quite unsuited to its state of development in a few years time. At the same time, he will not desire to set out provisions of this kind in his will itself. Any attempt, however, to reserve a right to modify an existing document incorporated in the will seems bound to fail as reserving a right to make an unexecuted codicil. When it is desired to modify the trust deed, the only course is to incorporate a new trust deed in the will by the execution of a codicil.

For the Law on the Point, see HALSBURY, Hailsham Edn., Vol. 34, pp. 183-185, para. 235; and for Cases, see DIGEST, Vol. 44, pp. 237-245, Nos. 624-712.]

Cases referred to:

(1) *Allen* v. *Maddock* (1858), 11 Moo. P.C.C. 427; 44 Digest 243, *698*; 31 L.T.O.S. 359.

(2) *University College of North Wales* v. *Taylor*, [1908] P. 140; 44 Digest 241, ***675***; 77 L.J. P. 20; 98 L.T. 472.

(3) *Re Keen, Evershed* v. *Griffiths*, [1937] Ch. 236; [1937] 1 All E.R. 452; Digest Supp., 106 L.J. Ch. 177; 156 L.T. 207.

(4) *Blackwell* v. *Blackwell*, [1929] A.C. 318; Digest Supp.; 98 L.J. Ch. 251; 140 L.T. 444.

Summons to determine whether a gift contained in a will was a valid charitable bequest. The facts are fully set out in the judgment.

G. D. Johnston for the plaintiffs, the executors.

W. F. Waite for the first defendants, the residuary legatees.

A. Guest Mathews for the second defendant, Mr. Perry.

C. V. Rawlence for the third defendants, the Trustees of Tettenhall College.

H. O. Danckwerts for the fourth defendant, the Attorney-General.

Simonds, J.: The question which I have to determine in this case is the validity of a bequest contained in a will dated Mar. 5, 1901, of William Highfield Jones, who died on Mar. 25, 1903. The gift in question is contained in cl. 25

of his will, which is one of a number of clauses following upon a direction to pay certain charitable legacies. The legacy is in these terms:

> £1,000 to the Tettenhall College Investment Trustees appointed or to be appointed under special declaration of trust for the benefit of Tettenhall College or otherwise as therein contained executed by me bearing even date with this my last will and testament or any substitution therefor or modification thereof or addition thereto which I may hereafter execute such declaration or declarations of trust to be enrolled for safe custody in the Chancery Division of His Majesty's High Court of Justice.

The question which I have to determine is whether this is a valid gift to trustees to be held by them upon the trusts of the declaration of trust of even date with the will which has been, as I hold, clearly identified and proved.

It is clear that a gift in a testamentary document, by reference to a then existing and identifiable document, may be valid. The later document is incorporated in the former, and may, though not necessarily, be admitted to probate. It is equally clear that a gift in a testamentary document may be made by reference to other documents in such terms as to exclude parol testimony as where it is to papers not yet written, or where the description is so vague that it is incapable of being applied to any document in particular. Such a gift is clearly bad (*Allen* v. *Maddock* (1) at p. 454). A third case is that which we have here, where in the testamentary document there is a gift by reference to an existing ascertainable document or to a document which may in the future be substituted therefor.

In regard to such gift, two different contentions are put forward. On the one hand, it is urged that the existing document must be admitted in evidence and incorporated in the testamentary document; and this having been done, the rest of the reference must be disregarded. There is then a valid gift in the terms of the incorporated document, and the court is not entitled, or concerned, to inquire whether there was a later document. On the other hand, it is urged that the whole gift must be treated as invalid, upon the ground that the testator's testamentary intention can only be ascertained by evidence *dehors* the will itself, both in regard to documents existing at the time of the will and to those coming into existence thereafter, and that, since such evidence cannot be admitted about the latter, it ought not to be admitted about the former. I think that the second contention is the right one, and, although I have been unable to find any case in which the question has come before the court in this neat form, I shall refer to certain authorities which appear to support the conclusion to which a consideration of principle leads me.

The function of a court of construction is to ascertain the testator's testamentary intention from the language which he has used in his will, with the aid of such extrinsic evidence as is admissible. Finding upon the face of the will the clear statement of the testator's wish that a sum of money is to be held upon the trusts of a specified existing document, or of such a document as may be substituted therefor, I do not know of any principle which compels me to disregard the second alternative, and say that the testator's will is that the sum of money is to be held on the trusts of the first alternative. A partial admission of evidence to ascertain the testamentary intention, admitting it as to the first alternative but excluding it as to the second, does not appear to me to be justified. In other words, if the testator's will is not adequately stated in the testamentary document itself, and cannot as a whole be ascertained by admissible evidence, then effect cannot be given to parts only of it. The rule which admits evidence of an ascertainable existing document is based upon the presumption that, by such admission, effect will be given to the testamentary intention of the testator, but to admit such evidence alone, where the gift is in such an alternative form as we have here, may well result in the defeat of his intention. It is, in my judgment, immaterial whether, if evidence about subsequent documents were admitted, it would appear that there were or were not such documents. The question is one of principle, and, as it appears to me, must be answered by saying that, where evidence is not admissible to make clear the whole testamentary intention, it is not admissible to make clear part of it.

The same result may be reached in a slightly different way by saying that, since the testator has expressed his intention in two alternative forms, and evidence is not admissible to ascertain the second alternative, the gift as a whole must fail for uncertainty.

I must add for the sake of clarity that a somewhat different form of words in the gift may lead to a different conclusion. If, for instance, the testator directs his trustees to hold a sum of money upon the trusts of an existing identifiable document, unless he substitutes some other document therefor, it may be that evidence is admissible to show whether or not he has purported to substitute a new document, and that the original gift will stand or fall accordingly, though in no event could the trusts of the new document have testamentary validity. In such a case, the substitution of a new document might perhaps A be treated like any other event or condition mentioned by the testator; as, for example, "unless I shall before my death have gone to Rome." That is a case clearly distinguishable from the present one. I do not have to decide it, and I express no opinion upon it.

I turn to the relevant authorities. In *University College of North Wales* v. *Taylor* (2), the Court of Appeal held that, on the true construction of the will there under review the relevant gift was to be construed as if the testator had B said:

> , . . upon such trusts and conditions, and subject to such rules and regulations, as shall be found contained and specified in any existing or future memorandum amongst my papers written or signed by me . . .

At p. 144, SIR H. H. COZENS-HARDY, M.R., says:

> That, in my view, is the true meaning and construction of this gift. I cannot read it as meaning "upon the trusts and upon the terms specified in any one existing docu- C ment, unless and until I may alter it by some other document which I may execute at some future time." Whether such a gift would or would not be valid I do not pause to consider, but I am entirely unable to accept that view of the construction.

In this case I have followed the prudence of SIR H. H. COZENS-HARDY, M.R., in that case by not expressing any view upon the validity of such a hypothetical gift. At p. 145, SIR H. H. COZENS-HARDY, M.R., continues:

> But, having regard to the importance and interest of the case, we thought it right D *de bene esse* to listen to what the parol evidence was; and, speaking for myself, if I had any doubt before, I think that if that parol evidence had been considered it would have made it still more impossible to support the view that this memorandum could have been incorporated in the will, because it is quite plain that the testator's wish and intent was that his trusts should be found, not merely in the then existing memorandum which was before him, but in some subsequent future memorandum or memoranda which he contemplated and intended to execute, and which he meant to incorporate.

Then FLETCHER MOULTON, L.J., at p. 146, says this: E

> The respondents to this appeal do not contest that the testator intended to reserve to himself the power of making future memoranda setting forth the conditions under which these legacies were to be enjoyed. But they suggest that because there was one document in existence at the date of the will which answers the description in the will that document is entitled to probate although future documents of the same kind would not be. I should require a good deal of persuasion to induce me to accept that doctrine, but before they can avail themselves of it they must prove that a document precisely F answering the description was then in existence.

Finally, in the same case, FARWELL, L.J., makes this observation, at p. 147:

> Apart from that, reading the words fairly I find it impossible to doubt that the words "as are contained and specified in any memorandum amongst my papers written or signed by me relating thereto" do not refer to any particular document, but refer to any number of documents which may or may not answer the description of being written, or in the alternative signed, and which may or may not be in existence. So far as regards G the word "are" is concerned, it is well settled that in wills it may well not point to futurity, and I cannot doubt that the testator in using those words has intended to reserve to himself the right to declare from time to time the rules and regulations and the trusts which he desires to apply to his gift. If this is decided to be the true construction of the words, it is obvious that parol evidence cannot be admitted in order to contradict that which has already been held to be the meaning of the words. I am not sure that I have altogether followed the grounds on which the learned President did H admit it, but we have heard it *de bene esse*, and I can only say that the impression produced on my mind is this, that it is exceedingly fortunate that the rule is as it is, because we should be defeating the intention of the testator in this particular case if we gave effect to a memorandum which, on the evidence if it were admissible, he did not intend to be final, but intended to alter.

These observations appear to me strongly to support the conclusion to which I have come. They are only short of direct authority binding on me because, in that case, it was clear upon the face of the will that the existing document, even if identifiable, was an incomplete statement of the testator's wishes, and was intended to be supplemented by other documents; whereas, in the present case, the existing document was in itself complete and might remain the sole repository of the testator's wishes.

I next refer to *Re Keen, Evershed* v. *Griffiths* (3). In that case the testator had, by cl. 5 of his will, made a gift to A and B of £10,000 free of duty:

> . . . to be held upon trust and disposed of by them among such person, persons or charities as may be notified by me to them or either of them during my lifetime and in default of such notification [as therein mentioned].

The Court of Appeal was of opinion that, upon their true construction, those words could only be construed as referring to a definition of trusts which had not at the date of the will been established and which between that date and the date of the testator's death might or might not be established. LORD WRIGHT, M.R., said, at p. 243 ([1937] 1 All E.R. at p. 457):

> Mr. Roxburgh has strenuously argued, basing himself in particular on the word "may," that the clause even though it covers future dispositions, also includes a disposition antecedent to or contemporaneous with the execution of the will. I do not think that even so wide a construction of the word "may" would enable Mr. Roxburgh's contention to succeed, but in any case I do not feel able to accept it.

This last sentence may be considered *dictum* only; but it is re-affirmed at p. 246, where LORD WRIGHT, M.R., cites the following passage from the judgment of LORD SUMNER in *Blackwell* v. *Blackwell* (4), at p. 339:

> "A testator cannot reserve to himself a power of making future unwitnessed dispositions by merely naming a trustee and leaving the purposes of the trust to be supplied afterwards, nor can a legatee give testamentary validity to an unexecuted codicil by accepting an indefinite trust, never communicated to him in the testator's lifetime.

LORD WRIGHT, M.R., then said at p. 246 ([1937] 1 All E.R., at p. 459):

> As in my judgment, cl. 5 should be considered as contemplating future dispositions and as reserving to the testator the power of making such dispositions without a duly attested codicil simply by notifying them during his lifetime, the principles laid down by LORD SUMNER must be fatal to the appellant's claim. Indeed, they would be equally fatal even on the construction for which Mr. Roxburgh contended, that the clause covered both anterior or contemporaneous notifications as well as future notifications.

It is true that, in the case under review, the reference was not necessarily to a document, since notification might have been oral; but I do not think that there can be any difference in principle between the two cases. The question is whether evidence is admissible to prove what is the document or the notification referred to, and the decision is that such evidence is not admissible if, upon its true construction, the reference is to notification both future and anterior or contemporaneous. As LORD WRIGHT, M.R., points out, if effect is given to such a direction, it would be equivalent to giving a power to change a testamentary disposition by an unexecuted codicil, and the Wills Act, 1837, s. 9, would be violated.

The same observation could with equal force be made about the bequest which I have to consider. The testator's intention was that subsequent declarations should have testamentary validity, though they might not satisfy the formal requirements of the Wills Act. That intention must fail. It appears to me that this is, in effect, another way of stating the conclusion to which I have come in the present case. A bequest in the terms of that before me is invalid; (i) because evidence cannot be admitted to establish only the first but not the second of two alternatives which together are the expression of the testamentary intention; (ii) because, if evidence is admitted to establish the first but not the second alternative, the testator's intention as a whole cannot be ascertained, and the gift must fail for uncertainty; (iii) because it is not permissible to make a gift in a form which involves power to change a testamentary disposition by an unexecuted codicil.

I must, accordingly, declare that the gift in question fails.

Declaration that gift fails and falls into residue.

Solicitors: *Field Roscoe & Co.*, agents for *Minshall Pugh & Co.*, Oswestry (for the plaintiffs and the first defendants); *Sharpe, Pritchard & Co.*, agents for *Underhill, Wilcock & Co.*, Wolverhampton (for the second defendant); *Miller & Smiths*, agents for *Shelton, Wearing & Bates*, Wolverhampton (for the third defendants); *The Treasury Solicitor* (for the fourth defendant).

Reported by IRENE G. R. MOSES, *Barrister-at-Law.*]

Re LESTER, LESTER *v.* LESTER.

[Chancery Division (Simonds, J.), **April 23, 1942.**]

Wills—Construction—Gifts subject to the payment of annuities—Whether both personal obligation and charge on the subject-matter of the gift.

The testator bequeathed certain shares to his son "subject . . . to the payment by him" of an annuity to another son of the testator for life, and, after that son's death, annuities to his wife and daughter respectively, on terms specified therein. It was admitted that this condition imposed a personal obligation on the legatee, who accepted the gift, but it was contended for the annuitants that it also created a charge on the shares :—

Held : a personal obligation was created on the legatee by this condition, but the words used in the will were not apt to create a charge on the shares.

[**EDITORIAL NOTE.** It has generally been said that where property is given subject to certain payments for the benefit of persons other than the beneficiary, then, if the payments exhaust the whole value of the property, the property is held by the beneficiary upon trust for the persons entitled to the payments. If the payments when made will leave a surplus, the property is held charged with the payments. Whether or not there is a charge is in all cases a question of construction of the will as a whole, and in some cases the words may point to a mere personal obligation on the part of beneficiary to pay the sums without the persons to whom payment is to be made having any recourse against the property itself. In the judgment herein, Simonds, J., reviews some of the authorities on the subject and expresses the view that, while there may be cases where the words used are apt to create both a personal obligation and a charge upon the property, in general, the words will be apt to impose one or the other.

As to Creation of Charge, see HALSBURY, Hailsham Edn., Vol. 34, pp. 363, 364, para. 412 ; and for Cases, see DIGEST, Vol. 44, pp. 395-399, Nos. 2283-2311.]

Cases referred to :

(1) *Welby* v. *Rockcliffe* (1830), 1 Russ. & M. 571 ; 44 Digest 396, *2292* ; 8 L.J.O.S.Ch. 142.
(2) *Wright* v. *Wilkin* (1862), 2 B. & S. 259 ; 44 Digest 439, *2654* ; 31 L.J.Q.B. 196 ; 6 L.T. 221.
(3) *Rees* v. *Engelback* [1871] L.R. 12 Eq. 225 ; 44 Digest 397, *2299* ; 40 L.J.Ch. 382 ; 24 L.T. 417.
(4) *Re M'Mahon, M'Mahon* v. *M'Mahon*, [1901] 1 I.R. 489.
(5) *Duffy* v. *Duffy*, [1920] 1 I.R. 122 ; 23 Digest 498 *5642 i.*
(6) *Messenger* v. *Andrews* (1828), 4 Russ. 478 ; 44 Digest 396, *2291.*
(7) *Re Hodge, Hodge* v. *Griffiths*, [1940] Ch. 260 ; Digest Supp. ; 109 L.J. Ch. 185 ; 162 L.T. 155.
(8) *Re Cowley, Souch* v. *Cowley* (1885), 53 L.T. 494 ; 44 Digest, 397, *2302.*
(9) *Re Oliver, Newbald* v. *Beckitt* (1890), 62 L.T. 533 ; 44 Digest 439, *2656.*

Summons to determine the construction of a conditional legacy.

The testator made his will on Feb. 9, 1937. He died on Dec. 21, 1940, and his will was proved in the District Probate Registry at Birmingham, on May 27, 1941. One of the clauses of his will provided as follows :

> I bequeath the remainder of my shares in W. M. Lester & Sons, Ltd., and the Walsall District Iron Co., Ltd., to my said son Albert William Lester, subject . . . (*c*) To the payment by him to my said son Alfred John Lester during his lifetime of the sum of eight pounds per week ; (*d*) To the payment by him after the death of said Alfred John Lester of the sum of six pounds per week to the widow of the said Alfred John Lester during her lifetime or until her remarriage ; (*e*) To the payment by him (after the death of the survivor of the said Alfred John Lester and his wife or after her remarriage as the case may be) to their daughter Dorothy Louise Lester during her lifetime or until her marriage of the sum of two pounds per week.

C. L. Fawell for the plaintiff, the legatee.

S. Pascoe Hayward for the first two defendants, the executors.

W. F. Waite for the third defendant.

H. E. Salt for the fourth, fifth and sixth defendants, the annuitants.

Simonds, J. : It is claimed by the persons entitled to the payments, and it is admitted by the legatee, that the words of the clause impose a personal obligation on the legatee accepting the legacy to make the prescribed payment, and I think that, on the authorities, that is so. The only question is whether, in addition, a charge is created, so that the persons entitled to the payments can assert their rights against the property.

Various authorities have been cited, and the result of them is, in my judgment, that it must be a question of construction in each case whether an obligation or a charge is created, or whether both are created. I find it difficult to construe the words used in this case as creating both a personal obligation and a charge. There may be words which create both, as in *Welby* v. *Rockcliffe* (1) and *Wright* v. *Wilkin* (2), where the language does not admit fairly of any other conclusion than that there was both a personal obligation and a charge. *Rees* v. *Engelback* (3) was a case where the language was such as to create a personal obligation. There are two Irish cases, *Re M'Mahon* (4), and *Duffy* v. *Duffy* (5), where the clauses were drafted in terms which were apt to impose a personal obligation, but not to create a charge. In *Rees* v. *Engelback* (3) the testator had devised his business to his trustees on trust to allow his son to carry it on upon the terms that he should pay certain annuities, and the only question was whether his son, having accepted the legacy, had incurred a personal liability. BACON, V.-C., said at p. 237:

> Now, upon the authority of the case of *Messenger* v. *Andrews* (6), and even without the authority of that case, upon very plain principles of justice and law, the defendant, who admits that he had enjoyed the benefit given to him by a will upon the conditions expressed in it, is under a personal liability, which can be enforced in this court, of fulfilling those conditions.

It is true that in the bill, as set out on p. 229, the plaintiff had claimed a declaration that the annuities were by the will charged on the business, but that question was not ventilated.

In *Re Hodges* (7) a testatrix devised to her husand, who was her executor and sole residuary legatee, certain freehold property in consideration of his paying her sister £2 per week for life. There, it will be observed that a condition was introduced by the words "in consideration of," and the judge came to the conclusion that there was a personal obligation on the legatee, if he accepted the devise. I think that there is very little difference between a bequest to a legatee "in consideration of" and a bequest to him "subject to" the payment by him of certain sums. In either case the words are apt to create a personal obligation. On the other hand, where there is no reference to the legatee as the person by whom the payment is to be made, but the property is merely given subject to the payment of a certain sum, it may well be that the effect is to create a charge upon the property, but not to impose a personal obligation on the legatee. The distinction is fine, but, I think, a real one. Here it is, in my view, rightly conceded that a personal obligation is imposed upon the legatee to make the payment, but I see no ground for saying that in addition a charge is created.

I must refer to two other cases which were cited to me. In *Re Cowley* (8) a testator gave all his interest in certain leasehold premises to his son, subject, nevertheless, to payment of all his debts, funeral and testamentary expenses. The testator's son accepted the bequest and it was held that he must be deemed to have accepted it subject to the payment of such debts, funeral and testamentary expenses, but that he was not personally liable to pay them. KAY, J., said at p. 495:

> In the absence of authority, I am not prepared to say that the gift of specific legacies contained in the present will, "subject to payments of debts, funeral and testamentary expenses," means anything but that the testator gives this property and the other property subject to payment of his debts, funeral and testamentary expenses. It does not seem to me at all intended that, whether or not the property is enough, the legatee is to pay the debt.

From the passage that follows it is clear that the words under consideration were apt to create a charge on the property of the debts, funeral and testamentary expenses. He goes on:

> It is commonly expressed in very different terms—"he paying the debts." Here I take the words only as amounting to a charge by the testator between that property and the other property. I think that the testator's son must be deemed to have elected to accept the legacies, subject to payment of the debts, funeral and testamentary expenses, but that he is not personally liable to pay such debts, funeral or testamentary expenses, or any part thereof.

The opening word "it" in the passage last cited means "the intention that, whether or not the property is enough, the legatee is to pay the debt." The judge does not in so many words say that in that case a charge would not be created, but he is clearly contrasting the two cases of charge and personal liability.

The other case is *Re Oliver* (9). There the testator gave his real estate at North and South Collingham and his residuary estate to his nephew, " He also paying thereout the following legacies . . .", but later referred to the legacies as " charged on my Collingham estate." Chitty, J., held that the words " he also paying thereout " by themselves would have been apt to create a trust (he does not use the words " personal obligation "), but, since the testator has referred to the legacies as " charged " on the Collingham estate, he was constrained to hold that a charge only, not a trust, was created. He was, I think, clearly of opinion that such an expression could not carry the double burden of creating a charge and imposing a personal obligation.

So also in this case, since it is clear that a personal obligation is imposed on the legatee upon his accepting the legacy, I should not be justified in saying that the words in question also create a charge upon the subject-matter of the legacy.

Declaration that the legatee is personally liable to pay the sums but that they are not a charge on the subject-matter of the legacy.

Solicitors: *Rider, Heaton, Meredith & Mills*, agents for *Lenton Lester & Co.*, Walsall (for the plaintiff and first three defendants); *Joynson-Hicks & Co.* (for the last three defendants.)

[*Reported by* Irene G. R. Moses, *Barrister-at-Law.*]

EARL FITZWILLIAM'S COLLIERIES CO. *v.* PHILLIPS.

[Court of Appeal (Lord Greene, M.R., du Parcq, L.J. and Singleton, J.), **April 17, 1942.**]

Income Tax—Mining lease—Right to let down surface—Acreage payment as liquidated damages—Easement—" Rent "—Finance Act, 1934 (c. 32), *s.* 21 (4) (*b*) (*c*).

A colliery company, under a mining lease, contracted to pay to a lessor sums of £10 and £5 per acre of so much of the coal demised as should have been worked and gotten during the preceding half year as liquidated damages in respect of the over-lying surface. It was contended that the payments made were a composition for damage :—

Held: the right granted was an easement within the meaning of the section and the payments were rent within the Finance Act, 1934, s. 21 (4).

Decision of Lawrence, J. ([1941] 3 All E.R. 296) *affirmed.*

[**EDITORIAL NOTE.** The Court of Appeal have found it impossible to distinguish this case from the *New Sharlston* case (1). It was strongly urged that the periodic payments in this case were not in the nature of the rent. They were not made in respect of the user or occupation of any premises nor as consideration for a right granted. They were, in fact, made as instalments of liquidated damages agreed to be taken in lieu of the compensation which might be recovered in respect of damage to the surface lands. The Court of Appeal have held, however, that, in the consideration of this question, the words " payment in the nature of rent " must be construed in relation to the particular type of subject-matter with which the section is dealing, and, on this view, they are clear that the payments are payments in the nature of rent.

As to Assessment of Surface Damage Payment, see HALSBURY, Hailsham Edn., Vol. 17, pp. 140, 141, para. 283; and for Cases, see DIGEST, Vol. 28, p. 8, No. 28.]

Cases referred to:

(1) *Inland Revenue Comrs.* v. *New Sharlston Collieries Co., Ltd.*, [1937] 1 K.B. 583; [1937] 1 All E.R. 86; 21 Tax Cas. 69.

(2) *Elliott* v. *Burn*, [1935] A.C. 84; Digest Supp.; 103 L.J.K.B. 578; 151 L.T. 526; 18 Tax Cas. 595.

(3) *Inland Revenue Comrs.* v. *Hope* [1937] S.C. (Ct. of Sess.) 585; Digest Supp.; 21 Tax Cas. 116.

Appeal by the plaintiff from an order of Lawrence, J., dated Oct. 13, 1941, reported [1941] 3 All E.R. 296, where the facts are fully set out.

F. Heyworth Talbot for the appellant.

The Attorney-General (*Rt. Hon. Sir Donald Somervell, K.C.*), *J. H. Stamp* and *Reginald P. Hills* for the respondent.

Talbot: It is well-established that payments made in respect of claims for damage can be deducted for the purpose of arriving at the income tax payable. In each of the leases in the present case there is a provision that the lessee shall pay at the rate of so much per acre worked as liquidated damages in respect of injury to the overlying surface. This liability falls to be met as each acre overlying the coal worked is reached. Apart from the Finance Act, 1934, s. 21, these payments would be deductible. The question, therefore, is whether or not they are within the ambit of that section. When one construes the term "rent" as used in that section, one must conclude that annual payments which come into the hands of the recipient are within the scope of the term. If the company had been content to pay damage as it occurred the persons who received it would have received what, in their hands, would have been a capital payment. The payments made in respect of the leases are distinguished from royalties. A royalty is a true rent. The question as to whether a payment is a rent or in the nature of a rent may have to be determined according to the consideration for which it is paid. A rent may be described as a recompense paid by the lessee to a lessor for the occupation and user of a hereditament. In the present case, the payments were not made in connection with the user or occupation of any hereditaments at all. The colliery company does not get a right to withdraw the support by reason of the payments. What the company does get is freedom from claims in respect of damage. In *Inland Revenue Comrs.* v. *New Sharlston Collieries, Ltd.* (1), a right to withdraw support was acquired. In the present case, the payment was not in respect of an easement. [Counsel referred to *Elliott* v. *Burn* (2) and *Inland Revenue Comrs.* v. *Hope* (3)].

Counsel for the respondent were not called upon.

LORD GREENE, M.R.: In my opinion, this is a clear case, and the decision of LAWRENCE, J., was manifestly right.

There are two questions involved. The first is whether the particular right in question is an easement within the definition contained in the Finance Act, 1934, s. 21 (4) (*b*), which I need not read. The second question is whether the payments which are in question are annual or periodical payments in the nature of rent within the definition of sect. 21 (4) (*c*). On the first question LAWRENCE, J., held that the case was covered by the decision of this court in *Inland Revenue Comrs.* v. *New Sharlston Collieries, Ltd.*, and I need not repeat what the judge said with regard to that case.

The only distinction which counsel for the appellants endeavoured to draw between the two cases was of the following nature. In the *New Sharlston* case (1), the company concerned started off with the right to get the coal because they were the freehold owners of the coal, but their title did not confer upon them the right to let down the surface without compensating the owner for any damage. That provision, which I have not set out verbatim, was held by the House of Lords in the year 1900 as not operating as a surrender to the coalowners of the right to support incident to the surface lands. Accordingly, in the year 1901, after that decision, the company proceeded to obtain from the then tenant for life of the surface lands full liberty to work the coal notwithstanding that the working might cause subsidence; but the company did not by that document obtain the right to work the coal without any liability to pay damages which might ensue from any subsidence which took place.

The question arose as to whether the right in respect of which the payments fell to be made in that case—which was the right, as I have said, to work without leaving support for the surface—was an easement within the meaning of the definition of that term in sect. 21 (4).

The distinction which it is attempted to draw between that case and the present case is that the right in respect of which the payments in controversy here are to be made is a right which goes further than that which was acquired in the *New Sharlston* case (1), because it is the right to be exempt from any claim for damages caused by subsidence. It is said that here the appellants acquired the right to let down the surface, which meant that they acquired the right to act in relation to the land and to let down the surface without the liability to be restrained by injunction. It is said that the lease conferred that right upon them, and, if it had stopped there and it had been a payment in respect of that right, it is conceded that the *New Sharlston* case (1) would have covered it. It is contended, however, that the appellants are given an additional right which exempts them, in the exercise of the right already conferred upon them, from liability for damages and is in effect nothing more or less than a composition paid for damages.

In my opinion that distinction is one which cannot stand in the light of the reasoning on which the decision in the *New Sharlston* case (1) was based. I do not propose to read passages from that decision, but in my view the distinction drawn is one which cannot possibly be made good. I agree with the judge that the *New Sharlston* case (1) conclusively decides, so far as this court is concerned, that the right acquired in respect of which these payments are made is an easement within the meaning of the definition clause.

The next question is whether or not the payments are annual or periodical payments, and, if so, the further question arises whether they are payments in the nature of rent. It seems to me quite beyond dispute that these payments are periodical payments because they are payable half-yearly during the continuance of the demise, or, at any rate, so long as any coal is being worked under the demise. They must, however, be periodical payments in the nature of rent before they are caught, and it is pertinent to point out that the phrase " payment in the nature of rent " must, of course, be construed in relation to the type of subject-matter in respect of which the payment in controversy falls to be made.

The type of subject-matter in the present case is the particular type of " easement " within the meaning of this artificial definition clause. We, therefore, start off with a subject-matter which, looked at from the strict point of view of law, apart from the working of this particular section, involves a payment which, if analysed, is a commutation of a claim for damages. So be it ; but, once the right is an easement within this highly artificial definition, I cannot myself see how an annual payment made in respect of that easement can fail to be a payment in the nature of rent within the meaning of those words used in this context. It is not a question of what the nature of rent is *in vacuo*. It is a question of what the words " payment in the nature of rent " mean in relation to this particular type of subject-matter. If counsel for the appellants had not argued the point with great ability and conciseness, it could not really be contended, I should have thought, that these payments are not in the nature of rent.

The result, therefore, is that the appeal must be dismissed with costs.

du Parcq, L.J. : I agree.

Singleton, J. : I agree.

Appeal dismissed with costs. Leave to appeal to the House of Lords.

Solicitors : *Andrew, Purves, Sutton & Creery*, agents for *Newman & Bond*, Barnsley (for the appellant) ; *Solicitor of Inland Revenue* (for the respondent).

[*Reported by* W. K. Scrivener, Esq., *Barrister-at-Law*.]

SKELTON AND OTHERS *v.* YOUNGHOUSE AND ANOTHER.

[House of Lords (Viscount Maugham, Lord Russell of Killowen, Lord Macmillan, Lord Wright and Lord Porter), **March 5, 6, April 27, 1942.**]

Wills—Construction—Option to purchase shares—Whether option exercisable by donee's executors or by assignees.

The testator by his will dated Feb. 15, 1911, gave his son an option to purchase certain shares upon the death of the testator's wife or previously thereto whenever the trustees should proceed to realise that part of the estate. During his lifetime, the son assigned the benefit of the option to trustees for the purpose of securing an option for his wife. He survived the testator's wife but died without having exercised the option :—

Held : the option to purchase was personal to the son and was not exercisable after his death by his executors or assigns. Whether or not such an option is personal to the donee is a pure question of construction of the will in each particular case.

Decision of the Court of Appeal sub nom. Re Sykes, Younghouse v. *Sykes* ([1940] 4 All E.R. 122) *affirmed.*

[**EDITORIAL NOTE.** The decision of the House is based entirely upon a construction of the terms of the particular will to be construed. In the course of their opinions, however, their Lordships have negatived two views, one expressed in Jarman on Wills, and the other in the dissenting judgment of Luxmoore, L.J., in the Court of Appeal. The first expressed the view that an option to purchase given by a will is *prima facie* personal to the donee, but the House has decided that it is a pure question of construction in all cases. The second expressed the view that *Wright* v. *Morgan* (2) laid down a general rule than an option was assignable in the absence of something in the nature of the interest or in the words creating it negativing assignability. No such general proposition, it is said, was laid down by that case and the passage relied upon was an *obiter dictum.*

As to Options to Purchase in Wills, see HALSBURY, Hailsham Edn., Vol. 34, pp. 34-36, para. 29; and for Cases, see DIGEST, Vol. 44, p. 211, Nos. 384-386.]

Cases referred to:

(1) *Re Cousins, Alexander* v. *Cross* (1885), 30 Ch.D. 203; 44 Digest 211, *386.*

(2) *Wright* v. *Morgan,* [1926] A.C. 788; 43 Digest 781, *2218*; 95 L.J.P.C. 171; 135 L.T. 713.

(3) *Re Madge, Pridie* v. *Bellamy* (1928), 44 T.L.R. 372; Digest Supp.

(4) *Grant* v. *Grant* (1870), L.R. 5 C.P. 727; 44 Digest 614, *4415*; 39 L.J.C.P. 272; 22 L.T. 829.

Appeal from a decision of the Court of Appeal (Scott and Clauson, L.JJ., Luxmoore, L.J., *dissenting*), dated Sept. 19, 1940, and reported *sub nom. Re Sykes, Younghouse* v. *Sykes* [1940] 4 All E.R. 122, affirming a decision of Bennett, J., dated May 4, 1940, and reported [1940] 2 All E.R. 492. The facts are fully stated in the opinion of Viscount Maugham.

Roxburgh, K.C., Wilfrid M. Hunt and *L. M. Jopling* for the appellants.

H. B. Vaisey, K.C., E. M. Winterbotham and *S. Pascoe Hayward* for the respondents.

Viscount Maugham: My Lords, this is an appeal from the order of the Court of Appeal (Scott, Clauson and Luxmoore, L.JJ.) dated Sept. 19, 1940, affirming the order of Bennett, J., in an action commenced by originating summons in which the respondent Arnold Chadwick Younghouse was the plaintiff and Leonard Musgrave Sykes (since deceased) and the appellants were the defendants. The question raised is whether an option to purchase shares in a private company conferred by the will of William Shaw Sykes (whom I shall call the testator) on his son Edward Musgrave Sykes was exercisable by the son's executors or assignees after his death.

At the date of the will the testator owned certain shares in a private company called the English Card Clothing Co., Ltd. (which I shall call the company). Three hundred of these shares at that date were standing in the books of the company in the name of the testator's son Edward as the nominee of the testator. They were of the nominal value of £10 a share.

The testator made his will on Feb. 15, 1911, and thereby gave all his real and personal estate to his wife Clara and his sons Edward and Leonard upon trust for sale and conversion with the fullest discretion to postpone the sale and conversion, and upon trust to invest the ultimate proceeds of conversion and to pay the income of the trust moneys and investments to his wife Clara for her life; and he declared that after her death his trustees should stand possessed of the trust premises upon trust for his sons Edward and Leonard in equal shares. Both Edward and Leonard survived the life tenant, and it is unnecessary to state the provisions made for the event of either predeceasing the life tenant. The will continues as follows:

> And whereas part of my estate consists of the shares in the English Card Clothing Company, Limited, now standing in the name of my son Edward Musgrave Sykes as registered owner and I am desirous that my said son shall have the opportunity of becoming absolute owner of the same shares Now I hereby declare and direct that upon the decease of my said wife or previously thereto in case or whenever my trustees shall proceed to realise the part of my estate consisting of or including such shares and my beneficial right thereto and ownership thereof my son Edward Musgrave Sykes shall have the option of purchasing and becoming absolute owner of the said shares or any part thereof and all my estate interest right and title therein and thereto the value of such shares for the above purpose to be estimated at par value.

The testator died on Sept. 9, 1916, and the widow and the son Edward shortly afterwards proved the will. The 300 shares of £10 each in the English Card Clothing Co., Ltd., above referred to, which belonged to the testator were still registered at the time of his death in the name of the son Edward. They were subsequently subdivided into 3,000 shares of £1 each. In 1918, 1,500 bonus ordinary shares of £1 each were issued to Edward as the holder of the 3,000 shares, but no question now arises as to the bonus shares. The trustees did not realise the shares during the widow's lifetime. She died on May 18, 1939, and Edward thereupon became entitled to exercise the option given to him by the will, that is, to purchase the beneficial interest in the 3,000 shares at par value. They were then of the value of £2 6*s*. a share or thereabouts. He, however, died shortly afterwards, namely, on June 29, 1939, without having exercised the option, and, as already stated, the question is whether it is now exercisable by his executors.

It should be added that it appears from the memorandum of association and the articles, that the company had been formed in 1897 to amalgamate four card clothing concerns, one of which belonged to the Sykes family. In Feb., 1916, new articles were adopted, the company having by that time become a private company in the strict technical sense, with restrictions on transfer of the usual character, giving the directors a right to require any intending transferor of shares to offer the shares to them at the market price, to be fixed annually by the auditors. The appeal has been argued upon the footing that the shares at the date of the will were of a value considerably in excess of their nominal value. The option, therefore, at the date of the will as well as at the date of the testator's death was of a considerable pecuniary value.

The originating summons was heard by Bennett, J., who held that, in the events that happened, the option ceased to be exercisable on the death of Edward. He based his decision on a statement to be found in Jarman on Wills, 7th Edn., Vol. I, p. 73 :

> An option of purchase given by will to A. B. is *prima facie* personal to him, and does not pass to his executors on his death.

The decision of the Court of Appeal in *Re Cousins* (1) is cited in support of the statement, and Bennett, J., held that that decision did in fact support it.

The appellants appealed from the decision of Bennett, J., and the matter was heard in the Court of Appeal (Scott, Clauson and Luxmoore, L.JJ.), on July 25, 26, 1940. On Sept. 19, 1940, judgments were delivered dismissing the appeal (Luxmoore, L.J., *dissenting*). All the lords justices agreed that *Re Cousins* (1) did not lay down any principle of construction but turned on its own peculiar facts. Scott and Clauson, L.JJ., held on the construction that the option was given to Edward Musgrave Sykes personally and was therefore not assignable or transmissible. Luxmoore, L.J., in his dissenting reasons, expressed the opinion that the judgment of the Privy Council delivered by Lord Dunedin in *Wright* v. *Morgan* (2) laid down a general principle of construction that there was nothing in the nature of an option of purchase conferred by a will on a named person which in the absence of a context points to non-assignability. He said that in his view there was nothing in this testator's will which pointed to non-assignability, and he held that the fact that the subject-matter of the option was a beneficial interest in shares in the company and that this conferred and was intended to confer a large pecuniary benefit on the son together with other circumstances showed that the testator contemplated that the option was assignable.

My Lords, I cannot think that there is any sufficient ground for holding that an option of purchase given to A.B., created by the will of a testator and relative to a part of his property, is *prima facie* personal to A.B. I agree with the view of the Court of Appeal that the case of *Re Cousins* (1) cannot be treated as laying down such a principle, and I think that case depended, as a careful consideration of the judgments of Cotton and Lindley, L.JJ., seems to show, on the language used by the testator in the light of the surrounding and somewhat special circumstances of that case. Nor do I think that Lord Dunedin intended in *Wright* v. *Morgan* (2) to lay down any general rule which would apply in such a case as your Lordships have before you. The case related to a right of pre-emption in relation to an estate devised by the will of the testator. The passage relied upon is a very short one [pp. 795, 796] :

> The leading question accordingly is whether the option to purchase given by the will to Harry Herbert was assignable and assigned to Douglas . . Speaking generally, any vested interest is assignable unless there is something in the nature of the interest, or something in the words of the settlement which creates the interest which contradicts the nature of the assignability.

If I correctly understand the words " vested interest," which generally implies in English law that the interest given is not subject to any condition, I see nothing to criticise in this general statement ; but it is to be noted that the right given in the present case was not a vested interest in the ordinary sense and that the words " unless there is something in the nature of the interest or " etc. qualify the general proposition. Without saying anything on the question whether an option to purchase contained in a will confers a vested interest before the option is exercised, and particularly if the option is only exercisable at an uncertain time, I may observe that the observation was of the nature of an *obiter dictum* and the point was never in fact argued before the board. *Re Cousins* (1) and other relevant cases on the point were neither cited nor considered.

My Lords, I have come to the conclusion that the question in this case does not depend upon, nor is it affected by, any *prima facie* view one way or the other. A Such an option as is here in question may be given to Edward personally and therefore to be exercised by him and by no one else, or it may be given to him and his executors, administrators and assigns, and not the less that those additional words are not used. It is a matter which depends on the true construction of the will in the light of any surrounding circumstances which may properly be admissible. The passage cited from JARMAN ON WILLS is, I think, incorrect.

B In my opinion there are sufficient grounds in this case for holding that the option was personal to Edward and was, therefore, not assignable or transmissible. It should be noted in the first place that the option according to the express terms of the will was not exercisable until one of two events should happen, namely, the death of the testator's widow or previously thereto when the trustees should "proceed to realise" the shares standing in the name of Edward. It is not, therefore, an immediate unconditional gift of a valuable right, but one C conditional upon the happening of the first of two events, and it could not be certain that Edward would be alive when the option became exercisable. That is not in dispute, and I have, therefore, said nothing about an attempt to assign the option by a deed dated July 26, 1932. In the next place, it is to be observed that upon the death of the widow the whole of the testator's estate was divisible between his sons Edward and Leonard, if living. Thus, any exercise of the option D would enure to the benefit of Edward at the expense of Leonard. The reference to "the said shares *or any part thereof*" seems to me to suggest that the testator might possibly have thought that, in certain possible events, the elder brother would prefer not to exercise the option or not to exercise it over all the shares. Thirdly, it is important to observe that the shares were shares in a family concern, a private company in which the testator may well have desired his son Edward to continue to hold a substantial interest if alive at the death of the E widow.

Finally, it is to be noted that the testator himself says that he is "desirous that my said son shall have the opportunity of becoming absolute owner of the said shares," which, as the testator points out, were held by the son as nominee for his father. This is the reason given for conferring the option, and the same thought is repeated in describing the effect of its exercise. Edward will then become "absolute owner of the said shares or any part thereof," and all the F testator's "estate, interest, right, and title therein." This language would be inappropriate if it extended to a purchase by an assignee or by executors or administrators after the death of the son.

I should add that in my opinion *Re Cousins* (1) was rightly decided on the grounds mentioned by COTTON and LINDLEY, L.JJ. The decision of my noble and learned friend LORD RUSSELL OF KILLOWEN (then RUSSELL, J.) in the case of *Re Madge* (3) was also, if I may be allowed to say so, unquestionably correct.

G On these grounds I have arrived at the same conclusion as SCOTT and CLAUSON, L.JJ., and I observe that BENNETT, J., would have come to the same conclusion on the question of construction. My Lords, I move that the appeal be dismissed with costs unless the parties have come to some other agreement in relation to the costs.

LORD RUSSELL OF KILLOWEN: My Lords, I agree with the unanimous view H of the Court of Appeal that *Re Cousins* (1) is no authority for the proposition enunciated in JARMAN ON WILLS, 7th Edn. The decision in that case rested, as I read the judgments, simply upon the court's view of the true construction of the testator's will, without any question of a presumption either way. In my opinion that is the correct way of approaching the solution of the problem whether an option given by a will to a person is transmissible to and exercisable by his assigns or his legal personal representatives, or is intended to be personal to the donee and incapable of exercise by anyone else. The solution depends upon the intention of the testator as expressed by the words he has used, construed in the light of the relevant surrounding circumstances.

I confess that, in so approaching the present problem, I have not found it one of easy solution. The benefit to be conferred by the exercise of this option was a very valuable one, involving as a condition of its acquisition nothing beyond the payment of a sum of cash to the testator's estate; i.e., a condition the fulfilment of which required nothing in the nature of a qualification personal to the only donee named, viz., Edward. In default of indications to the contrary, one would incline to the view that so valuable a right was to be within the power A of Edward to dispose of, as and when he wished to realise it, and that, if he neither assigned his right nor personally exercised the option in his lifetime, his estate could reap the benefit after his death. However, on carefully considering the language which the testator has used, and the circumstances which existed at the date of his will and to which his language applies, I am driven to the conclusion that the option was intended by the testator to be exercised by Edward and by no one else. B

The position as regards the 300 shares has already been explained by my noble and learned friend Viscount Maugham. Edward owned the legal interest in them. He was, *vis-a-vis* the company, the shareholder. The equitable or beneficial interest was in the testator. The language of the will seems to me to be dealing only with the acquisition by Edward of this equitable or beneficial interest. The recital, which leads up to and explains the reason for giving the option to Edward, relates to nothing else; and the reason is stated to be the C testator's desire to give Edward the opportunity of becoming absolute owner of the shares, of which he was the registered owner, words incapable of application to assigns of Edward, or (unless they succeeded in having their names placed on the register in respect of the shares) incapable of application to Edward's legal personal representatives. The same remarks apply to the operative provision. Edward is to have the opportunity of purchasing and "becoming D absolute owner of the shares or any part thereof and all my estate interest right and title therein and thereto." It must be noted that to give Edward the right to "purchase" shares already in his name is a misapplication of the word. What is effectively given to Edward is the right to purchase and become absolute owner of all the testator's estate, interest, right and title in and to the shares. Again this is a right, the gift of which (according to its terms) can only apply to Edward personally. E

Furthermore, the testator states that he desires that Edward shall have the "opportunity" of becoming the absolute owner of the shares. I think that the use of the word "opportunity" gives another clue to the testator's intention. It is true that every donee of an option may choose not to exercise it, and in that sense is given an opportunity; but it seems to me that, in stating that he gives the option in order that Edward may have the indicated opportunity, the testator suggests that the person to whom the opportunity is given may not think F fit to avail himself of it; and this at once introduces the idea of the individual opinion of a particular person, in other words the personal judgment of Edward.

Thus, from start to finish of the clause in question, there is apparent an indication that the testator is leaving it to the personal decision of Edward whether or not the 300 shares shall be taken out of his residuary estate on payment of their par value. There are other matters which I understand have influenced some G of your Lordships in favour of the respondents, but the features to which I have referred are those which have led me to the conclusion that the order of the Court of Appeal should be affirmed.

Lord Macmillan: My Lords, the question is whether a valuable option which the testator by his will conferred on his son Edward was personal to his son or transmissible to his son's executors, administrators or assigns. The terms in which the option was conferred and the surrounding circumstances, H so far as they may properly be taken into consideration, have been set out by my noble and learned friend Viscount Maugham. It is, therefore, only necessary for me to state the reasons which have satisfied me that the option was personal and not transmissible.

The answer to the question is to be sought in the intention of the testator, and his intention must be ascertained not by conjecture, but by a reasonable interpretation of the language which he has used, aided by such light as may be derived from the relevant facts. There is, in my opinion, no presumption of law one way or the other in the matter. And I would add, as the point was raised in the course of the debate, that cases on the interpretation of contracts are not entirely apposite, for, as LORD BLACKBURN reminds us, a will is a soliloquy, while the language of a contract is addressed to another. (*Grant* v. *Grant* (4), at p. 728).

First of all, the option here is conferred on the testator's son by name. He is singled out for the benefit and for a very good reason, as will appear. There is no mention of possible personal representatives, though the words "executors or administrators" were not foreign to the testator's vocabulary, as he shows in his appointment of trustees. If, then, the option is to be held to be transmissible this must be in virtue of the general principle inherent in the conception of ownership that what a man owns he may dispose of as he pleases. It is true that on the testator's death there passed to his son Edward a right to acquire the shares in question at par, and this was a valuable right, for the shares were worth about two and a half times par. What was the nature and quality of the right so acquired? It was not immediately exercisable. Its exercise was postponed until either the death of the testator's wife, when his estate would become distributable, or until at some earlier date the trustees should proceed to realise the shares. If this option was not personal to the son, it became transmissible by or through him immediately on the testator's death. It could be transmitted before it could be exercised. The scheme of the testator's directions to his trustees seems to me quite inconsistent with his having intended anything of the sort. The position was that the testator had the beneficial interest in a number of valuable shares in a company conducting a business with which his family was intimately connected. Presumably for some reason of convenience, these shares stood in the name of his son Edward as nominal holder. The testator tells us that he is desirous that his son in whose name "as registered owner" the shares stand should have "the opportunity of becoming the absolute owner of the same." He then indicates when his son is to have this opportunity and then proceeds to give him the power to convert his titular ownership into beneficial ownership. The qualification to exercise the option is thus seen to be, in the testator's mind, the titular ownership of the shares. The option is an option of "purchasing and becoming the absolute owner of the said shares or any part thereof." The language both of the preamble to the option and of the operative words appears to exclude the idea that the testator intended the option to be exercisable by a third party who was not already the "registered owner" of the shares and who would not be exchanging the position of nominal owner for that of absolute owner. The option is, in effect, to convert a nominal ownership into a beneficial ownership, and the qualification of nominal ownership was personal to his son. Moreover, the option is to acquire the shares or "any part thereof," so that it is left to the son, when he comes to make his choice, to decide how many of the shares he wishes to acquire. Such a discretion is not one which the testator is likely to have intended to confide to a third party, possibly a complete stranger.

The matter may be said to be to some extent one of impression, but, in my opinion, the language of the clause which has to be construed, when scrutinised in the light of the circumstances, yields a clear indication of *delectus personae* on the part of the testator. Accordingly, when Edward, having survived his mother, died without having exercised the option conferred on him, I am of opinion that it ceased to exist to all intents and purposes. I am, therefore, for dismissing the appeal.

LORD WRIGHT: My Lords, I have found this case so nicely balanced that the scales seemed for some time to oscillate within very narrow limits. In the end, however, the balance has to my mind settled in favour of the respondents, notwithstanding the able arguments of counsel for the appellants.

The case is one which depends on the view taken of the meaning of the testator's words, read in the light of the circumstances which must have been present to his mind, and considered with particular reference to the nature of the not perhaps very usual subject-matter of the gift. I regard this will as an individual expression of the testator's mind. A will, it might appear, should be easier to construe than a contract, which involves a *consensus ad idem* of two minds, whereas a will is the personal and individual expression of the intention of the testator, who is figured as soliloquising or, as it has been said, sitting in his arm-chair. I am not sure, however, that the fact that the language of a contract is the combined expression of the two parties does not on the whole help to clarify the interpretation.

The crucial question here is whether the option was personal to the legatee or whether it was transmissible. Except for one circumstance which I shall later state, I should have felt that the option was not of a merely personal character. The shares were marketable things in action, though at a later date subject under the company's articles to a right of preemption by the company in certain events. There is nothing to show that the holding of the shares by the legatee was associated with any direct share in the management of the company or that it had any sentimental value attached to it, or that the shares could not have been sold at once by the legatee if he acquired them under the will. The condition of acquiring the shares, if the option was exercised, was simply the payment of a sum of money, which anyone could make. The option was a valuable option, not on the face of it different in kind from a similar option conferred by contract *inter vivos* in the ordinary course of business and in normal course clearly transmissible. The absence of the words " executors, administrators, and assigns " is not significant either way, though, if they had appeared, the difficulty could not have arisen.

It is, however, clear that an option given in a will may be construed as personal without express words to that effect if it appears that the limitation ought to be inferred upon the true construction of the will considered with all the relevant facts in the light of which it is to be read. The peculiarity here is that the will does not simply leave a sum of money, or a particular block of shares, but by its language seems to presuppose that the option will be exercised by one who is the registered, though not the beneficial, owner of the shares and who by payment of the par value will acquire full ownership. That may be merely a form of expression, dictated by the actual facts as they existed when the will was made and not a qualification or condition of the gift ; but on the whole I have come to the conclusion that the dominant purpose in the testator's mind was that his son should acquire the shares in full ownership, if he should be so minded and paid the specified sum, when the time came. This, I think, is confirmed by the wording of the relevant clauses. The recital is :

> I am desirous that my said son shall have the opportunity of becoming absolute owner of the shares.

The operative words are that he :

> . . . shall have the option of purchasing and becoming absolute owner of the said shares or any part thereof and all my estate interest right and title therein and thereto the value of such shares for the above purpose to be estimated at par value.

There is indeed in this the element of bounty. It is a gift of a substantial value in pounds, shillings and pence represented by the difference between the par value and the market value. I think that the dominant object which to my mind emerges from these words is that his son should, if he desire, have the shares. On that view, the option is properly held to be personal to the son. After all, if what the testator intended was to bequeath a particular sum of money to his son, he could have done so simply and directly without the elaborate machinery of a future and conditional option.

The issue is on a razor's edge. I have considered all the cases which have been cited and some others ; but one will is not always, or even perhaps generally, likely to be any help in construing another will. Authorities dealing with other wills are often more likely to mislead than to guide. My decision is based on this particular will itself, and what I deduce from that to have been the testator's intention.

I think that the appeal should be dismissed.

LORD PORTER : My Lords, I concur in the conclusions at which your Lordships have arrived.

Appeal dismissed.

Solicitors : *S. F. Miller, Matthews & Co.*, agents for *Taylor, Kirkman & Mainprice*, Manchester (for the appellants) ; *Charles Russell & Co.*, agents for *Skelton & Co.*, Manchester (for the respondents).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

Principle enunciated by LORD WRIGHT, *followed.* BISHOP *v.* CUNARD WHITE STAR, LTD. [1950] 2 All E.R. 22.

DAVIES AND ANOTHER *v.* POWELL DUFFRYN ASSOCIATED COLLIERIES, LTD.

[HOUSE OF LORDS (Lord Russell of Killowen, Lord Macmillan, Lord Wright, Lord Porter and Lord Clauson), **January 9, 10, April 27, 1942.**]

Negligence—Personal injuries—Overlapping of damages—Fatal Accidents Acts (1846-1908) *—Law Reform (Miscellaneous Provisions) Act,* 1934 (c. 41), *s.* 1 (5).

The husbands of the appellants were fatally injured by an explosion in a coal mine belonging to the respondents. The appellants, each of them suing as administratrix of her deceased husband, brought actions against the respondents for breach of statutory duty and negligence. Each claimed damages (i) under the Fatal Accidents Acts, 1846 to 1908, on behalf of the deceased's dependants, and (ii) under the Law Reform (Miscellaneous Provisions) Act, 1934, in respect of the deceased's shortened expectation of life. The appellants contended that no allowance should be made in assessing damages under the Fatal Accidents Acts in respect of any damages awarded under the 1934 Act :—

HELD : in assessing damages under the Fatal Accidents Act, 1846, damages awarded under the Law Reform (Miscellaneous Provisions) Act, 1934, must be taken into account in the case of dependants who will benefit under the latter Act.

Decision of the Court of Appeal (*sub nom. Yelland* v. *Powell Duffryn Associated Collieries, Ltd.*, [1941] 1 All E.R. 278), *affirmed.*

[**EDITORIAL NOTE.** It was stated in *Rose* v. *Ford* (6), that there might be some overlapping in the damages awarded under the Law Reform (Miscellaneous Provisions) Act, 1934, and those awarded under the Fatal Accidents Act, 1846. In *Feay* v. *Barnwell* (9), decided in December, 1937, this suggestion was considered and it was decided that the award under the 1934 Act, subject to a deduction for administration expenses, must be deducted from that under the Fatal Accidents Act. Since that decision this rule has been acted upon, but, in the appeal in the present case, it was alleged to be contrary to the Law Reform (Miscellaneous Provisions) Act, 1934, s. 1 (5). That subsection states that the rights conferred by the 1934 Act are in addition to and not in derogation of any rights conferred by the Fatal Accident Acts. Their Lordships are unanimous in their view that the decision in *Feay* v. *Barnwell* (9), was correct, and view the matter purely as one of the construction of the subsection in the 1934 Act.

AS TO DAMAGES UNDER THE FATAL ACCIDENTS ACTS, see HALSBURY, Hailsham Edn., Vol. 23, p. 690, para. 975 ; and FOR CASES, see DIGEST, Vol. 36, pp. 139-141, Nos. 933-944.]

Cases referred to :

(1) *Grand Trunk Ry. of Canada* v. *Jennings* (1888), 13 App. Cas. 800 ; 36 Digest 139, *936* ; 58 L.J.P.C. 1 ; 59 L.T. 679.

(2) *Admiralty Comrs.* v. *S.S. Amerika*, [1917] A.C. 38 ; 36 Digest 128, *846* ; 86 L.J.P. 58 ; 116 L.T. 34.

(3) *The Vera Cruz* (*No.* 2) (1884), 9 P.D. 96 ; 41 Digest 768, *6230* ; 53 L.J.P. 33 ; 51 L.T. 104 ; on appeal *sub nom. Seward* v. *The Vera Cruz* (1884) 10 App. Cas. 59.

(4) *Pym* v. *Great Northern Ry. Co.* (1862), 2 B. & S. 759 ; 36 Digest 129, *855* ; 31 L.J.Q.B. 249 ; 6 L.T. 537.

(5) *Hicks* v. *Newport, Abergavenny & Hereford Ry. Co.* (1857), 4 B. & S. 403n ; 36 Digest 139, *935*.

(6) *Rose* v. *Ford*, [1937] A.C. 826 ; [1937] 3 All E.R. 359 ; Digest Supp. ; 106 L.J.K.B. 576 ; 157 L.T. 174.

(7) *Mechanical & General Inventions Co., Ltd. & Lehwess* v. *Austin ; & Austin Motor Co.* [1935] A.C. 346 ; Digest Supp. ; 104 L.J.K.B. 403 ; 153 L.T. 153.

(8) *Flint* v. *Lovell*, [1935] 1 K.B. 354 ; Digest Supp. ; 104 L.J.K.B. 199 ; 152 L.T. 231.

(9) *Feay* v. *Barnwell*, [1938] 1 All E.R. 31 ; Digest Supp.

(10) *Benham* v. *Gambling*, [1941] A.C. 157 ; [1941] 1 All E.R. 7 ; Digest Supp.

(11) *Avery* v. *London & North Eastern Ry. Co.*, [1938] A.C. 606 ; [1938] 2 All E.R. 592 ; Digest Supp. ; 107 L.J.K.B. 546 ; 159 L.T. 241.

(12) *Owen* v. *Sykes*, [1936] 1 K.B. 192 ; Digest Supp. ; 105 L.J.K.B. 39 ; 154 L.T. 82.

APPEALS by the plaintiffs in consolidated actions from a decision of the Court of Appeal, dated Dec. 10, 1940, and reported *sub nom. Yelland* v. *Powell Duffryn Associated Collieries, Ltd.*, [1941] 1 All E.R. 278. The facts are fully stated in the opinion of LORD MACMILLAN.

Gilbert J. Paull, K.C., and *Godfrey Parsons* (for *W. Griffith Williams* on war service), for the appellants.

A. S. Comyns Carr, K.C., *Joshua Davies, K.C.*, and *Gerwyn P. Thomas* (for *H. Edmund Davies* on war service), for the respondents.

Lord Russell of Killowen: My Lords, the relevant facts have been fully stated by my noble and learned friend **Lord Macmillan** in his opinion, which I have had the privilege of reading. There is no necessity for any additional statement. The main point for our decision is short but important. It may be stated A thus. Must damages recoverable under the Law Reform (Miscellaneous Provisions) Act, 1934, be taken into account in assessing damages under the Fatal Accidents Acts, 1846 to 1908, in the case of dependants who will benefit from the damages under the Act of 1934? The general rule which has always prevailed in regard to the assessment of damages under the Fatal Accidents Acts is well-settled, viz., that any benefit accruing to a dependant by reason of the relevant death must be taken into account. Under those Acts, the balance B of loss and gain to a dependant by the death must be ascertained, the position of each dependant being considered separately. It is conceded, and rightly conceded, that the general rule must apply, unless some statutory exception to the rule prevents its application.

There are two well-known instances in which such a statutory exception has been enacted. One is the case of life insurance, as to which the Fatal C Accidents (Damages) Act, 1908, s. 1, enacts:

> In assessing damages in any action, whether commenced before or after the passing of this Act, under the Fatal Accidents Act, 1846, as amended by any subsequent enactment, there shall not be taken into account any sum paid or payable on the death of the deceased under any contract of assurance or insurance, whether made before or after the passing of this Act.

The other instance relates to pensions, as to which the Widows', Orphans' and D Old Age Contributory Pensions Act, 1936, (re-enacting sect. 22 of the 1929 Act) provides by sect. 40 that:

> In assessing damages in any action under the Fatal Accidents Acts, 1846 to 1908, whether commenced before or after the commencement of this Act, there shall not be taken into account any widow's pension, additional allowance or orphans' pension payable under this Act. E

The appellants claim that a statutory exception to the rule in relation to damages recoverable under the 1934 Act is to be found in sect. 1 (5) of that Act which runs thus:

> The rights conferred by this Act for the benefit of the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependants of deceased persons by the Fatal Accidents Acts, 1846 to 1908.

All that this subsection does, according to the language used, is to provide F that the rights shall co-exist. I can find no words which would justify me in holding that the subsection purports to alter the measure of the damages recoverable for the benefit of a dependant under the Fatal Accidents Acts. The language of the subsection falls far short of this, and its weakness for the purpose to which the appellants seek to apply it, is emphasised by a comparison of the language used therein with the clear and unambiguous provisions of the two G statutory exceptions referred to above, and by the fact that the Act which enacts the earlier of the two exceptions is actually mentioned in the subsection in question.

It was sought to extract some special meaning from the dual phrase "shall be in addition to and not in derogation of." This, it was said, was not idly tautological, but intentionally cumulative; and the words "not in derogation of" involved a direction that there was to be no taking away or deduction H from or diminution of the damages obtainable under the Fatal Accidents Acts. For myself I can see no sufficient ground for reading this subtle hidden meaning into the subsection. I agree with the Court of Appeal that the words "and not in derogation of" merely emphasise what has been already said, that the rights conferred by one Act are additional to the rights conferred by the other Acts, and are to that extent tautological.

It was suggested that a difficulty would arise if, at the time of assessing the damages under the Fatal Accidents Acts, no proceedings had been taken under the Act of 1934, and it was unknown whether any such proceedings would ever be taken. I see no real difficulty here. The authority assessing the damages could always take into account the possibility of such proceedings and make allowance accordingly. A difficult matter no doubt, and quite incapable of accurate valuation; but as LORD WATSON observed, in delivering the judgment of the Judicial Committee in *Grand Trunk Ry. Co. of Canada* v. *Jennings* (1), at pp. 803, 804:

> In some circumstances, that principle admits of easy application; but in others, the extent of loss depends upon data which cannot be ascertained with certainty, and must necessarily be matter of estimate, and, it may be, partly of conjecture.

I am of opinion that upon the main point the appeal fails.

The appellants also claimed that the amounts awarded were insufficient in the cases of the two children of Mrs. Davies, and in the cases of Mrs. Williams and her three children. I entertain no doubt that your Lordships have full power to alter the amounts awarded, if, upon consideration of all relevant facts, you come to the conclusion that in any particular case an entirely erroneous estimate has been made. As regards the children, I am unable to come to any such conclusion. Indeed, the amounts of increase suggested by counsel in each case was small. As regards Mrs. Williams, the case is different. Counsel claimed for her a sum of £1,200, instead of the £250 and £5 in fact awarded to her. Taking into consideration all relevant matters, whether operating in her favour or against her, I have come to the conclusion that the judge has in her case made an entirely erroneous estimate. On the other hand, the sum of £1,200 I regard as a very inflated claim. I would award her the sum suggested by LUXMOORE, L.J., viz., £750, and this sum meets, I understand, with the approval of all your Lordships.

It remains to consider the question of the costs here and in the Court of Appeal. The appellants have failed in regard to the main point; but one appellant has succeeded here, and ought to have succeeded in the Court of Appeal, in regard to the award to herself, a matter the argument on which took up but a small portion of the time occupied in your Lordships' House. In these circumstances I suggest that substantial justice would be done if the appellants were ordered to pay one third of the respondent's costs of the appeal to this House and only three-quarters of the costs which they were ordered to pay by the order of the Court of Appeal.

I move accordingly that the order of the Court of Appeal of Feb. 12, 1941, be discharged, but only so far as it provides that the judgment of Mar. 19, 1940, be affirmed and the appeal dismissed with costs, and that in lieu of such provision it be ordered that the said judgment be varied by inserting therein the sum of "£500" in place of the sum of "£5" awarded to the plaintiff Margaret Williams and the sum of "£975" in place of the sum of "£480", that save as aforesaid the said judgment be affirmed, and that the plaintiffs Doris Davies and Margaret Williams be ordered to pay to the defendants or their solicitors three-quarters of the taxed costs of the appeal.

The appeal to this House should succeed to that extent, but the appellants must pay one third of the respondent's costs in this House.

My Lords, I am authorised by my noble and learned friend LORD CLAUSON to say that he agrees with the opinion which I have just delivered.

LORD MACMILLAN: My Lords, this appeal raises for your Lordships' determination two questions, one of general importance, the other of importance only to the appellants. The question of general interest is whether in assessing the damages payable under the Fatal Accidents Acts, 1846 to 1908, to any dependant of the deceased, there must be taken into account any benefit which that dependant may receive by participating in damages under the Law Reform (Miscellaneous Provisions) Act, 1934. The other and particular question is whether any of the sums awarded to the appellants by the trial judge and affirmed by the Court of Appeal are so inadequate as to call for revision.

The facts are simple and not in dispute. On Sept. 6, 1938, Daniel Davies and John Sidney Williams, colliers in the employment of the respondents, were fatally injured by an explosion in one of the respondents' mines. Actions were raised in the High Court in May, 1939, against the respondents by Mrs. Davies and Mrs. Williams, each suing as the administratrix of her deceased husband. In these actions the plaintiffs attributed the accident to breach of statutory duty and negligence on the part of the respondents, and each claimed damages (*a*) under the Fatal Accidents Acts, 1846 to 1908, on behalf of the deceased's dependants, and (*b*) under the Law Reform (Miscellaneous Provisions) Act, 1934, in respect of the deceased's shortened expectation of life. There was also a claim in each case for funeral expenses. The actions were consolidated with an action at the instance of the widow of David John Yelland, who also lost his life in the same accident. With this third action your Lordships are not concerned. The cases were heard by Lewis, J., at the Cardiff Assizes in Mar., 1940. Having decided the question of liability in favour of the appellants, the judge proceeded to consider the question of the damages to be awarded in each case.

The material facts were as follows. The deceased Davies was a man of 23 years of age, in sound health and regular employment, earning an average weekly wage of £2 2*s.* 4*d.*, the whole of which he gave to his wife, who handed him back 5*s.* as pocket money. He died intestate leaving the appellant his widow, 21 years of age, a daughter aged 2 years and son aged 6 months. The widow and children were entirely dependent on the deceased's earnings.

The deceased Williams was 42 years of age, also in sound health and regular employment, and his average weekly earnings were £3 15*s.* 5*d.*, the whole of which he gave to his wife, who handed him back small sums not exceeding half a crown a week for pocket money. He died intestate, leaving the appellant his widow, 43 years of age, and six children. The widow and three of the children, namely, two daughters aged respectively 13 and 10 and a son, aged 7—were entirely dependent on the deceased's earnings. The three other children were self-supporting.

With these facts before him the judge assessed and apportioned the damages as follows: A.—In the Davies case—I. Under the Fatal Accidents Acts (*a*) To the widow, £5; (*b*) To the daughter, £100; (*c*) To the son, £150. II. Under the Law Reform Act: To the widow, £700, together with £14 for funeral expenses.

B.—In the Williams case—I. Under the Fatal Accidents Acts: (*a*) To the widow, £5; (*b*) To the elder daughter, £50; (*c*) To the younger daughter, £75; (*d*) To the son, £100. II. Under the Law Reform Act: To the widow, £250, together with £15 for funeral expenses.

In fixing the sum of £5 as damages payable to the widow in each case under the Fatal Accidents Acts the judge took into account the sum he had assessed as damages under the Law Reform Act, which, in each case, would go entirely to the widow as both of the deceased died intestate and neither left an estate exceeding £1,000. What the judge in substance did was to give to the appellant Davies under the Fatal Accidents Acts £705, less £700 awarded under the Law Reform Act, and to the appellant Williams under the Fatal Accidents Acts £255, less £250 awarded under the Law Reform Act.

The defendants appealed on the question of liability. The plaintiffs cross-appealed (i) on the question whether in law the judge in assessing the damages under the Fatal Accidents Acts was entitled to take into account the damages awarded under the Law Reform Act, and (ii) for revision of the sums awarded as being inadequate.

The Court of Appeal affirmed the decision of the judge on liability and then dealt with the cross-appeal, which they dismissed. The Lords Justices were unanimous in holding that damages awarded under the Law Reform Act must be taken into account in assessing damages under the Fatal Accidents Acts, but on the question of amount Luxmoore, L.J., was in favour of increasing the damages awarded to the appellant Mrs. Williams, under the Fatal Accidents Acts to £750 at least, which, after taking into account the £250 awarded to her under the Law Reform Act, would give her a net sum of £500, instead of £5.

The question of liability has not been further contested, but the widows have appealed to your Lordships' House on both the points decided against them.

It was common ground that, except where there is express statutory direction to the contrary, the damages to be awarded to a dependant of a deceased person under the Fatal Accidents Acts must take into account any pecuniary benefit accruing to that dependant in consequence of the death of the deceased. It is the net loss on balance which constitutes the measure of damages. Two cases were referred to in which the legislature has expressly introduced exceptions.

By the Fatal Accidents (Damages) Act, 1908, s. 1, it is enacted that in assessing damages under the principal Act " there shall not be taken into account any sum paid or payable on the death of the deceased under any contract of assurance or insurance." The Widows', Orphans' and Old Age Contributory Pensions Act, 1936, s. 40, similarly provides that " there shall not be taken into account any widows' pension additional allowance or orphans' pension payable under this Act."

The appellants rely on a provision in the Law Reform Act, s. 1 (5), which they maintain to be similar in intention and effect, and which reads as follows :

> The rights conferred by this Act for the benefit of the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependants of deceased persons by the Fatal Accidents Acts, 1846 to 1908 . . .

On the interpretation of the provision which I have just quoted I find myself in agreement with the Lords Justices in the Court of Appeal and with all your Lordships. The rights conferred by the Law Reform Act for the benefit of the estates of deceased persons are the rights to maintain after the death of such deceased persons all causes of action vested in them. These rights are to be in addition to and not in derogation of any rights conferred on the dependants of deceased persons by the Fatal Accidents Acts. This means, as I read the words, that on the death of a deceased person it shall be competent to maintain actions both under the Law Reform Act and under the Fatal Accidents Acts. The rights of action in the two cases are quite distinct and independent. Under the Law Reform Act the right of action is for the benefit of the deceased's estate. Under the Fatal Accidents Acts the right of action is for the benefit of the deceased's dependants. Inasmuch as the basis of both causes of action may be the same—namely, negligence of a third party which has caused the deceased's death—it was natural to provide that the rights of action should be without prejudice the one to the other. It is quite a different thing to read the provision as meaning that, in assessing damages payable to dependants under the Fatal Accidents Acts, no account is to be taken of any benefit which the dependants may indirectly obtain from an award under the Law Reform Act through participation in the deceased's estate. When the legislature intends such an exclusion it employs appropriate and quite precise language as may be seen from the two instances I have quoted to which, as being, in *pari materia*, it is legitimate to refer by way of contrast. It will be observed that in both these instances the benefit arising on the deceased's death is independent of the manner in which the deceased met his death. It was, therefore, reasonable to exclude such benefits from the computation of damages due in respect of negligence causing the deceased's death. However, the damages due under the Law Reform Act and under the Fatal Accidents Acts are both awarded in respect of the same negligence, and it is appropriate that any benefit taken indirectly by a dependant by way of participation in an award under the Law Reform Act should be taken into account in estimating the damages awarded to that dependant under the Fatal Accidents Acts.

On the question of amount, counsel for the appellants at your Lordships' bar confined his criticism to certain items of the sums awarded. In Davies' case, he submitted that the daughter should have been given £225, instead of £100, and the son £275, instead of £150. In Williams' case, he submitted that, after allowing for £250 awarded under the Law Reform Act, the widow ought to have been given about £1,200 under the Fatal Accidents Acts and that the younger daughter should have been awarded £100, instead of £75, and the son £150, instead of £100.

Your Lordships are properly reluctant to vary the awards of the trial judge in such cases as the present, and do so only in very exceptional circumstances. I am, however, satisfied that, in the case of the appellant Mrs. Williams, the sum awarded to her under the Fatal Accidents Acts was quite inadequate. In this I agree with Luxmoore, L.J., and I am in favour of adopting the figure which he proposed, namely £750, which, after taking into account the award of £250 under the Law Reform Act, leaves a balance of £500 payable to Mrs. Williams under the Fatal Accidents Acts. I see no justification for altering the awards of the trial judge in the case of any of the children of either of the deceased.

LORD WRIGHT: My Lords, the main question in these appeals is one of principle, whether the trial judge and the Court of Appeal were right in holding that the damages awarded under the Law Reform (Miscellaneous Provisions) Act, 1934, should be brought into account in ascertaining the sum to be awarded to the appellant under the Fatal Accidents Acts. There is a further question which I shall consider later as to the sufficiency of the sums awarded by the judge under these Acts.

The general nature of the remedy under the Fatal Accidents Acts has often been explained. These Acts "provided a new cause of action and did not merely regulate or enlarge an old one," as LORD SUMNER observed in *The Amerika* (2), at p. 52. The claim is, in the words in the *Vera Cruz* (3), at p. 101, for injuriously affecting the family of the deceased. It is not a claim which the deceased could have pursued in his own lifetime, because it is for damages not suffered by himself, but by his family after his death. Sect. 2 of the 1846 Act provides that the action is to be for the benefit of the wife, or other member of the family, and the jury (or judge) are to give such damages as may be thought proportioned to the injury resulting to such parties from the death. The damages are to be based on the reasonable expectation of pecuniary benefit or benefit reducible to money value. In assessing the damages all circumstances which may be legitimately pleaded in diminution of the damages must be considered (*Grand Trunk Ry. Co. of Canada* v. *Jennings* (1), at p. 804). The actual pecuniary loss of each individual entitled to sue can only be ascertained by balancing on the one hand the loss to him of the future pecuniary benefit, and on the other any pecuniary advantage which from whatever source comes to him by reason of the death. An early and striking statement of the principle is afforded by *Pym* v. *Great Northern Ry. Co.* (4), in the Exchequer Chamber, in which the direction of the jury, given by LORD CAMPBELL in *Hicks* v. *Newport, etc., Ry. Co.* (5) was approved. LORD CAMPBELL there directed the jury that from the aggregate amount of compensation which they would be otherwise prepared to give they should make a deduction in respect of (e.g.) an insurance of £1,000 against accidents by railways. That was a benefit which went to reduce the pecuniary loss to the plaintiff consequent on the death. In the *Grand Trunk* case (1), other illustrations are given of a general character, but the principle is too well known to need further instances. A relaxation of the rule was introduced in an Act passed in 1908, entitled the Fatal Accidents (Damages) Act, to amend the law with respect to the assessment of damages under the Fatal Accidents Acts. It provided by sect. 1 that in assessing damages in such cases there should not be taken into account any sum paid or payable on the death of the deceased under any contract of assurance or insurance. The same principle was extended to pensions under the Widows'. Orphans' and Old Age Contributory Pensions under the Acts of 1925 and 1935, so that these pensions have no longer to be taken into account in assessing damages under the Acts. The question is whether the general principle of bringing into account other benefits accruing to a plaintiff upon the death applies to sums awarded under the Law Reform Act. The judge acted on that principle. Thus, he awarded to the appellant Margaret Williams £5 and no more under the Fatal Accidents Acts, because he awarded to her (apart from funeral expenses) £250 under the Law Reform Act. It is clear that, but for the deduction of that sum, he would have awarded £255 under the Fatal Accidents Acts. The two claims by the appellant Mrs. Williams were indeed separate and distinct. In the claim under the Law Reform Act she sued as administratrix on behalf of her late husband's estate, but, in the circumstances, whatever was awarded under that Act would go to her on administration as widow for her own benefit, since the estate was under £1,000 in value. There were, it seems, no debts or legacies or death duties or expenses (apart from funeral expenses, which are now dealt with separately under the Law Reform Act) of sufficient importance to be considered. Thus, the £250 accrued to her by reason of the death, though it came to her by a different title and under a different statute from any sum which she recovered under the Fatal Accidents Acts. The claims of the children under these Acts are not affected.

The general principle that the right of the individual defendant under these Acts is for damages to be assessed on a balance of loss and gain, which is established by long-standing authority, would *prima facie* seem to apply to this case. Counsel for the appellants, however, has strenuously contested this.

I am of opinion that the decisions appealed from in these cases are on this point correct. It is true that the damages under the Law Reform Act would not necessarily in all cases come to the widow. The deceased man might have willed away from her in whole or in part his estate, whatever it was, and thereby willed away these damages, which are awarded to the personal representative as representing the estate; or the estate might be insolvent, so that the whole of the damages were eaten up by the liabilities. These and many other contingencies, some of which were instanced in the *Grand Trunk* case (1), might have to be considered and estimated, particularly when the action under the Law Reform Act was not brought until after the action under the Fatal Accidents Acts had been decided, so that it might have been quite hypothetical what sum, if any, should be set off against the damages under the Fatal Accidents Acts. As LORD WATSON pointed out in the *Grand Trunk* case (1), the estimation of the actual extent of the pecuniary loss of the defendant may depend on data which cannot be ascertained with certainty and must be matter of estimate or even partly of conjecture. This may be true of any contingent or doubtful claim which the estate may have, including a claim under the Law Reform Act which would need to be considered in order to ascertain the amount, if any, coming to the widow out of the estate.

These difficulties, however, do not arise in a case so simple as this. The court in one trial can decide all relevant matters. Counsel's strong point has depended on an express provision in the Law Reform Act, 1934, s. 1 (5), the material words of which are:

> The rights conferred by this Act for the benefit of the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependants of deceased persons by the Fatal Accidents Acts, 1846 to 1908, or by the Carriage by Air Act, 1932.

His contentions were that these words mean that any sums recovered under the Law Reform Act were not to be taken into account in assessing the damages under the Fatal Accidents Acts; that the causes of action are distinct and independent, and the word "rights" under the Acts includes all rights, including the right to recover a sum of damages; that this right is not to be derogated from or diminished by reason of the new right of action or damages recovered under it.

To accept these contentions would, in my opinion, involve changing the whole basis of the Fatal Accidents Acts, which give a claim for damages to be assessed on the balance of profit and loss. The damages are to be proportioned to the injury resulting from the death to the individual. The injury suffered by the individual from the death cannot be computed without reference to the benefit also accruing from the death to the same individual from whatever source.

The position under the Fatal Accidents Acts is too well and too long established to be changed without clear words. I think that sect. 1 (5) is dealing with the cause of action under the Fatal Accidents Acts, not with the assessment of damages. If that had been intended, different words would have been used, as they were in the Act of 1908, to which I have already referred. It was there intended to provide that sums recovered under policies of insurance were not to be taken into account, and the language used was appropriate:

> In assessing damages . . . under the Fatal Accidents Act, 1846, as amended by any subsequent enactment, there shall not be taken into account any sum paid or payable on the death of the deceased under any contract of assurance or insurance . . .

It is clear that this clause precisely covers what counsel for the appellants has contended to be the meaning of the very different language of the Law Reform Act, 1934, s. 1 (5). I do not treat the difference in wording as conclusive; nor do I think that a parliamentary draftsman necessarily uses the same set of words to express the same idea, but the contrast is not without significance and confirms the conclusion that the language of sect. 1 (5) has some other intention than a change in the method of calculating the damages. I do not think it helpful to speculate what is the precise object of the language used. It may perhaps be to exclude any idea that the Law Reform Act, by giving the executor or administrator an action under it, prevented the same person from also suing as executor or administrator under the Fatal Accidents Acts on his personal behalf for the same negligence or breach of duty. The two causes of action are, however, independent, though a duplication of damages is to be avoided. In my opinion, this cannot arise if the ordinary rule in assessing damages under the Fatal Accidents Acts is observed.

That this duplication should be avoided was the view both of LORD ATKIN and of myself, and I think also of LORD ROCHE, in *Rose* v. *Ford* (6). That case was peculiar in respect of the award of damages. The judge awarded £300 to the deceased girl's father under the Fatal Accidents Acts and £500 to the father as administrator under the Law Reform Act for the deceased girl's personal injuries, including the loss of her leg. The £500 was reduced by the Court of Appeal to £22. This sum was awarded for loss of expectation of life. In this House, however, damages under that head were given in the sum of £1,000, which was an agreed figure accepted by the House from the parties. The House was not asked to consider the propriety of any of these figures, or any question of their possibly overlapping or of their being set off one against the other. LORD ATKIN, however, expressed the view that overlapping would be avoided by the ordinary method of setting off gains against losses where the facts so require under the Fatal Accidents Acts. That, I think, is right. I also expressed the view that duplication was to be avoided, notwithstanding the words of sect. 1 (5). Having in mind that the damages agreed under the Law Reform Act were so agreed subsequently to and independently of the damages awarded under the Fatal Accidents Acts, I assumed that there was no duplication in that case. I seem to have thought, also, that the damages under the Law Reform Act might be liable to abatement if damages came to the same beneficiary under the Fatal Accidents Acts. I do not now see how this could happen, because in theory the former damages must be taken into account in assessing the latter. In *Rose* v. *Ford* (6) the question did not arise and was not argued.

There remain to be considered the appeals of the widows and children on the issue of fact, claiming that the sums awarded by LEWIS, J., were wholly inadequate and should be increased. I think that all these appeals fail, except one, i.e., the appeal of the appellant Mrs. Williams. As to that I agree with the dissenting judgment in the Court of Appeal of LUXMOORE, L.J., that the award is wholly inadequate, and, like him, I would increase it to £750. MACKINNON and DU PARCQ, L.JJ., were opposed to any increase in any of the sums awarded.

No doubt an appellate court is always reluctant to interfere with a finding of the trial judge on any question of fact, but it is particularly reluctant to interfere with a finding on damages. Such a finding differs from an ordinary finding of fact in that it is generally much more a matter of speculation and estimate. No doubt this statement is truer in respect of some cases than of others. The damages in some cases may be objective and depend on definite facts and established rules of law, as, for instance, in general damages for breach of contract for the sale of goods. In these cases the finding as to amount of damages differs little from any other finding of fact, and can equally be reviewed if there is error in law or in fact. At the other end of the scale would come damages for pain and suffering or wrongs such as slander. These latter cases are almost entirely matter of impression and of common sense, and are only subject to review in very special cases. There is an obvious difference between cases tried with a jury and cases tried by a judge alone. Where the verdict is that of a jury, it will only be set aside if the appellate court is satisfied that the verdict on damages is such that it is out of all proportion to the circumstances of the case (*Mechanical & General Inventions Co.* v. *Austin*) (7). Where, however, the award is that of the judge alone, the appeal is by way of rehearing on damages as on all other issues, but as there is generally so much room for individual choice so that the assessment of damages is more like an exercise of discretion than an ordinary act of decision, the appellate court is particularly slow to reverse the trial judge on a question of the amount of damages. It is difficult to lay down any precise rule which will cover all cases, but a good general guide is given by GREER, L.J., in *Flint* v. *Lovell* (8), at p. 360. In effect, the court, before it interferes with an award of damages, should be satisfied that the judge has acted upon a wrong principle of law, or has misapprehended the facts, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency.

In the case of the appellant Mrs. Williams, I think that the judge has awarded a wholly inadequate sum. There is no question here of what may be called sentimental damage, bereavement or pain and suffering. It is a hard matter of pounds, shillings and pence, subject to the element of reasonable future probabilities. The starting point is the amount of wages which the deceased was earning, the ascertainment of which to some extent may depend on the regularity of his employment. Then there is an estimate of how much was required or expended for his own personal and living expenses. The balance will give a datum or basic figure which will generally be turned into a lump sum by taking a certain number of years' purchase. That sum, however, has to be taxed down by having due regard to uncertainties, for instance, that the widow might have again married and thus ceased to be dependant, and other like matters of speculation and doubt. It seems as if the award of £250 was based on something like 3½ years' purchase of the basic figure. This appears to me to be out of all proportion and much too low. I should, after allowing for all reasonably probable chances of the diminution of the loss, accept the figure taken by LUXMOORE, L.J., of £750 as being not unfair, and I should increase the damages recoverable by the appellant Mrs. Williams, accordingly. In that respect I should allow her appeal. Otherwise, the appeal fails in her case, and it fails entirely in the case of the other appellant.

I agree with the motion proposed by LORD RUSSELL OF KILLOWEN.

LORD PORTER: My Lords, the points taken on behalf of the appellants in this case differ widely in the importance of their character.

They were two in number. (i) That damages recovered under the Law Reform (Miscellaneous Provisions) Act, 1934, should not be taken into account in calculating the damages recoverable under the Fatal Accidents Act, 1846, even though the same persons benefited as a result of sums received under both Acts. (ii) That the sums awarded under the Fatal Accidents Act, 1846, to one of the claimants, Mrs. Davies, and to the children of both claimants were inadequate. The decision of the first point will affect a large number of claims and determine the principle to be applied in all cases where the same persons stand to benefit under both Acts. The second is only of importance in this individual case and depends solely on its particular circumstances.

As to (i) it is common ground that, apart from the provisions of the Law Reform (Miscellaneous Provisions) Act, 1934, s. 1 (5), any recovery under that Act which benefits a person having a claim under the Fatal Accidents Act, 1846, must be taken into consideration in assessing the amount recoverable on behalf of that person under the latter Act. Under the Fatal Accidents Act, 1846, the question for decision is what damage is proportioned to the injury resulting from the death to the parties respectively for whom and for whose benefit the action is brought. The wording itself is sufficient to show that each individual must be considered separately, and *Pym* v. *Great Northern Ry. Co.* (4) so decides. In calculating the damage proportioned to the injury it is the accepted view that all factors, benefits as well as injuries, must be taken into account, so as to ascertain on a balance of losses and gains what (if any) compensation is to be awarded—*Pym's* case (4) illustrates this proposition.

Accordingly, up till 1908, it was necessary to have regard to any insurance effected by the deceased on his life. If the subject-matter of that insurance was accidental death and the deceased man was accidentally killed, the full sum recoverable, being a gain resulting wholly from the death was generally regarded as a gain which, to the extent to which any dependant benefited from it, would diminish the sum to be awarded to that dependant. Not every sum paid under an insurance policy was so regarded. Life insurance, inasmuch as its receipt was not solely brought about by the death, but was merely accelerated by it, was, it is true, to be taken into account, but only to the extent of the benefit arising from its acceleration. In *Grand Trunk Ry. Co. of Canada* v. *Jennings* (1), LORD WATSON said, at p. 804:

> Their Lordships are of opinion that all circumstances which, though insufficient to exclude a statutory claim, may be legitimately pleaded in diminution of it, ought to be submitted to the jury . . . It appears to their Lordships that money provisions made by a husband, for the maintenance of his widow, in whatever form, are matters proper to be considered by the jury in estimating her loss; but the extent, if any, to

which these ought to be imputed in reduction of damages must depend upon the nature of the provision and the position and means of the deceased.

Up to the year 1908 these observations were applicable to every such provision. In that year, however, was passed the Fatal Accidents (Damages) Act, which provided that in assessing damages under the Fatal Accidents Act, 1846, there should not be taken into account any sum paid or payable on the death of the deceased under any contract of assurance or insurance. Apart from such sums, however, no change has been made in the matters to be taken A into consideration in calculating the damages to be awarded under the Act of 1846, except that a similar provision in similar terms has been enacted by the Widows', Orphans' and Old Age Contributory Pensions Act, 1936, s. 40, with the result that in assessing damages under the Fatal Accidents Act, 1846, widows and orphans pensions are not to be taken into account. Both these Acts contain special provisions whereby certain sums accruing to dependants by reason of the death of a relative are to be disregarded in calculating the amount B to be awarded to them under the Fatal Accidents Act, 1846, as a consequence of that death. In each the language is clear and precise. It is argued that the same result is attained, though in less exact language in respect of sums recovered or recoverable under the Law Reform (Miscellaneous Provisions) Act, 1934. The wording relied upon is that of sect. 1 (5):

> The rights conferred by this Act for the benefit of estates of deceased persons shall be in C addition to and not in derogation of any rights conferred on the dependants of deceased persons by the Fatal Accidents Acts, 1846 to 1908 . . .

It was contended that the better interpretation of this wording was not only that the right of recovering damages given by the Fatal Accidents Act, 1846, was not taken from the dependants concerned, but that any sum recoverable under the Act of 1934 should be disregarded in calculating the amount to be D awarded under the earlier Act. If this was the intention of the draftsman of the Act, he might have followed the plain language of the Fatal Accidents Act, 1908, and the Widows', and Orphans' Pensions Act of 1936, but he was not obliged to do so and the construction of the subsection must depend upon its own wording.

Even, however, regarding the language as it stands, it appears to me unsuitable to bring about so drastic a change in the law as is claimed. Both the E Fatal Accidents Act and the Law Reform (Miscellaneous Provisions) Act deal with the same matter. Both provide means whereby compensation may be recovered on death against a tortious killer—compensation passing in the one case to certain specified dependants, in the other to the estate of the deceased person. Without the provisions of sect. 1 (5) of the later Act, it might well be thought that the right of recovery given by that Act would put an end to the particular F rights given in respect of the same death by the Fatal Accidents Act. The provision is desirable and understandable as a safeguard against such a construction and it is unnecessary to impart to it the more comprehensive effect claimed.

It is said that, if this be all that is comprehended, why use the duplicate phrase "shall be in addition *and* not in derogation of". It is true that in construing an Act of Parliament weight should be given to all the words used, and, if I thought that insufficient regard was being paid to the language by G adhering to the narrower meaning, I should be impressed by the argument. However, the phraseology used seems to me natural enough if its object be to ensure that the rights given by the Fatal Accidents Act shall not be taken away altogether but shall be additional to the rights given by the Act of 1934. On the other hand, it seems ill-adapted to secure that the quantum of damage to be given shall not be affected. It is perhaps worthy of notice that in sect. 1 (5) it is the rights, not the damages, which are to be additional to and not in deroga- H tion of the rights under the Fatal Accidents Act. If the quantum of damage recoverable under that Act was to be unaffected, one would have expected some such wording as: "The damages recoverable under this Act shall be in addition to and not in diminution of any damages recoverable by dependants of deceased persons under the Fatal Accidents Acts, 1846 to 1908." The words "rights" and "in derogation of" are, I think, inappropriate to effect the purpose suggested; those actually used are, to my mind, far from being explicit enough to bring about the result contended for.

Various objections and difficulties were pressed upon your Lordships as leading to the conclusion that, though the wording might have been clearer, yet it was clear enough to show that compensation under the Fatal Accidents Act should be recovered in full, whatever might be the additional sums awarded under the Law Reform (Miscellaneous Provisions) Act of 1934. It was said, in the first place, that the personal representatives of the deceased man might be different from any of the persons entitled to compensation under the Fatal A Accidents Act and might be unwilling to bring an action. So far, there is little difficulty, because in such a case the persons entitled are in no worse position than any person entitled under a will in a case where executors refuse to sue in order to get in an actual or supposed debt. It was added, however, suppose in that or any other case an action is brought under the Fatal Accidents Act and it is not clear whether a subsequent action under the Law Reform Act will or will not be brought. Plainly, in such a case any damages awarded under B the Fatal Accidents Act cannot subsequently be deducted from those obtained by the same persons under the Law Reform Act. If any deduction is to be made, it must be effected by taking away an appropriate sum from the damages recoverable in the action under the Fatal Accidents Act. The principle to be adopted is not difficult to state, but the calculation of what is an appropriate sum is far from easy. The answer is, I think, that in any such case the court must, if necessary, make the best estimate it can of the benefit which the parties C entitled under the Fatal Accidents Act are likely to obtain under the Act of 1934. As LORD WATSON said in the *Grand Trunk Ry.* case (1), at p. 803:

> . . . in others, [i.e., other cases] the extent of loss depends upon data which cannot be ascertained with certainty, and must necessarily be matter of estimate, and, it may be, partly of conjecture.

Before 1907 a case might have arisen where there existed on behalf of the dead D man's estate a claim under a policy of life or accident insurance which was disputed. In that event, the court in assessing the measure of damages under the Fatal Accidents Act would have had to calculate as best it could the worth of the claim to each of the parties interested. The difficulty may be greater in a case where for any reason it is hard to discover amongst whom and in what proportions the sum so recovered is divisible, but it is not insuperable and it is E not new.

Finally, it was said that, in the case of a recovery under the Fatal Accidents Act, the court could, by reason of the provisions of R.S.C. Ord. 22, r. 14 (9), together with sub-rules (2) and (3) of the same rule, keep control of the sum or sums recovered and prevent them from being wasted by the recipients, whereas, in the case of a widow at any rate, it had no such power in the case of damages obtained under the Law Reform Act. This, no doubt, is true, but it is hardly F a valid reason for altering the interpretation of the section in question.

In my view, the appellants fail, and I should reach the same conclusion without assistance from views expressed in previous cases. However, this House is not left without some indication of the impressions formed in at least one previous case of the answer to the problem presented to it. Your Lordships were told that, following the example set in *Feay* v. *Barnwell* (9), at p. 35, the practice has sprung up of deducting sums which have been recovered under G the Law Reform Act and which go to the benefit of persons who are entitled to receive compensation under the Fatal Accidents Act from such compensation. The decision of SINGLETON, J., in that case is, as he states, founded upon the principles which he believed to be deducible from the opinions expressed by some members at least of your Lordships' House in *Rose* v. *Ford* (6). In the latter case LORD ATKIN said at p. 835 ([1937] 3 All E.R. at p. 363):

> H I should add that I see no difficulty as to the alleged duplication of damages under the Act of 1934 and the Fatal Accidents Acts. If those who benefit under the last-mentioned Acts also benefit under the will or intestacy of the deceased personally, their damages under those Acts will be affected.

LORD WRIGHT dealt with the same matter in these words, at p. 852 ([1937] 3 All E.R., at p. 375):

> I think that in practice no duplication of damage need occur. I think the jury would be properly directed to take into account either that they were at the same time giving damages under Lord Campell's Act as they did here, or that such damages had

> been or might be given . . one of the fruits of continued life is generally provision for dependants. If that provision is made good by awards under the Fatal Accidents Acts, the loss consequent on the shortening of life may be deemed to be *pro tanto* reduced.

It is true that, except incidentally by way of argument, this question of duplication did not arise in that case, and, indeed, it is clear that Lord Wright was merely suggesting methods by which duplication might be avoided and not considering exactly how it could be done. The statements, so far as they go, are against the appellants and in conformity with the view which I have formed.

It was urged, however, that one must read these views in the light of the speech of Lord Roche who said, at p. 862 ([1937] 3 All E.R., at p. 381) :

> . . . I have nothing to say as to the award of £300 under Lord Campbell's Act save that this was the proper place to deal with the deceased's future earning power cut off by death, and that accordingly there was no clashing or overlapping as between the two causes of action . . .

This, it is argued, expresses the true view. The widow and dependants must not get compensation for the future earning power of the husband twice over, once under the Fatal Accidents Act and once under the Law Reform Act. That would be duplication of damages. It is said, however, no such overlapping occurs where damages for loss of expectation of life are given. It is, it is contended, plain from the decision in *Benham* v. *Gambling* (10), that such damages represent only the loss of a happy life and do not include loss of future earning power, and that one who gets compensation under the Fatal Accidents Act and also a share of such damages is at any rate not getting the same thing twice over. Whatever may be the truth of this argument—and I say nothing as to its merits either way—it leaves untouched, as I think, the true reason for deducting damages under the Law Reform Act from those recovered under the Fatal Accidents Act, viz., that the latter are given to compensate the recipient on a balance of gains and losses for the injury sustained by the death. To discover this balance, gains as well as losses must be taken into account, whether or not there be a duplication of damages. At best the argument is only a method of explaining the language used in *Rose* v. *Ford* (6) and has little real bearing on the point in issue.

My Lords, the other question is whether this House should increase the sums awarded under the Fatal Accidents Act in the case of Mrs. Williams and the children of both widows. These amounts must be considered separately: see *Pym's* case (4) and *Avery* v. *London & North Eastern Ry. Co.* (11). The principle upon which a change will be made is, I think, accurately set out in *Owen* v. *Sykes* (12), where it is stated that the finding of the trial judge as to the amount of damages will not be reviewed unless the appellate court is satisfied that the trial judge acted upon a wrong principle of law or the amount of damages is such (in that case it was "so high") as to make it an entirely erroneous estimate of the damages to which the claimants were entitled. Acting upon this principle, I cannot find any error in law, and, so far as the children are concerned, the sums awarded are not in my view such as to show an entirely erroneous estimate of the damage. So far, however, as Mrs. Williams is concerned, the damage does seem to me unreasonably small. The judge has not given any reasons for his decision nor explained the discrepancy between the sum given to Mrs. Davies and that given to Mrs. Williams. I do not know whether I should myself have awarded exactly the sum suggested by Luxmoore, L.J., but I know it would have been very greatly in excess of that given by the judge, and I am not dissatisfied with the sum of £750 suggested by the lord justice. To that extent I should allow the appeal.

Solicitors: *Russell Jones & Co.*, agents for *Morgan, Bruce & Nicholas*, Pontypridd (for the appellants); *William A. Crump & Son*, agents for *A. J. Prosser*, Cardiff (for the respondents).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

WATERLOW & SONS, LTD. *v.* ASSESSMENT COMMITTEE FOR SHOREDITCH.

[KING'S BENCH DIVISION (Viscount Caldecote, L.C.J., Humphreys and Cassels, JJ.), **April 28, 1942.**]

Rates and Rating—Assessment—Air-raid shelter—Reduction of area available for business purposes—Reduction in assessment—Rating and Valuation (Air-Raid Works) Act, 1938 (*c.* 65), *s.* 1 (1).

W. & Co. constructed an air-raid shelter on premises belonging to them. This resulted in a reduction in the amount of space available for their business and in the annual rent which a tenant might be expected to pay for the premises. The Rating and Valuation (Air-Raid Works) Act, 1938, s. 1 (1), provides that in ascertaining the value of property for rating purposes " no regard shall be had " to additions or alterations effected for the purpose of affording protection from air raids. Relying upon this section, the assessment committee refused to alter the assessment, but quarter sessions, on appeal, reduced the assessment by an appropriate amount :—

HELD : where the alteration in the premises has resulted in making the rateable value less, the above section does not prohibit a reduction in the assessment. In the circumstances, the reduction in the assessment allowed by quarter sessions was right.

[**EDITORIAL NOTE.** The Rating and Valuation (Air-Raid Works) Act, 1938, provides that, where an air-raid shelter is an addition or an improvement in the hereditament, the rateable value shall not be increased on that account. It made no provision for the case where the provision of the shelter detracted from the value of the premises. The section presents some difficulty of construction, but the court has held that, where the value is decreased, the ordinary law of rating applies and the occupier is entitled to a reduction in the assessment.

FOR THE RATING AND VALUATION (AIR-RAID WORKS) ACT, 1938, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 31, pp. 614, 615.]

APPEAL by way of case stated at the request of the assessment committee from an order of the London Quarter Sessions directing that a hereditament be entered in the supplementary valuation list at a reduced annual value. In April, 1940, Waterlow & Sons, Ltd., altered their premises by the construction on the ground floor and in the basement of an air-raid shelter. The construction of the shelter resulted in a reduction of the space available for business purposes and lowered by £422 the rent which a tenant would pay upon the terms set out in the definition of gross value in the Rating and Valuation (Metropolis) Act, 1869. The Assessment Committee, relying upon the Rating and Valuation (Air Raid Works) Act, 1938, refused to make any alteration in the assessment of the property, but quarter sessions reduced the assessment by an appropriate amount having regard to the reduction in the rent which the premises would command.

N. L. C. Macaskie, K.C., and *G. D. Squibb* for the appellants.

Harold B. Williams for the respondents.

VISCOUNT CALDECOTE, L.C.J. : The provision of air-raid shelters was a subject which received a good deal of attention in the period immediately before the war and in the first year of the war. With a view to inducing people who were the occupiers of premises to provide air-raid shelters, Parliament passed the Rating and Valuation (Air-Raid Works) Act, 1938, which seems to have been intended to provide some inducement to people who otherwise might not provide air-raid shelters. Sect. 1 (1) provides that in ascertaining under the principal Act the value for rating purposes of a hereditament, no regard shall be had to additions to the hereditament, made solely for the purpose of affording protection from air raids, after it was first assessed. It also provides that no regard shall be had to any structural alterations or improvements to the hereditament made for the same purpose at any time after the hereditament was first assessed. At first sight, it would seem that the intention of that section was to prevent a person who had expended a sum of money, which in some cases might be a large sum of money, for the purpose of air-raid shelters for himself or his servants or his family, from having to pay upon an increased rateable value. If Parliament intended to give relief from any increase in rateable value, these words would seem to be effective for that purpose.

In the case stated, it is found that the provision of an air-raid shelter resulted in a reduction of space. Para. 7 (*c*) of the case is as follows :

> The reduction in the space available for the purposes of the appellants' business resulted in a reduction of £422 in the annual rent which a tenant might reasonably be expected to pay for the said hereditament.

The question is whether, for the purposes of a supplemental list, that reduction in the rent which might be expected to be paid by a tenant should be reflected A in the supplemental list. The Shoreditch Assessment Committee, basing themselves strictly upon the words of the section that " no regard shall be had " to these additions or alterations, shut their eyes to them ; and valued the premises as if they were in their original unaltered state.

Counsel for the assessment committee says that that is right, because the words of the Act direct that the assessment committee should ignore the alterations altogether. The argument is that, but for the Act of 1938, the premises B would be assessed upon the rent that a hypothetical tenant would pay for the premises in their altered condition. According to counsel, the Act of 1938 forbids the application of the ordinary law contained in the Valuation (Metropolis) Act, 1869, s. 46 ; and that is the only interpretation of which the strict language of the Act admits. There is one rule which has always to be borne in mind in the interpretation of statutes, and that is, that it is the duty C of the court to interpret the Act according to the intent of those who passed it. When I look at the provisions of this Act, upon which this question depends, I think that the intention of Parliament was to prevent a person who would otherwise have to pay on an increased rateable value, from having to bear that additional burden, after having spent a good deal of money on providing air raid shelters. Parliament might have gone further than that. I have come to the conclusion, however, that, with regard to the rateable value of premises D in which some structural alterations have been made which have the effect of making the rateable value less than it previously was, the ordinary law of rating applies. The premises will be assessed in those circumstances upon their condition at the time when the amendment is considered.

I think that this conclusion is supported by the provisions of the Civil Defence Act, 1939, s. 69, which adds a third case to the cases provided for by the Rating and Valuation (Air-Raid Works) Act, 1938, s. 1 (1) (*a*), (*b*). This third case E is one imposed upon, or added to, the two cases already dealt with by the section. Sect. 69 provides :

> The Rating and Valuation (Air-Raid Works) Act, 1938, s. 1 (which provides for the relief of air raid protection works from rates), shall, in relation to a hereditament forming part of a building, have effect as if any structural alterations or improvements made in the building . . . for the purpose of providing air-raid shelter were structural alterations F or improvements to the hereditament, and in ascertaining the rateable value for rating purposes of a hereditament under the principal Act (as defined in the said sect. 1) no regard shall be had to any increase in the rent thereof . . .

That case is clearly one in which relief is given to an occupier in respect of an increase in the rent upon which the premises would otherwise have to be assessed. The purpose is to prevent an addition to the ratepayer's burden and not to add to the burden which the ordinary law of rating would impose on him. G

The point is not altogether easy to state, but I have tried to express the view which I have formed. I think upon the finding of fact at which they arrived, the London Quarter Sessions were right in the view which they took of the law ; and that the supplemental list was, therefore, properly altered by them in the way indicated in the special case. Therefore, I think that this appeal fails.

HUMPHREYS, J. : I agree that the point raised in this case is not altogether H an easy one, but I have arrived at the same conclusion as my Lord, and I agree with his judgment.

CASSELS, J. : I agree.

Appeal dismissed with costs.

Solicitors : *R. Cyril Ray* (for the appellants) ; *Paul Urban* (for the respondents).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

BORMAN AND OTHERS *v.* LONDON & NORTH EASTERN RAILWAY CO.

[COURT OF APPEAL (Lord Greene, M.R., and MacKinnon and Goddard, L.JJ.), **May 7, 8, 1942.**]

Railways—Amalgamation—Compensation of employees dismissed—Dismissal must be by reason of amalgamation—Railways Act, 1921 (c. 55), *Sched. III.*

The applicants were originally employed on a railway which became part of the respondent company's undertaking through the operation of the Railways Act, 1921. They were dismissed from the service of the respondent company in 1938, in order to effect a reduction in expenses, and it was found as a fact that the old company would have been affected by a similar necessity even if the amalgamation had not taken place. The applicants claimed to be compensated under the Railways Act, 1921, Sched. III, para. (5), by which compensation is payable to any such employee whose office is abolished, or who retires, or whose services are dispensed with for any reason except misconduct or incapacity, or whose remuneration is reduced because his duties have been diminished, or who otherwise suffers any direct pecuniary loss by reason of the amalgamation :—

HELD : the words " by reason of the amalgamation " govern all the events contemplated in para. (5), and not merely the last-mentioned. Accordingly, the applicants were not entitled to be compensated under this paragraph, since their dismissal was not an event which arose out of the amalgamation.

Decision of ATKINSON, J. ([1942] 1 All E.R. 442) *affirmed.*

[**EDITORIAL NOTE.** This is a short point on the construction of the Railways Act, 1921. Amalgamations and transfers of duties and powers have made us familiar with compensation for loss of office and employment, and it seems almost an axiom that compensation provisions added to an Act amalgamating undertakings is to be limited to loss of office or employment arising out of amalgamation. No doubt there can be cases where the loss of office due to an amalgamation occurs some considerable time after the date of the amalgamation. Reorganisation may sometimes take time ; but, *prima facie*, a loss occurring 17 years after the amalgamation is due to some other cause. In this case the arbitrator found as a fact that the dismissals here in question would have occurred if there had been no amalgamation. The case, therefore, raised the direct question whether a retained employee of one of the constituent companies can be dismissed by reason of his employment becoming unnecessary or impossible for reasons other than misconduct or incapacity and not arising out of the amalgamation. The question is answered by holding that the compensation provisions of the Act apply only to loss arising out of the amalgamation.

FOR THE RAILWAYS ACT, 1921, Sched. III, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 14, pp. 374, 375 ; and FOR CASES, see DIGEST, Supp., Railways, Nos. 503a, 503b.]

APPEAL by the applicants from an order of ATKINSON, J., dated Feb. 10, 1942, and reported [1942] 1 All E.R. 442, where the facts are fully set out.

N. L. C. Macaskie, K.C. and *M. R. Nicholas* for the applicants.

W. H. Cartwright Sharp, K.C. and *B. J. M. MacKenna* for the respondents.

Macaskie, K.C. : The Act is a charter against the dismissal of existing servants at the date of the amalgamation. The Act contains no time limit and it ceases to operate only when the last of the qualified servants has retired or died. The Act was intended to protect those who found themselves affected by the amalgamation. The words " or for any reason " would not have been inserted in Sched. III, para. (5), if the onus is upon a person whose claim is affected to prove his case. The words " or who otherwise suffers any direct pecuniary loss " in the same paragraph mean all who suffer any direct pecuniary loss otherwise than in the cases previously dealt with. Such persons are entitled to be compensated. If the words " by reason of the amalgamation " govern all the preceding words, a servant has not only to show that he has been dispensed with but he has the difficulty of proving that he has been dispensed with owing to the amalgamation. A company knows why a man has been dismissed. The man, however, cannot know the reason. The effects of the amalgamation are still continuing. The first 4 cases in para. (5) are obviously intended to call for compensation if they occur, particularly having regard to Sched. III, para. (2).

It would have been easy for Parliament to have provided in express terms that amalgamation was to be the cause which brought about these men's loss.

Lord Greene, M.R.: In my opinion this is the clearest possible case. The claim is made by some old servants of the Hull and Barnsley Railway Co., a company which, under the Railways Act, 1921, was amalgamated with other railway companies and became a part of the London & North Eastern Railway Co. The claimants had all had at least five years' service with the Hull and Barnsley Railway Co. before the amalgamation, and, accordingly, they fell within the definition of "existing officers and servants" contained in the Railways Act, 1921, Sched. III. They have now, unfortunately, suffered the loss of their services with the London & North Eastern Railway Co., who took them over when the amalgamation took place twenty years ago; and the present claim has been dealt with by the arbitrator appointed under the Act, whose findings of fact are, of course, conclusive. Putting those findings of fact shortly, the termination of the services of these claimants had nothing in the world to do with the amalgamation. It was not a consequence of the amalgamation, but was a thing done in the ordinary course of the economical working of the railway company, which found it necessary to cut down certain parts of its staff. On the basis of those facts the present question has to be decided.

Before I refer to the question formulated by the arbitrator for the opinion of the court, I must say a word about the actual provisions of the Act upon which the claim is based. Those provisions are contained in Sched. III, but they do not derive their force merely from the statute, because Sched. III contains only provisions which, under sect. 3 of the Act, must find a place in the amalgamation schemes put forward under the Act.

We therefore proceed on the footing that the particular provisions on which the claim is based are part of an amalgamation scheme under the Act and, of course, are no less binding than they would have been if they had been made the subject of direct enactment. Nevertheless, the document in which they find their place is an amalgamation scheme, and that leads (at any rate at first sight) to the assumption that in those provisions—forming, as they do, an integral part of the amalgamation scheme—the matters we shall find provided for are matters connected with and arising out of the amalgamation.

Nevertheless, the contention in the present case is that the compensation provisions contained in Sched. III are applicable to the present case, notwithstanding the fact that the loss suffered by these claimants has nothing in the world to do with the amalgamation, is not a consequence of it and, therefore, cannot be attributed to it.

Sched. III applies to the "existing officers and servants" of the companies which ultimately became the amalgamated company. The object of the provisions contained in that schedule is, of course, quite clear. When an amalgamation scheme of this kind is made affecting companies by whom large bodies of men are employed, one of the natural things which the legislature tries to ensure is that the economies which the amalgamation scheme is ultimately intended to produce shall not result in wholesale dismissals of servants of the units which are brought into the amalgamation. A similar provision was contained in the London Passenger Transport Act, and I have no doubt there are other statutory provisions to a like effect, the object of which is perfectly clear and quite reasonable.

In this case, we are asked to extract from the language of these provisions something which would not merely preserve the position of the existing officers and servants of these amalgamating companies, but which would give them a charter of rights far beyond anything they would have enjoyed and would put them out of the danger of having their services dispensed with for reasons totally unconnected with the amalgamation.

Sched. III provides, in para. (1), for the existing officers and servants becoming officers and servants of the amalgamated company. Para. (2) empowers the amalgamated company to abolish the office or situation of any existing officer or servant which they deem unnecessary. It seems to me that that paragraph must be read in the light of the whole context of the scheme of which it forms part and cannot be given a general application for all circumstances, but must be confined to cases where the amalgamated company, by reason of the amalgamation and as a consequence of the amalgamation, finds that an office or situation is no longer necessary.

The next part of para. (2) deals with the position of an existing officer or servant who is " required to perform duties such as are not analogous or which are an unreasonable addition to those which " he was required to perform under the old company by whom he used to be employed. There again, that is the sort of thing which inevitably happens on an amalgamation, and this provision is put in to protect those people if they are required to perform duties of that A nature, not for some reason totally disconnected with the amalgamation, but as the result in some way of it.

Para. (3) provides a further safeguard :

> No existing officer or servant so transferred shall, without his consent, be by reason of such transfer in any worse position in respect of the conditions of his service as a whole.

B There again, it is perfectly clear what the limitations of that provision are.

Then I come to para. (5), which is the paragraph under which the claim in this case is made, and I will read the relevant words of it :

> Every existing officer or servant whose office or situation is so abolished [reference back to the first part of para. (2)] or who so relinquishes his office or service [reference back to second part of para. (2)] or whose services are dispensed with on the ground C that they are not required or for any reason not being on account of misconduct or incapacity [which happened in the present case] or whose salary, wages, or remuneration are reduced on the ground that his duties have been diminished or who otherwise suffers any direct pecuniary loss by reason of the amalgamation shall be entitled to be paid compensation, for such pecuniary loss.

There follows provisions as to how that is to be determined.

On that language the question of law raised by the arbitrator is as follows :

D

> Do the words " by reason of the amalgamation " Railways Act, 1921, Sched. III, para. (5), govern any of the events contemplated by the preceding words of that paragraph other than the words " or who otherwise suffers any direct pecuniary loss."

It is argued on behalf of the appellants that that question should be answered in the negative, or, at any rate, should be answered in the negative so far as regards the words applicable to these present claimants, namely, " or whose E services are dispensed with on the ground that they are not required." The construction for which the appellants contend is that, with regard to persons who suffer any direct pecuniary loss otherwise than in the cases mentioned in the earlier part of para. (5), their claim is limited to loss by reason of the amalgamation or absorption ; and that in all the other cases mentioned in the earlier part of para. (5), or alternatively at least in the case where their services have F been dispensed with on the ground that they are not required, the pecuniary loss in respect of which compensation may be awarded need not be a loss by reason of the amalgamation or absorption.

Why different treatment should be meted out to the one class of persons rather than the other does not appear. Quite apart from that consideration, it appears to me that the language used makes it clear beyond the possibility of doubt that the words in question, " by reason of the amalgamation or absorption," G govern all the cases set out in the preceding words. The word " otherwise," by itself, would be sufficient to indicate that the following words " suffers any direct pecuniary loss by reason of the amalgamation or absorption " are merely general sweeping-up words of other matters falling within the same class : loss by reason of the amalgamation or absorption.

It is to be observed that the words " direct pecuniary loss " must apply to all the cases, because, when compensation comes to be spoken of, it is "compensa- H tion for such pecuniary loss " which is to be awarded. " Such pecuniary loss " must mean a pecuniary loss of the character specified, that is to say : " direct pecuniary loss by reason of the amalgamation or absorption." If it had been intended to confine the words " by reason of the amalgamation or absorption " to the case of direct pecuniary loss, to the exclusion of the cases mentioned earlier, the proper way to frame the paragraph would have been " or who, by reason of the amalgamation or absorption, otherwise suffers any direct pecuniary loss." As it is worded, the word " otherwise " quite clearly has the meaning which I have attributed to it.

In spite of the apparent object of the provisions of this kind of amalgamation scheme, if the language used was wide enough to go beyond the needs of the amalgamation and matters arising out of it, they would have to be construed in the proper way. In the present case, however, not merely is the whole object of the provisions of an amalgamation scheme quite contrary to the suggestion which is made, but the precise language itself is quite incapable of bearing the meaning which is attributed to it on behalf of the appellants.

The result, therefore, is that the appeal fails, and must be dismissed with costs. A

MacKinnon, L.J.: I agree. I do not think I have ever seen a clearer case.

Goddard, L.J.: I agree.

Appeal dismissed.

Solicitors: *Pattinson & Brewer* (for the applicants); *W. H. Hanscombe* (for the respondents). B

[*Reported by* W. K. Scrivener, Esq., *Barrister-at-Law.*]

C

EGHAM & STAINES ELECTRICITY CO., LTD. *v.* EGHAM URBAN DISTRICT COUNCIL.

[King's Bench Division (Cassels, J.), **February 18, 19, 25, 1942.**]

Contract—Impossibility of performance—Supply of electricity for public lighting—Black-out—Contract containing composite provision for supply of current and other services—Provision for abatement in certain events, not including the event which happened. D

Under three contracts the plaintiffs agreed to supply electricity to the defendants for street lighting purposes and to undertake various duties in connection with the maintenance of the street lighting system. The plaintiffs were paid for their services quarterly at a fixed rate. The contracts provided that in the event of a failure of supply due to any "unavoidable cause" over which the plaintiffs had no control, the payments were to abate in the same proportion as the supply was curtailed. By the Lighting (Restrictions) Order, 1939, the display of lights in the streets was made unlawful from Sept. 1, 1939, and the defendants thereupon ceased to consume the greater proportion of the current hitherto supplied by the plaintiffs. The plaintiffs continued to perform their duties under the contracts as respects the maintenance of the lighting system and were ready to put it into full operation at short notice. In an action by the plaintiffs to recover the quarterly payments due under the contracts, the defendants contended that the contract entitled them to abate the payments:— E F

Held: the plaintiffs had performed everything which they had undertaken to perform under the contracts and were entitled to the payment of the full sum due under the contracts, which made no provision for the abatement of the amount due if the defendants were unable to take the supply of current. G

[**EDITORIAL NOTE**. The facts of this case differ from those in the well-known *Leiston Gas Co.* case (1), and it can hardly be said that that decision is followed. The point of the case is that the contracts contain a stipulation to pay a composite sum for a large number of services, one of which is the supply of electric current. There was no provision for the apportionment of this composite charge. The contract also contained a clause dealing with a failure to supply which did not provide for the events which had happened. The result is that the court has reluctantly come to the conclusion that no relief can be granted to the defendants. H

As to Public Utility Contracts and Impossibility of Performance, see HALSBURY, Hailsham Edn., Vol. 7, pp. 218, 219, para. 297; and for Cases, see DIGEST, Vol. 12, p. 403, Nos. 3251, 3252.]

Cases referred to:

(1) *Leiston Gas Co.* v. *Leiston-cum-Sizewell Urban Council*, [1916] 2 K.B. 428; 12 Digest 403, *3251*; 85 L.J.K.B. 1759; 115 L.T. 172.

(2) *Wycombe Borough Electric Light & Power Co., Ltd.* v. *Chipping Wycombe Corpn.* (1917), 33 T.L.R. 489; 12 Digest 403, *3252*.

Action for moneys due under three contracts for the supply of electricity by the plaintiffs to the defendants for street lighting purposes. The facts are fully set out in the judgments.

H. J. Wallington, K.C., and *H. Malone* for the plaintiffs.

C. R. Havers, K.C., and *Robert Fortune* for the defendants.

Cassels, J.: The first contract was made on Nov. 17, 1933, and was for 5 years from Oct. 1, 1933, but the parties have continued to act under it up to and including material times. Under this contract the plaintiffs agreed to supply and maintain, and the defendants agreed to take, an efficient and adequate supply of electrical energy for the lighting of the danger sign and the several lamps during such hours and at such charges as appear in the schedules, and such additional lamps as may be included. The schedules stated the position of the lamps and the times during which they should be lighted; the second schedule stated the charges per annum, fixed at various sums according to the wattage of the lamps, and these charges were to be payable by equal quarterly instalments. Provision was further made in the contract for the maintenance and repair by the plaintiffs of the lanterns, wires, fittings and lamps, for renewals and replacements, for the painting of the lamp standards, for nightly inspection, and the replacement of broken lamps and for the cleaning of the glasses by the plaintiffs, and for the indemnification of the defendants against costs, damages and expenses arising from the existence of centrally suspended lamps. Further provision was made for the plaintiffs to pay to the defendants 2*s.* 6*d.* per lamp for any evening that the lamp should not be alight, provided that such failure was not attributable to any of the happenings mentioned in cl. 15. That clause reads as follows:

> Lastly it is hereby agreed that no default by the company [i.e., the plaintiffs] under this agreement shall render the company liable in damages if and so far as such default shall arise or be occasioned by reason of fire, frost, accident, strikes, lock-outs or combination of workmen or cessation or restriction of work by workmen or from any other unavoidable cause over which the company has no control. Provided always that all payments under this agreement by the council [i.e., the defendants] shall abate in the same proportion as the supply shall be curtailed by reason of any event provided for in this clause.

The second contract was made on July 15, 1935, and was for 15 years. It related to 67 hot cathode lamps in certain parts of the area. It provided that the plaintiffs should erect the lamp standards, brackets, lanterns, lamps, time switches, wires, overhead lamps and other fittings necessary for the complete installation of those 67 lamps; that they should be maintained and kept in sound condition and repair at the expense of the plaintiffs; that the plaintiffs should paint the standards, brackets and overhead gear with two coats of paint every two years, and inspect nightly; and that these lamps should be lighted during the hours scheduled. This contract provided for the payment by the defendants of £650 per annum payable quarterly, and a clause similar to cl. 15 in the first contract was included in this, the second contract.

The third contract was made on Feb. 16, 1937, and was for 15 years. It related to 33 hot cathode lamps. The provisions were similar to the second contract, and the charge was £11 per lamp per annum.

By the provisions of the Lighting (Restrictions) Order, 1939, the Lighting (Restrictions) (No. 2) Order, 1939, and the Lighting (Restrictions) Order, 1940, the display of lights in the streets was made unlawful from Sept. 1, 1939. Danger signs were permitted to be illuminated, and in respect of the danger signs illuminated by the plaintiffs in the defendants' area there was no dispute between the parties, the charges having been paid to the plaintiffs by the defendants. The defendants, however, ceased to pay the other charges in the three contracts from and including the third quarter in the year 1939, and the plaintiffs claim a sum of £3,599 for seven quarters beginning with that quarter and ending with the first quarter of 1941.

The defendants cited the Lighting (Restrictions) Orders and said that the plaintiffs' supply of lighting (as it was put) in each of the contracts was curtailed and that the plaintiffs were and would be prevented for the duration of the present war from supplying the quantity provided for by each of the contracts. Further, the defendants pleaded that they were entitled to an abatement under each of the contracts which would exceed the sum claimed in the action.

The plaintiffs do not generate electricity. They obtain it in bulk from the Metropolitan Electric Supply Co., and distribute it to their consumers, including the defendants. The plaintiffs called evidence to show that they had carried out their part of the contracts. They had fulfilled and were still fulfilling their undertaking with regard to the provision, maintenance, repair and painting, and had supplied electricity to the time switches attached to the lamps. The plaintiffs had not replaced broken lamps on the lower standards because they were an easy target for boys throwing stones, but they had an ample stock and could replace the lamps in a very short space of time, and the defendants had made no objection. No replacements had been necessary in the case of the hot cathode lamps. There had not been a nightly inspection, because that was not necessary, not one of the lamps in the area having been lighted since Sept. 1, 1939. There was, however, a monthly inspection by day. According to the plaintiffs' engineer, if the Lighting (Restrictions) Order should be repealed at 3 o'clock in the afternoon, all the lights would be on that night. The fuses had been removed in response to a request contained in a letter from the defendants dated Aug. 14, 1941, so as to prevent the street lighting being put into operation by explosion, but the reinstatement of these fuses would not seriously delay the reinstallation of the lights. The engineer also stated that periodical tests which were made showed that the supply of electricity was up to the time switches which control the hot cathode lamps individually, and the other lamps in series of about 10.

The defendants called no evidence. They contended that it was the duty of the plaintiffs under the contracts to light the lamps and that there had been default which came under cl. 15 as it is numbered in the first contract, and the defendants were entitled to abatement exceeding the amount claimed by the plaintiffs. The defendants referred to, but did not necessarily rely on, *Leiston Gas Co.* v. *Leiston-cum-Sizewell Urban Council* (1). In that case, the defendants sought to avoid payment of quarterly instalments for gas supplied by the plaintiffs to lamps on the ground that an order made by the competent military authorities under the Defence of the Realm Regulations, 1914, had rendered the contract illegal and impossible of performance. Low, J., decided that the order had not rendered the contract wholly illegal or impossible of performance and that the consideration for the plaintiffs' services could not be apportioned. It was, of course, a different contract in that case from the contracts in this case. Counsel for the defendants here drew attention to the observations of Scrutton, J., as he then was, when the case went to the Court of Appeal. Scrutton, J., said, at pp. 437-439:

> They make no express provision for any reduction [he was referring there to the defendants] from the quarterly payment in case of failure to light from causes beyond the gas company's control; nor do they say whether the company are to suffer a reduction of payment as well as damages in the case of failure to light from causes within their control . . . It is said that the supply of lighted gas has become illegal. This is true for an uncertain time; at any moment the illegality may be removed by peace or changed conditions of war. But the payment of the quarterly sums has not become illegal, and part of it is not for light supplied, but for the plant which has been supplied and of which the council has had the benefit . . . They have not expressly provided for the case of a failure to supply light owing to causes beyond the company's control, and I do not think the court ought to make such a contract for them, when the consideration for the payment claimed has not wholly failed.

The plaintiffs do not suggest that this case has any bearing upon the case under discussion. All that the defendants used the case for was to refer to the extract from the judgment of Scrutton, J., in the Court of Appeal and to say that cl. 15 shows that an attempt has been made to make provisions for a failure to supply lighting owing to causes beyond the plaintiffs' control. In the *Leiston* case (1) there were two defences, (i) that the supply of gas was a condition precedent to the right to payment and (ii) frustration of the adventure. Counsel for the defendants said that he was not setting up either in this case but relied on cl. 15.

Similarly, reference was made to *Wycombe Borough Electric Light & Power Co., Ltd.* v. *Chipping Wycombe Corporation* (2), where BAILHACHE, J., followed the *Leiston* case (1). Counsel further relied on cl. 15 as excusing the defendants from payment of the amount claimed and asked me to hold, as a matter of construction, that the obligation of the plaintiffs was to light the lamps, and that, A if there was a failure from any unavoidable cause, cl. 15 came into operation, and that there was a failure on the part of the plaintiffs to light as a result of the prohibition imposed by the Lighting (Restrictions) Order, that prohibition being an unavoidable cause within the meaning of cl. 15.

Counsel for the plaintiffs contended that there was no obligation on the defendants to light these streets at all. They merely had power to do so. The only duty of the plaintiffs arose under the contract between them and the B defendants. The regulations as to lighting forbade the lighting of the streets and that was a duty undertaken by the defendants. The regulations referred to the difficulties in carrying out their duty, voluntarily undertaken, not to the plaintiffs in supplying. Under the contracts, the system of payment was regulated, not by the quantity supplied, but by the value of the many things to be provided and done. It was by a payment of a lump sum under the contract No. 2, and by so much per lamp according to the wattage under the first and C third contracts. The defendants could at any time take and use the supply which the plaintiffs had ready, within the meaning of the contracts. The war might cease or the authorities might at any time change their view as to the desirability of having dark streets during hours of darkness. The lighting as permitted at present might be increased, and the plaintiffs had to be ready to perform their contract. They had no control over the lighting of the streets, D which was entirely under the control of the defendants. It was the defendants' lighting of the streets which had been prevented, and that had no effect on the plaintiffs at all. This was not *force majeure* within cl. 15, which really dealt with some physical hindrance which incapacitated the plaintiffs from producing energy or performing their specific obligations under the contract. The regulations restricting lighting did not physically prevent anything on the part of the plaintiffs. Short of switching on the lighting, the plaintiffs had performed their E part of the contract. There had been no default on the part of the plaintiffs, and unless there was a default cl. 15 had no operation. If there was no default, there could be no abatement, because the proviso was an integral part of the whole clause. The plaintiffs were always ready and willing to supply energy, which was always available, and were always ready and willing to render the services. In fact, they did supply some energy to the danger signs and had rendered the services in regard to provision, maintenance, repair and painting.

F Counsel for the plaintiffs further contended that cl. 15 merely provided that, if the plaintiffs could not supply for any of the reasons stated, they should not be liable in damages but should not make an additional profit by means of the breach. If the regulations had prohibited the supply, instead of the user of the supply, then it would have been illegal to supply. The word "supply" in the proviso could only refer to the electrical energy and left out of account the G other services which the plaintiffs had supplied but the defendants had failed to take, but that did not entitle them to abatement. The supply had not been curtailed by any event in the clause. The proviso was not and was not intended to be a substantive provision in the contract, but was merely a modification of the operative part of cl. 15, which had no application to this case at all.

I have set out as fully as I can the contentions on both sides in this case because the matter is of importance to both parties, and the defendants are administering H funds provided by ratepayers, and, if they fail, they will have to pay the amount claimed. For a considerable portion of that sum they have received no benefit. Equally can it be said that, if the plaintiffs recover the amount which they claim, they will receive a considerable part of the money in return for which they have certainly supplied no electricity. Further, the second and third contracts do not expire until 1950 and 1952, and the first contract still prevails.

The contracts are very plain. The plaintiffs were to provide certain things, maintain, repair and paint, as well as supply electricity. The defendants were to pay a lump sum each quarter. The plaintiffs have done all they had to do under the contract. The defendants have not paid. In my view, cl. 15, the default clause, affords the defendants no defence and does not cover the circumstances. The lighting restrictions did not prevent the plaintiffs performing their contract, and they have performed it. The lighting restrictions prohibit the display of lighting on the streets, except in certain limited ways, but that only affects the defendants in regard to one part of the contract and that is the taking of the plaintiffs' supply of electricity which is available. Doubtless, that is a substantial part, but it is not the whole of the contract, and for the whole of the contract the defendants have contracted to pay a lump sum by quarterly instalments. No clause in the contract makes provision for the conditions in which the defendants unfortunately find themselves. I cannot help thinking that it is to be regretted that, when the first contract was made, provision was not made to reduce the liability of the defendants in the event of there being during wartime a restriction of the use of public lighting. The defendants had the last war and the decisions in the two cases which I have cited to warn them of the danger.

The plaintiffs are entitled to succeed, and I give judgment for them for the sum of £3,590 with costs. Seeing that the defendants are a public body dealing with ratepayers' money and the plaintiffs are a company with a monopoly, and under the control of the Electricity Commissioners, it is to be hoped that some arrangements will be made between the parties which will relieve the defendants of some portion of their liability under the contracts, which is now accumulating at the rate of over £2,000 a year. For much of that sum the defendants will get nothing and the plaintiffs will supply nothing. There ought to be a way of dealing with such a position.

Judgment for the plaintiffs.

Solicitors: *Torr & Co.*, agents for *Pound & Pound*, Egham (for the plaintiffs); *Burton, Yeates & Hart*, agents for *Horne, Engall & Freeman*, Staines (for the defendants).

[*Reported by* D. K. Belcher, *Barrister-at-Law.*]

HENRIKSEN (H.M. INSPECTOR OF TAXES) *v.* GRAFTON HOTEL, LTD.

[Court of Appeal (Lord Greene, M.R., du Parcq, L.J. and Singleton, J.), **April 23, 24, 27, May 13, 1942.**]

Income Tax—Deduction against profits—Monopoly value of licensed premises—Licensee the lessee of the premises—Licensing (Consolidation) Act, 1910 (*c.* 24), *s.* 14.

In arriving at their income tax assessments, the appellants claimed to deduct instalments of monopoly value paid in respect of licensed premises of which they were the tenants. The lease provided that the appellants should pay all such charges, and they contended that the monopoly value payments were, therefore, payments made under a contractual liability, and in the course of, and for the purpose of, their trade. The licence had on three occasions been granted for a period of 3 years, and on each occasion monopoly value had been assessed as a lump sum payable by instalments:—

Held: monopoly value, though payable by instalments, is imposed as a lump sum and is of the nature and quality of a capital payment. There can be no difference in principle between a payment out and out for monopoly value and a payment in respect of a term. The sums claimed by the appellants were, therefore, not deductible.

Decision of Lawrence, J. ([1942] 1 All E.R. 18) *affirmed.*

[**EDITORIAL NOTE.** It was argued in this case that, when the instalments of monopoly value were paid by the tenant, they partook of the nature of rent and were, therefore, an income payment. Affirming the decision of Lawrence, J., however, the Court of Appeal has decided that monopoly value is in its nature a capital payment and remains so although the licence is granted for a short term of years and the monopoly value payment is ordered to be paid in annual instalments. A very thorough and detailed analysis of the position is contained in the judgment of Singleton, J.

As to Payments in Respect of Licences, see HALSBURY, Hailsham Edn., Vol. 17, p. 131, para. 249; and for Cases, see DIGEST, Vol. 28, pp. 56, 57, Nos. 284-292.]

Cases referred to:

(1) *Usher's Wiltshire Brewery, Ltd.* v. *Bruce*, [1915] A.C. 433; 28 Digest 56, *287*; 84 L.J.K.B. 417; 112 L.T. 651.
(2) *Inland Revenue Comrs.* v. *Truman, Hanbury, Buxton & Co., Ltd.*, [1913] A.C. 650; 39 Digest 236, *112*; 82 L.J.K.B. 1042; 109 L.T. 337.
(3) *R.* v. *Customs and Excise Comrs.*, [1914] 2 K.B. 390; 30 Digest 20, *128*; *sub nom. R.* v. *Sunderland Customs and Excise Comrs.*, 83 L.J.K.B. 555; 110 L.T. 527; *affg.*, [1913] 3 K.B. 483.
(4) *Appenrodt* v. *Central Middlesex Assessment Committee*, [1937] 2 K.B. 48; [1937] 2 All E.R. 325; Digest Supp.; 106 L.J.K.B. 690; 157 L.T. 201.
(5) *British Insulated and Helsby Cables* v. *Atherton*, [1926] A.C. 205; 28 Digest 52, *264*; 95 L.J.K.B. 336; 134 L.T. 289.
(6) *Addie (Robert) & Sons' Collieries, Ltd.* v. *Inland Revenue Comrs.*, [1924] S.C. 231; Digest Supp.
(7) *Inland Revenue Comrs.* v. *Adam*, [1928] S.C. 738; Digest Supp.
(8) *Kneeshaw* v. *Abertolli*, [1940] 2 K.B. 295; [1940] 3 All E.R. 500; Digest Supp.; 109 L.J.K.B. 760.
(9) *R.* v. *Taylor*, [1915] 2 K.B. 593; 30 Digest 35, *272*; 84 L.J.K.B. 1489; 113 L.T. 167.
(10) *Anglo-Persian Oil Co., Ltd.* v. *Dale*, [1932] 1 K.B. 124; Digest Supp.; 100 L.J.K.B. 504; 145 L.T. 529.
(11) *Ainley* v. *Edens* (1935), 19 Tax Cas. 303; Digest Supp.
(12) *Inland Revenue Comrs.* v. *Fargus* (1926), 10 Tax Cas. 665; Digest Supp.
(13) *Green* v. *Favourite Cinemas, Ltd.* (1930), 15 Tax Cas. 390; Digest Supp.
(14) *Inland Revenue Comrs.* v. *Ramsay* (1935), 154 L.T. 141; Digest Supp.; 20 Tax Cas. 79.

Appeal by the taxpayer from an order of Lawrence, J., dated Oct. 1, 1941, reported [1942] 1 All E.R. 18. The facts are fully set out in the judgment of Lord Greene, M.R.

J. Millard Tucker, K.C., and *S. Pascoe Hayward* for the appellants.

The Attorney-General (*Rt. Hon. Sir Donald Somervell, K.C.*) and *Reginald P. Hills* for the respondent.

Tucker, K.C.: The monopoly value payment is not a capital expenditure, but the ordinary running expenses of the business. It is an expense on the same footing as rent so far as principle is concerned. The Licensing (Consolidation) Act, 1910, s. 14 does not say who is to make the payment. The question is left open. *Appenrodt* v. *Central Middlesex Assessment Committee* (4) decides that annual value is to be arrived at without deduction of the monopoly value. Therefore, the landlord pays tax under Sched. A on the increased value of the premises due to the monopoly value. That case, however, does not support the proposition that, where the tenant, and not the landlord, pays the sum, it is capital expenditure of the tenant. It may be capital expenditure when it is paid by the landlord because by making the payment the landlord is increasing the capital value of his property. The principle stated by Lord Atkinson in *Usher's Wiltshire Brewery Co.* v. *Bruce* (1) is the principle applicable in the present case. The payment is a burden which the landlord must bear in order to command from the tenant a rent of the premises on the footing that they are licensed premises. The position is the same as though the landlord had covenanted to pay the annual instalments. [Counsel referred to *Anglo-Persian Oil Co., Ltd.* v. *Dale* (10), *Kneeshaw* v. *Abertolli* (8), *British Insulated & Helsby Cables, Ltd.* v. *Atherton* (5), *and Ainley* v. *Edens* (11).

The Attorney-General: In a tax case the commercial nature of the transaction must be affected by the form the matter takes. Having regard to the nature of the monopoly value as laid down in the Licensing (Consolidation) Act, 1910, the payment in the present case is of a capital nature. Under the provisions of the Finance Act, 1909-10, s. 47, the justices may reduce a monopoly value payable by instalments, but they may not fix it by reference to the annual payments. The present case is concluded by the principle laid down in *Inland Revenue Comrs.* v. *Fargus* (12), *Inland Revenue Comrs.* v. *Adam* (7), and *Green* v. *Favourite Cinemas, Ltd.* (13). [Counsel referred to *Inland Revenue Comrs.* v. *Ramsay* (14), *R.* v. *Customs & Excise Comrs.* (3), *R.* v. *Taylor* (9), *Appenrodt* v. *Central Middlesex Assessment Committee* (4), and *Ainley* v. *Edens* (11).]

Lord Greene, M.R.: The appellants are lessees of a licensed hotel known as the Grafton Hotel, where they carry on business as licensed hotel and victualling house proprietors. By the terms of the lease the liability to pay any sums assessed by the licensing justices in respect of monopoly value under the Licensing (Consolidation) Act, 1910, s. 14, falls upon the appellants and not upon their lessors. The practice adopted by the justices in dealing with the on-licence has been to grant it for a term under sect. 14 (2). The first grant was made on Nov. 11, 1931, for a period from Nov. 11, 1931, to July 5, 1934, the second on Mar. 24, 1934, for a period of 3 years to July 5, 1937, and the third on Mar. 10, 1937, for a period of 3 years to July 5, 1940. Each of the grants was made to nominees on behalf of the appellants in the usual way. Each of them was expressed to be made on certain conditions of which that relevant to the present question provided for the payment of a stated sum as monopoly value. Those sums were £825, £570 and £570 respectively and each of them was expressed to be payable in three equal yearly instalments. This appeal relates to the last instalment payable under the second grant and the first instalment under the third grant. The appellants claim that these sums are permissible deductions in ascertaining the profits of their trade for the years in question for the purposes of income tax under Sched. D. The General Commissioners decided in favour of the appellants, but their decision was reversed by **Lawrence**, J., and this appeal results.

A new justices' on-licence granted under the Licensing (Consolidation) Act, 1910, s. 14, takes one of two forms. It may be an annual licence or it may (under subsect. (2)) be a licence for a term not exceeding seven years. Paradoxically, the annual licence gives in practice a more secure tenure to the licence-holder. Where the licence is granted for a term, an application for a regrant at the expiration of the term is treated as an application for the grant of a new licence with all the difficulties which that involves. An annual licence on the other hand is in ordinary circumstances renewed every year as a matter of course.

On the grant of a new on-licence, the justices are bound to attach conditions "for securing to the public any monopoly value which is represented by the difference between the value which the premises will bear in the opinion of the justices, when licensed, and the value of the same premises if they were not licensed." These conditions must be imposed whichever of the two forms above-mentioned the licence may take. In practice there is a difference in application, since, in the case of the licence for a term, it is only payment of the part or "slice" of the monopoly value which is referable to the term of the licence that is exacted. The advantage of this method of procedure is that the payments which the licensee is compelled to make for one period can be adjusted in a subsequent period so as to reflect what experience shows to be the real monopoly value.

It will be seen, therefore, that in the present case the sum fixed by the justices in the case of each of the three grants was intended to represent that part or "slice" of the monopoly value which was referable to the period covered by the licence. These sums were made payable by annual instalments, but this circumstance clearly cannot affect the character which for present purposes must be ascribed to the payments. If the sum payable is not in the nature of revenue expenditure, it cannot be made so by permitting it to be paid by annual instalments. These payments by instalments in respect of monopoly value have not the annual quality of the payments for the grant of the annual excise licence, but are of a different character altogether.

It was not seriously argued that the payments now in dispute fall within the list of prohibited deductions set out in Sched. D, Cases I and II, r. 3. The question, therefore, is, to quote the language of **Lord Sumner** in *Usher's* case (1): Is the deduction claimed "on the facts of the case a proper debit item to be charged against incomings of the trade when computing the profits or gains of it ?" This, of course, is to state the problem, not to solve it, since it remains to discover whether the item is a proper one to be charged. For this purpose the first thing to do is to examine the nature of the payment, that is to say, the nature of the subject in respect of which the payment is made. In this connection the manner of payment may be relevant as throwing light upon its nature. In many cases—and in my opinion this is one of them—the question will be found to answer itself once the true nature of the payment is ascertained.

Here the appellants were minded to acquire an asset in the shape of a licence for a term of years. As a condition of obtaining it, payment had to be made of a sum sufficient to secure to the public that part or slice of the monopoly value which was referable to the period of the licence. The effect of the licensing laws is, of course, to grant to a licensee what for practical purposes and in respect of a particular area is in truth a monopoly. What the grantee of a licence is under sect. 14 compelled to do is, so to speak, to purchase the monopoly rights for a sum equal to their value. The public confers the monopoly upon him, he must pay the public its value, although, in the case of a licence granted for a period under sub-sect. (2), he pays not for the whole monopoly value but only for a part of it.

The nature of the payment which justices are to fix in respect of monopoly value has been considered in a number of cases. It is true that these cases were not concerned with questions arising under the Income Tax Acts. They do, however, show what the nature of the payment is as between the licensee and the public and as between a hypothetical tenant and his landlord—in other words, they show what it is that the licensee is paying for. Thus, in *Inland Revenue Commissioners* v. *Truman, Hanbury, Buxton & Co., Ltd.* (2), Lord Haldane, L.C., observed at p. 659 that the corresponding section which he was there considering dealt "not with the annual value of the licence but with its capital value." In *R.* v. *Commissioners of Customs and Excise* (3), justices had omitted to estimate the monopoly value at a definite capital sum and had instead exacted payment of an annual sum representing a percentage of gross takings. This it was held they were not entitled to do. Lord Cozens-Hardy, M.R., said, at p. 397 :

> This is a lump sum, to be ascertained once for all, though when so ascertained it is competent to the justices in their discretion to say how that monopoly value is to be secured to the public and whether it is to be paid in one sum or by instalments.

Then Joyce, J., said, at p. 403 :

> I have not succeeded in finding anything in the Act to countenance the view that there is any such thing as annual monopoly value.

The last of these cases is a rating case in this court, *Appenrodt* v. *Central Middlesex Assessment Committee* (4). There it was decided that in fixing the estimated rent which the hypothetical tenant would be expected to pay, the liability for instalments payable in respect of monopoly value ought not to be taken into account. It is not necessary to consider this decision in any detail. Lord Wright, M.R., (at p. 54), approved the statement of Lush, J., in the Divisional Court in *R.* v. *Customs and Excise Commissioners* (3), at p. 497, that the sum fixed for monopoly value is "the capital sum which represents the monopoly value," which, he said, is only repeating the clear words of sect. 14 (1), "that the capital payment is based on the value of the premises and has directly nothing to do with annual value or with rent." He then went on to point out that in a case falling under subsect. (2) (as did the case before this court) the payment "though it concerns the market value of the hereditament it is limited to the number of years (not exceeding seven) for which the new on-licence is granted ; a further similar charge for a further period of monopoly value may be imposed, it seems, at the expiration of the term." At p. 56, he said :

> The justices' licence is essential to give the premises the status necessary to enable a licensed victualler's business to be carried on.

In his judgment Romer, L.J., said, at p. 61 :

> . . . the instalments are an expense necessary for the accrual to the hotel of the incorporeal condition of being licensed premises.

It is true that SCOTT, L.J., at p. 69, thought that a payment under sub-sect. (2) is not necessarily a true capital payment and he referred to the possibility of a fixation of the annual value of the monopoly. With respect, I doubt whether it is open to justices to do this; but, in any case, SCOTT, L.J., clearly regarded payment in respect of a 5¼ years period (which was the case before him) as of a capital nature, since (at p. 74) he treats the acquisition of the monopoly as being on the same footing as any capital improvement of the property effected before the licensed house was open for business, such as a swimming pool. It is to be noted that the provisions as to fixing monopoly value appear in sub-sect. (1), and there is nothing in the section to suggest that any change in the character of the payment or the method of fixing it takes place where a licence for a term is granted under sub-sect. (2). It is true that in the two earlier cases the observations which I have quoted were not directed to the case of a licence granted for a term, and it is argued that for income tax purposes at any rate the payments in such a case fall into a different category. This argument cannot, in my opinion, be sustained. The fact that under subsect. (2) the licence is granted for a term and the payments are made in respect of the term gives a false appearance of periodicity to the payments. In the normal case the grantee of a new on-licence under subsect. (2) no doubt looks forward to a renewal of his licence and not unnaturally regards the payments which he makes as periodical payments. Indeed, he may well decide in his accounts to debit them to revenue account. This, however, is by no means conclusive as to their nature. Traders frequently prefer to debit to revenue account payments which are in their nature proper to be carried to capital account. If they do so, it means nothing more than that they have a conservative taste in the matter of accountancy.

It appears to me that there can be no difference in principle between a payment out and out for monopoly value and a payment in respect of a term. Each licence granted for a term must stand by itself, since an application for its renewal falls to be treated as an application for a new licence. This is what I mean when I say that there is a false appearance of periodicity about these payments. Whenever a licence is granted for a term, the payment is made as on a purchase of a monopoly for that term. When a licence is granted for a subsequent term, the monopoly value must be paid in respect of that term and so on. The payments are recurrent if the licence is renewed, they are not periodical so as to give them the quality of payments which ought to be debited to revenue account. The thing that is paid for is of a permanent quality although its permanence, being conditioned by the length of the term, is shortlived.

A payment of this character appears to me to fall into the same class as the payment of a premium on the grant of a lease which is admittedly not deductible. In the case of such a premium it is nothing to the point to say that the parties, if they had chosen, might have suppressed the premium and made a corresponding increase in the rent. No doubt they might have done so, but they did not do so in fact. The lessee purchases the term for the premium. There is no revenue quality in a payment made to acquire such an asset as a term of years. Another class of expenditure which is comparable to the payment now in question is expenditure on improvements to the property which justices may require to be made as a condition of granting a licence. Such expenditure would clearly not be deductible in so far at any rate as the work required went beyond mere repair.

If my view of the nature of this expenditure is correct, it is unnecessary to discuss the authorities in which questions relating to deduction have been considered or to refer to the various attempts which have been made to find a formula for describing what is a proper item to be charged when computing profits in cases which do not fall within the list of prohibited deductions. I need only say that I have considered carefully the authorities to which we have been referred. They have been quoted again and again in the books. I do not propose to quote them again, but the conclusion to which I have come in the present case that the sums claimed are not deductible is, I think, entirely consonant with those authorities.

One other argument must be mentioned. It was said that, whatever the position might be in the case where, e.g., a freeholder obtains a licence and makes the necessary payments, there is a difference where the payments are made by a lessee under a covenant in that behalf contained in his lease. I do not follow this. If a payment is of such a nature as to preclude its deduction when made spontaneously, I cannot see that its nature is affected by reason of the fact that it is made under a covenant with a third party. Capital improvements are often made under a covenant in a lease. I have never heard it suggested that the cost of making them can be deducted by the lessee in computing his profits for income tax purposes. An attempt was made to rescue this argument from shipwreck by saying that, if the lessor had undertaken to bear these payments and had consequently exacted a higher rent, the full rent could have been deducted as an expense. This argument has a familiar ring. The answer to it is that this was not the contract which the parties chose to make. It frequently happens in income tax cases that the same result in a business sense can be secured by two different legal transactions, one of which may attract tax and the other not. This is no justification for saying that a taxpayer who has adopted the method which attracts tax is to be treated as though he had chosen the method which does not or *vice versa*.

The appeal fails and must be dismissed with costs.

DU PARCQ, L.J.: I agree that this appeal should be dismissed.

The material facts are set out in paras. 4 to 7 of the case stated, and I will not re-state them. The question for our decision is whether two sums of £190 paid by the appellants to their lessors, the first in Oct., 1936, the second in Oct., 1937, ought to be deducted in computing, for income tax purposes, the profits of the appellants' trade for the years 1938-39 and 1939-40.

The appellants made these payments to their lessors in pursuance of the provisions in the lease that all charges imposed in respect of the licences by virtue of the Licensing Act should be paid by the tenants. Under the lease the appellants were tenants for a term of 14 years. Both parties to the lease intended, as the terms of the lease show, that the tenants should carry on the business of hotel keepers and licensed victuallers on the premises. It became necessary, therefore, to obtain the grant of justices' licences from time to time during the term. We are here concerned with two licences, one granted for three years from July 5, 1934, the other for three years from July 5, 1937. Each application for a re-grant of the licence on the expiration of the term had been properly treated "as an application for the grant of a new justices' licence." (Licensing (Consolidation) Act, 1910, s. 14 (2) (*a*)). The Act provides by sect. 14 (1) (*a*) that there shall be attached to the grant:

> Such conditions shall in any case be attached as . . . the justices think best adapted for securing to the public any monopoly value which is represented by the difference between the value which the premises will bear, in the opinion of the justices, when licensed, and the value of the same premises if they were not licensed.

On the occasion of each of the grants which are material here, the condition attached was that a payment of £570 should be made "as monopoly value." The justices directed that this sum should be payable by instalments, and each of the sums of £190 in question here was an annual instalment.

The persons liable to pay these sums of £570 under the justices' order were, I think, clearly the licensees, though probably no one expected that the money would come out of their pockets. When it is desirable from the point of view of lessor and lessee alike that the demised premises should be licensed, and nobody else can be expected to pay the cost of obtaining a justices' licence, it is necessary that they should agree how the cost is to be borne. The landlord may pay the cost, and recoup himself by charging a higher rent. In the case of a short tenancy, for instance that of the hypothetical tenant whose position had to be considered in *Appenrodt* v. *Central Middlesex Assessment Committee* (4), the landlord is very likely to pay such a charge "just as much as that of any other element of value in the hereditament which he lets" (per LORD WRIGHT, M.R., at pp. 56, 57). In the present case the lessees (the appellants) bound themselves to pay "all charges . . . imposed" in respect of the licences. They accordingly came under an obligation to pay two charges, each of £570, in respect of the second and third licences. In 1934, and again in 1937 they were left, until a new licence was obtained, without the protection which would enable them to carry on their trade. The payment of the £570 was an expense which secured for them the right to open the Grafton Hotel as a licensed house; without that right they must either have ceased to trade there altogether or carried on some different trade, but they could not have continued in business as licensed victuallers in those premises. In other words, when the licence dies, the trade dies, unless the grant of a new licence enables it to be carried on for a further period.

Thus the question which we have to consider comes to be whether a payment of a lump sum made to obtain permission to trade for a term of years is of such a character that it "is proper and necessary" to deduct it "in order to ascertain the balance of profits and gains." (See the speech of Lord Parker in *Usher's Wiltshire Brewery, Ltd.* v. *Bruce* (1), at p. 458). It is conceded that, if the payment was in the nature of a capital payment, it is not deductible. Unfortunately the expression "capital payment" does not appear to be capable of precise definition. At any rate I will not attempt to define it, but will confine myself to dealing with the facts of the present case. Here each sum in question was part of a total amount paid to acquire the right to trade for a period of years. At the date when that period began the possession of that right was essential before trading could be begun. In these circumstances, I am of opinion that each sum paid must be considered part of a capital outlay. This view is, I think, in accordance with the principle laid down by the Lord Chancellor in *British Insulated & Helsby Cables* v. *Atherton* (5), at pp. 213, 214, when he said:

> But when an expenditure is made, not only once and for all, but with a view to bringing into existence an asset or an advantage for the enduring benefit of a trade, I think that there is a very good reason (in the absence of special circumstances leading to an opposite conclusion) for treating such an expenditure as properly attributable not to revenue but to capital. For this view there is already considerable authority.

In *Robert Addie & Sons' Collieries, Ltd.* v. *Inland Revenue Comrs.* (6), and *Inland Revenue Comrs.* v. *Adam* (7) Lord Clyde, Lord President, formulated the question for decision as follows:

> Are the sums in question part of the trader's working expenses, are they expenditure laid out as part of the process of profit-earning; or, on the other hand, are they capital outlays, are they expenditure necessary for the acquisition of property or rights of a permanent character the possession of which is a condition of carrying on the trade at all?

It is true that the period for which the right was acquired in this case was three years and no more, and a doubt may be raised whether such a right is of "enduring benefit" or "of a permanent character." These phrases, in my opinion, were introduced only for the purpose of making it clear that the "asset" or "right" acquired must have enough durability to justify its being treated as a capital asset. This is borne out, so far as the judgments of Lord Clyde are concerned, by the fact that in *Adam's* case (7) the duration of the right acquired was eight years, and that Lord Clyde there spoke of its "relatively permanent character." "Permanent" is indeed a relative term, and is not synonymous with "everlasting." In my opinion the right to trade for three years as a licensed victualler must be regarded as attaining to the dignity of a capital asset, whereas the payment made for an excise licence is no doubt properly regarded as part of the working expenses for the year.

For these reasons I have come to the conclusion that the commissioners were wrong, not in their findings of fact, which are not disputed, but in the inference which they appear to have drawn from the facts, and that the decision of Lawrence, J., was right, and should be affirmed.

Singleton, J.: The appellant company, Grafton Hotel Ltd., appeals against a judgment of Lawrence, J., who reversed a decision of the General Commissioners for the division of St. Margaret and St. John in the county of Middlesex.

The company was incorporated on Oct. 30, 1931, for the purpose of carrying on the business of hotel proprietors and keepers. On Nov. 11, 1931, the licensing justices granted to George Leslie Brown and Harold John Scott (being nominees for and on behalf of the company) a justices' licence in respect of the Grafton Hotel for the period from Nov. 11, 1931, to July 5, 1934, and the sum of £825 was imposed as monopoly value payable in three instalments of £275 each on Oct. 1, 1931, Oct. 1, 1932, and Oct. 1, 1933. Paras. 6 and 7 of the case recite subsequent applications for, and grants of, a licence in the years 1934 and 1937 respectively. The owners of the premises were and are the Associated London Properties, Ltd., and the company is and has at all material times been in possession pursuant to the terms of an agreement, dated Nov. 30, 1911, with draft lease annexed, by which the company covenanted to conduct the business on the premises in a lawful and orderly manner and to use their best endeavours to maintain and extend the same to preserve the character of the said premises with the licensing justices and with the public and to pay all charges which might be imposed in respect of licences necessary for keeping open the said premises as a fully licensed hotel.

The application which resulted in the grant of Nov. 11, 1931, was an application under the Licensing (Consolidation) Act, 1910, s. 14, for the grant of a new justices' on-licence. On an application under that section the licensing justices may attach to the grant such conditions, both as to the payments to be made and the tenure of the licence and as to any other matters, as they think proper in the interests of the public, subject to the provisions of subsect. (1) (*a*), (*b*), which have already been read. Sect. 14 (2) provides:

> The licensing justices may, if they think fit, instead of granting a new justices' on-licence as an annual licence, grant the licence for a term not exceeding seven years, and where a licence is so granted for a term—(*a*) Any application for a re-grant of the licence on the expiration of the term shall be treated as an application for the grant of a new justices' licence, not as an application for the renewal of a justices' licence, and during the continuance of the term the licence shall not require renewal.

The licensing justices in Nov., 1931, granted a new justices' on-licence for a period of something less than three years, and they imposed conditions, (as the licence shows), one of which was "a payment of £825 payable in three instalments of £275 on Oct. 1, 1931, Oct. 1, 1932, and Oct. 1, 1933, as monopoly value." On subsequent applications in 1934 and 1937 they again acted, or purported to act, under subsect. (2) and granted a licence on each occasion for a period of three years, and on each occasion one of the conditions was a payment of £570, payable by instalments of £190 on Oct. 1 in each year "as monopoly value in pursuance the Licensing (Consolidation) Act, 1910, s. 14." The payments so required were duly made by the company.

The question before the court was, whether a deduction of the £190 instalment of monopoly value paid by the company on Oct. 1, 1936, and on Oct. 1, 1937, ought to be made in order to arrive at the company's taxable profit for the years ending June 24, 1937, and June 24, 1938, respectively.

The commissioners decided in favour of the company that it was legitimate and proper to make such a deduction. LAWRENCE, J., reversed that decision and the company appealed.

It is to be remembered that under sect. 14 (4) a new justices' on-licence granted for a term under the section may be forfeited if any condition imposed under the section is not complied with, by order of a court of summary jurisdiction. Thus failure to make any one of the payments might have resulted in loss of the licence, without which the business could not have been carried on.

It was submitted on behalf of the company that the payments were necessary expenses of carrying on the trade or business and that one could not arrive at the yearly profits of the trade or business without deducting the payments made by the company, and further, that the payment made each year by the company was not in the nature of a capital payment by them, but was a payment which had to be made on the due date in order to enable the company to carry on or to continue the business.

The argument on behalf of the Crown was that the payment of monopoly value was an essential preliminary to the carrying on of the trade of a licensed victualler, whether the payment was made in one sum or by instalments, and that the payments were of a capital nature, and consequently the deductions claimed were not permissible.

It becomes necessary to consider what is the nature of the payment made as one of the conditions of the grant of a new justices' on-licence under sect. 14 of the 1910 Act. Sect. 14 (1) (*a*) speaks of it as:

> any monoply value which is represented by the difference between the value which the premises will bear, . . . when licensed, and the value of the same premises if they were not licensed.

This clearly indicates a capital value, an increased value attached to the premises. This was the view taken in *R.* v. *Customs & Excise Commissioners* (3). I refer to the report of the case in the Court of Appeal. Lord Cozens-Hardy, M.R., at p. 397, said :

> This is a lump sum, to be ascertained once for all, though when so ascertained it is competent to the justices in their discretion to say how that monopoly value is to be secured to the public, and whether it is to be paid in one sum or by instalments. A

Then Sir Samuel Evans, P., at p. 399, said :

> I think it is abundantly clear from the section that the 'monopoly value' must be a definite sum fixed once for all when the licence is applied for, and before it is granted. When it has been fixed, the justices must take measures by the conditions attached B to the grant to secure it to the public ; and they can include in the conditions provisions for payment by instalments ; but by subsect. (1) (*b*) the amount of any payments imposed under the conditions shall not exceed "the amount thus required to secure the monopoly value." It follows that the monopoly value cannot be left to be ascertained or fixed either by the justices, or by anybody else, annually, or periodically.

Later, Joyce, J., said, at p. 403 :

C

> I have not succeeded in finding anything in the Act to countenance the view that there is any such thing as annual monopoly value. I think there is not.

The same view was taken by Lawrence, J., in *Kneeshaw* v. *Abertolli* (8). It is unnecessary to express a view as to whether what he said as to the mode of assessing monopoly value in the case of a licence granted for a period of years is right or not, but it is clear that he was of opinion that the amount fixed by way D of monopoly value was a capital sum.

In *Appenrodt* v. *Central Middlesex Assessment Committee* (4) the court was dealing with a question under the Rating and Valuation Act, 1925, and the point which arose was whether instalment payments made by the owner-occupier of licensed premises in respect of monopoly value of a licence granted for a period of 5¼ years could be taken into consideration by way of diminishing the estimated rent which a hypothetical tenant would pay for the premises. The E divisional court had held that the payments ought not to be taken into consideration, and from two of the judgments, at least, it is clear that the payments were to be regarded as payments of a capital nature. The Court of Appeal affirmed the decision of the divisional court on somewhat different grounds. Reliance was placed by counsel for the appellants on the judgment of Scott, L.J., in this case ; on the other hand, the Attorney-General submitted that, if it was carefully examined it was really support for the case of the Crown. F Scott, L.J., said at p.p. 66, 67 ([1937] 2 All E.R. at pp. 336, 337) :

> The Divisional Court have, however, decided that the amount of rent which the hypothetical tenant would be willing to pay is not in law affected by the payments of monopoly value. The main reason for the decision, as explained by the Lord Chief Justice, was that a payment to be made for monopoly value is, according to the decision of the Divisional Court, affirmed by this court, in *R.* v. *Customs and Excise Commissioners* (3), and followed by Lord Reading in *R.* v. *Taylor* (9), a capital payment, G whether payable in one sum or in several instalments. The learned Chief Justice concluded his judgment thus [at pp. 455, 456] : "But the one thing that is clear about it is that it is a part of capital value, and in those circumstances it seems to me that it is impossible to hold that the sum should be taken into account by way of deduction when the question is asked : What would the hypothetical tenant be prepared to pay by way of rent ?"

I draw attention to another passage in the judgment of Scott, L.J., commencing H at the bottom of p. 67, and ending on p. 69 ([1937] 2 All E.R. at pp. 337, 338. I quote the last few lines of the passage :

> As they have an unfettered discretion as to how they secure payment of the monopoly value during the period, I can see nothing to prevent their providing in each year for payment of an amount which they estimate will be the equivalent of the annual value of the monopoly in that year, if they so choose. But whether they make it a lump sum for the period payable once for all or by instalments, or an annual payment proper at the beginning of each year, seems to me immaterial. It shows, at any rate, that a

payment under subsect. (2) is not necessarily a true capital payment.

I confess that I find it difficult to reconcile some expressions of SCOTT, L.J., with the views of the Court of Appeal, as expressed in *R.* v. *Customs & Excise Comrs.* (3). If, as SCOTT, L.J., said, the words "capital sum" were not used in the judgments in the 1914 case, there were references to a "lump sum payment to be ascertained once and for all"; and JOYCE, J., in his judgment made it clear that he could find nothing which pointed to an annual payment. It must be borne in mind that in the 1914 case that which was being considered was a payment made for a licence granted under sect. 14 (1), while in the *Appenrodt* case (4) it was a payment for a licence granted under subsect. (2). SCOTT, L.J., obviously thought that there might be a difference between the two, and that is something which has to be considered. In this connection it must not be overlooked that subsect. (1) alone deals with the payment which may have to be made, and it is not easy to see that a payment required under that subsection may sometimes be a capital payment and at other times something quite different. Moreover, the monopoly value for which the payment is required attaches in a sense to the premises. The amount of it is determined in a normal case very much in the same way as compensation was determined in the case of a redundant old on-licence. That was always regarded as a capital sum, and so, I venture to think, has monopoly value been.

I cannot help feeling that there has been some misunderstanding as to the Licensing (Consolidation) Act, 1910, s. 14, which was in the same terms generally as sect. 4 of the 1904 Act. I have always understood that the reason for subsect. (2) enabling a licence to be granted for a period was because of the difficulty of arriving at the amount to be paid by way of monopoly value. If the licensing justices granted the ordinary licence (spoken of as an annual licence) and fixed a sum to be paid for monopoly value, they could not afterwards alter that sum, however unfair it might turn out to be to the one side or to the other. The difficulty of arriving at a figure in respect of a new house in a growing neighbourhood before trade has commenced is obvious. To avoid this difficulty, or to meet it to some extent, it was provided that a licence could be granted for a period, and when that course was adopted a more or less nominal payment was required in the first instance for monopoly value, and when the subsequent application was made the justices, with the help of the Commissioners of Customs & Excise, and with knowledge of the trade of the house and of development of the neighbourhood, were in a much better position to form a view as to what amount should be required by way of monopoly value. The first payment (already made) was regarded as in the nature of a payment on account, and a sum was fixed which was much more likely to be fair to both sides than one determined on the initial application could reasonably have been expected to be. (See note in PATERSON'S LICENSING ACTS, 51st Edn., p. 493). If this is the correct view, a payment required on the grant of a licence under subsect. (2) is just as much a capital payment as it is in the case of a grant under subsect. (1), and that, I think, was the view of LORD HEWART, L.C.J., in *Appenrodt's* case (4).

We were told by the Attorney-General that there was a practice in London of granting period licences again and again, as was done in the present case. Now it may be that that is strictly within the terms of sect. 14 (2), but I cannot think that it was the intention of the legislature. If the justices adopt such a course, and if they time and again fix a sum for what is described as monopoly value for a period they are, in my view, departing from the general understanding of monopoly value. The period may be a short one, and it can be argued that what they are then requiring from the applicant is a periodical payment to allow him to carry on his trade in that house. If that is the true position, they do not alter it by calling it a lump sum payable by instalments. In the case which we have to consider, on each of the last two applications the justices fixed the sum of £570 payable by instalments of £190 a year. It is at least akin to saying: "Pay £190 a year for the privilege of carrying on your trade on those premises." No doubt the justices had the help of the Commissioners of Customs & Excise (as representing the public) in arriving at the proper sum, and if they can be said to be parties to the fixing of a sum to be paid annually for these so-called period licences the position is indeed confused.

The case does not give the reasons for the decision of the commissioners. If they had found as a fact that the justices had on either of the last two applications decided that £190 a year was the amount to be paid for the licence to trade during that year, it seems to me that it would have been difficult for any court to interfere with their decision. In the absence of any such finding we must come to the conclusion that the justices did that which was their duty and fixed a capital sum as the value of the monopoly. If that is so, the company is not entitled to have the amount of an instalment of a capital sum allowed as a A deduction in calculating its yearly profits, any more than it would be if it had entered into a contract with the owners to rebuild or to make structural alterations (as distinct from repairs) which the licensing justices might require during the currency of the lease.

I have dealt with the Licensing Act, 1910, s. 14, at some length, because of what we were told as to the practice of granting period licences, not merely on the first application for a new justices' on-licence, but on subsequent applica- B tions. If this is done, and if a sum is required to be paid by way of monopoly value for a short period, it is arguable that the sum "is not necessarily a true capital payment," as SCOTT, L.J., said in *Appenrodt's* case (4), but that it is rather an amount required for the privilege of carrying on the trade for the period. It may be that this was the view of the commissioners, but they have not so found. In the course of the argument, it was suggested that it might C be necessary to send the case back for findings of fact, but counsel for the appellants said that he could not ask the commissioners to find that the justices had done something illegal, *id est*, that they had fixed a yearly sum instead of a capital sum. In the absence of any such finding by the commissioners, I do not see that it is open to this court to say that the sum fixed is other than a capital sum, and consequently I agree that the appeal fails.

Appeal dismissed with costs. Leave to appeal to the House of Lords. D

Solicitors: *Bower, Cotton & Bower* (for the appellants); *Solicitor of Inland Revenue* (for the respondent).

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

END OF VOLUME 1.